Hague Conference's 2nd Guide on Accreditation under Adoption Convention

The Hague Conference on Private International Law has issued its Second Guide on Accreditation and Adoption Accredited Bodies under the 1993 Hague Convention (Accreditation and Adoption Accredited Bodies: General Principles and Guide to Good Practice, *Guide No 2 under the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*).

> *Accreditation practice differs widely. The understanding and implementation of the Convention's obligations and terminology vary greatly. It is recognised that there is an urgent need to bring some common or shared understanding to this important aspect of intercountry adoption to achieve greater consistency in the operation of accredited bodies.*
>
> *The purpose of this Guide is therefore to have an accessible resource, expressed in plain language, which is available to Contracting States, accredited bodies, parents and all those other actors involved in intercountry adoption. The Guide aims to:*
>
> *• that the principles and obligations of the Convention apply to all actors in Hague Convention intercountry adoptions;*
>
> *• clarify the Convention obligations and standards for the establishment and operation of accredited bodies;*
>
> *• encourage acceptance of higher standards than the minimum standards of the Convention;*
>
> *• identify good practices to implement those obligations and standards; and*
>
> *• propose a set of model accreditation criteria which will assist Contracting States to achieve greater consistency in the professional standards and practices of their accredited bodies.*

> *It is hoped that this Guide will assist the accrediting and supervising authorities in the Contracting States to perform their obligations more comprehensively at the national level, and thereby achieve more consistency at the international level.*

It can be freely downloaded here.

Will the U.S. Supreme Court Take Up a Case Involving the Interpretation of Foreign Law?

What deference should a U.S. court give to a foreign sovereign's interpretation of its domestic law? That question is asked, and a whole host of interesting others, in a recently filed petition for certioari in the case of Islamic Republic of Iran v. McKesson Corp. To make a long story short (the original complaint was filed in 1982 and the case was just subject to a final judgment of $43.1 million dollars!), McKesson Corporation alleges that the Islamic Republic of Iran expropriated its interest in a dairy operated by McKesson from the 1960s to the 1980s. McKesson brought an action before the United States District Court for the District of Columbia, and, after much back and forth (the court of appeals has heard the case five times!), the disctrict court held that as a matter of Iranian law that McKesson had a cause of action under a Treaty of Amity between the U.S. and Iran.

While the cert. petition is largeley devoted to the question of interpreting that treaty, there is also a question presented regarding what deference is due to a foreign sovereign's interpration of its law. According to the cert. petition, this is a question that has split the circuits. Some courts give "substantial deference," others give "some degree of deference," others give some unstated deference.

It will be interesting to see if the Supreme Court takes up this choice of law

related case.

The New Issue of the TDM Journal: EU, Investment Treaties, and Investment Treaty Arbitration – Current Developments and Challenges

TDM Journal has just published its newest issue, which addresses the often-tenuous co-existance of EU law, international investment law, and the use of investment treaty arbitration for intra-EU investment disputes. In addition to addressing the latest developments in the field, this issue tries to reflect on the remaining challenges and possible solutions for open questions. It also includes a study requested by the European Parliament's Committee on International Trade which is made available on TDM with kind permission.

Grosse Ruse-Khan on Competing Rationalities in International Law

Henning Grosse Ruse-Khan (Max Planck Institute for Intellectual Property & Competition Law) has posted A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging between IP, Trade, Investment and Health on SSRN.

The idea of employing conflict-of-laws principles to address competing rationalities in international law is unorthodox, but not new. Research focuses on inter-systemic conflicts between different areas of international law – but has stopped short of proposing conflict rules. This article goes a step further and reviews the wealth of private international law approaches and how they can contribute to applying rules of another, 'foreign' system. Against the background global intellectual property rules and their interfaces with trade, investment, health and human rights, the dispute over plain packaging of tobacco products serves as test case for conflict-of-laws principles. It shows how these principles allow a forum to apply external rules – beyond interpretative concepts such as systemic integration.

Excessive English Costs Orders and Greek Public Policy

Dr. Apostolos Anthimos is attorney at law at the Thessaloniki Bar, Greece. He holds a Ph.D. in International Civil Litigation and is a visiting lecturer at the International Hellenic University.

Two recent Court of Appeal rulings in Greece have demonstrated the significance of the public policy clause in international litigation and arbitration. Both judgments are dealing with the problem of recognition and enforcement of "excessive" costs awarded by English courts and arbitration panels. The issue has been brought several times before Greek courts within the last decade. What follows, is a brief presentation of the findings, and some concluding remarks of the author.

I.a. In the first case, the Corfu CoA refused to grant enforceability to a costs order and a default costs certificate of the York County Court on the grounds that Greek courts wouldn't have imposed such an excessive amount as costs of the proceedings for a similar case in Greece. In particular, the court found that, granting costs of more than £ 80,000 for a case, where the amount in dispute was

£ 17,000, contravenes Greek public policy perceptions. Thus, the amount of £ 45,000 + 38,251.47 was considered as manifestly disproportionate and excessive for the case at hand. Consequently, the CoA granted exequatur for the remaining sums, and refused recognition for the above costs, which could not be tolerated by a court of law in Greece.

I.b. In the second case, the Piraeus CoA recognized an English arbitral award despite allegations made by the appellant, that the award's order for costs contravened public policy. In this case the amount in dispute was in the altitude of nearly $ 3 million, whereas the costs granted did not exceed £ 100,000. The court applied the same rule as in the previous case, and found that the costs were not disproportionate to the case at stake.

II. As already mentioned above, those decisions are the last part on a sequence of judgments since 2005. Free circulation of English judgments is generally guaranteed in Greece; the problem starts when English creditors seek to enforce the pertinent costs orders. For Greek legal views, it is sheer impossible that costs exceed the actual amount in dispute in the main proceedings. This was reason enough for the Supreme Court (Areios Pagos = AP) to establish the doctrine of public policy violation, on the occasion of an appeal against a judgment of the Athens CoA back in 2006 [AP 1829/2006, Private Law Chronicles 2007, p. 635 et seq.]. The Supreme Court held, that granting enforceability to similar orders would violate the principle of proportionality, which is embedded both in the Greek Constitution and the ECHR. At the same time, it emphasized that the excessive character of costs impedes access to Justice for Greek citizens, invoking again provisions from the Greek Constitution (Art. 20.1) and the Human Rights Convention (Art. 6.1). The reasoning of the Supreme Court is followed by later case law: In an earlier judgment of the Corfu CoA [Nr. 193/2007, Legal Tribunal 2009, p. 557 et seq.] the court reiterated the line of argumentation stated by the Supreme Court, and refused to grant exequatur (again) to an English order for costs. Two years later, the Larissa CoA [Nr. 484/2011, unreported], followed the opposite direction, based on the fact that costs were far lower than the amount in dispute.

In regards to foreign arbitral awards, mention needs to be made to two earlier Supreme Court judgments, both of which granted enforceability and at the same time rejected the opposite grounds for refusal on the basis of Art. V 2 b NYC. In the first case [AP 1066/2007, unreported], the Supreme Court found no violation

of public policy by recognizing an English award, which awarded costs equivalent to half of the subject matter. A later ruling [AP 2273/2009, Civil Law Review 2010, p. 1273 et seq.] reached the same result, by making reference to the previous exchange of bill of costs particulars, for which none of the parties expressed any complaints during the hearing of the case before the Panel.

In conclusion, it is obvious that Greek courts are showing reservation towards those foreign costs orders, which are perceived as excessive according to domestic legal standards. This stance is not unique, taking into account pertinent case law reported in France and Argentina [for the former, see Cour de Cassation 1re Chambre civil, 16.3.1999, Clunet 1999, p. 773; for the latter see Kronke / Nacimento / Otto / Port (ed.), Recognition and enforcement of foreign arbitral awards – A global commentary on the New York Convention (2010), p. 397, note 245]. The decisive element in the courts' view is the interrelation between the subject matter and the costs: If the latter is higher than the former, no expectations of recognition and enforcement should be nourished. If however the latter is lower than the former, public policy considerations do not usually prevail.

Final point: As evidenced by the case law above, it is clear that the Greek jurisprudence is applying the same criteria for foreign judgments and arbitral awards alike, irrespective of their country of origin. As far as the latter is concerned, no objections could or should be raised. However, making absolute no distinction between foreign judgments emanating from EU – Member States and non-Member States courts seems to defy the recent vivid discussion that predominated during the Brussels I recast preparation phase (2009-2012). Fact is, that public policy survived in the European context, and will continue playing a significant role in the new era (Regulation 1215/2012). Still, what is missing from Greek case law is an effort to somehow soften the intensity of public policy control in the EU landscape. Whatever the reason might be, a clear conclusion may be reached: Greek case law gives back to public policy a Raison d'être, demonstrating the importance of its existence, even when judicial cooperation and free circulation of judgments are the rules of the game.

Déjà vu: Italian Supreme Court on Jurisdiction over U.S. Rating Agencies

Many thanks to Felix A. Koechel, researcher fellow of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law. This contribution summarizes a presentation he made at one the Institute's weekly seminars (the so called "Referentenrunde"), which are held every Wednesday from 2 p.m. to 4 p.m.

Prior to the German Federal Supreme Court's decision in December 2012 (see here), the Italian *Corte Suprema di Cassazione* (Supreme Court) already in April 2012 was called upon to decide on Jurisdiction over damage claims brought by investors against rating agencies based in New York *(Cassazione*, 22 May 2012, No. 8076).

In January 2007 one of the three claimants, a stock company based in Bologna (Italy), purchased from another company based in London shares of a company based on the Cayman Islands. After the conclusion of the contract in London, the shares were pooled on the claimant's bank account in Bologna, and subsequently transferred to two further corporations equally based in the region of Emilia-Romagna and acting as claimants. The decision to acquire the shares was allegedly motivated by positive ratings awarded by the defendants (two rating agencies based in New York) as to the financial standing of the issuer. There was, however, no contractual relationship or even direct contact between the claimants and the defendants. By July 2007 the shares had already lost 80 % of their initial nominal value while it was not before August and December 2007 that the initial ratings were downgraded. Therefore, the claimants sued the defendants in Bologna for damages allegedly suffered as a consequence of both the initial inaccurate rating and the tardive downgrading. The Court of first instance referred the question of jurisdiction to the Italian Supreme Court by means of the *regolamento preventivo di giurisdizione* (Article 41 of the Italian Code of Civil Procedure).

Although the facts of the Italian and the German case are similar, their outcomes

differ considerably: The Italian Supreme Court declined jurisdiction on the grounds of Article 5(3) of Regulation (EC) No 44/2001. Not only is the application of the aforesaid Regulation noteworthy but the case more importantly gives an example of the problems arising from Article 5(3) Brussels I in case of merely financial damages.

Attentive readers of *conflictoflaws.net* know that according to Article 3(2) of Law No. 218 of 1995, in Italy the special rules of jurisdiction of the Brussels Convention apply even if the defendant is not domiciled in a contracting state (see here). Although it is controversial whether this reference should be read as referring to the Brussels I Regulation, both courts and scholars have clarified that to this date, and lacking the Italian legislator's intervention, the reference has to be interpreted as designating the Brussels Convention (cf. *Cassazione*, 21 October 2009, No. 22239; cf. *Pocar* in Riv. dir. internaz. priv. proc. 2011, 628 ff.). It is therefore likely that the application of the Brussels I Regulation in the present case is due to the very specific wording of the question referred by the Bolognese court and may not be misinterpreted as a change in case law. Taking into consideration the continuity between the Brussels Convention and the Brussels I Regulation in the specific case of Article 5(3) this question should have been without prejudice to the Court's decision.

In fact, Article 5(3) was the only ground of jurisdiction at hand that could have led to an Italian forum since the Italian legislator has refrained from introducing additional (exorbitant) *fora*. It is shown particularly in comparison with the German case that the progressive and courageous "Europeanization" of the national rules on international jurisdiction at that time came at the price of possible disadvantages for Italian claimants.

Regrettably, the Court does not address extensively the problems arising out of Article 5(3) in the case of financial damages. In line with the ECJ in *Marinari* (C-364/93), the Court narrows down the Article 5(3) notion of "place where the harmful event occurred" to the place of the initial damage. According to the Italian Court, this initial damage consists of the acquisition of the shares at an excessive price. Apart from that, the Italian Court neither refers to the principle of ubiquity nor to the relevant and more recent ECJ case law regarding financial damages in *Kronhofer* (C-168/02). While the localization of the initial damage in London can be well accepted, the Italian Supreme Court missed the chance to contribute to the discussion on the interpretation of Article 5(3) in case of

financial damages. It is to be hoped that the financial crisis with its rising flood of claims against rating agencies will shed some light on the problem.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (2/2013)

Recently, the March/April issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Miriam Pohl***: The Recast of Brussels I – striking the balance between trust and control

Roughly two years after the presentation of the Commission's proposal, the recast of the Brussels I Regulation was adopted on 6 December 2012. As from 10 January 2015, the recast will replace Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The following article presents the most important changes.

- ***Michael Coester***: The Influence of EU-Law on German Conflict Rules for Registered Partnerships

Since the enactment of the German conflict rules on registered partnerships (Art. 17b EGBGB) in 2001 significant changes have taken place. The European Union is progressively building a system of private international law rules in family matters, and the constitutional as well as the human rights approach towards registered partnerships today focuses more on the protection of same-sex relationships against unjustified discrimination rather than on the protection of marriage. As a result, some elements of Art. 17b EGBGB are already today (or will be in the next future) governed by Community law instead of national law (alimony, inheritance, property issues), and basic principles of common private international law become visible. This article explores in detail

(1) the scope of EU-regulations with regard to registered partnerships, (2) the convergence of the remaining text of Art. 17b EGBGB with emerging techniques and principles of Community law and (3) its conformity with overriding principles of constitutional, EU- or human rights law. It is suggested that the existing German rules of private international law on registered partnerships need an overall revision in order to bring it in line with existing constitutional law and emerging European Community law. To this end, the author submits concrete text proposals for all areas of German Private International Law on registered partnerships which are still subject to national law.

- ***Eric Wagner/Marius E. Mann***: The Merchant Status of Foreign Parties in Civil Proceedings

According to section 95 Judiciary Act (Gerichtsverfassungsgesetz), the functional jurisdiction of the court seized of the matter depends on the merchant status of the parties to the proceedings. This can lead to difficulties in the case of disputes in international business dealings. For example, if a party established abroad is involved, the question arises as to what country's laws determine whether this party has merchant status. So far there is no Supreme Court case law on this question. The views taken by the lower courts and in legal literature vary. This article offers a view of the status of the discussion and explains why, when it comes to determining, within the scope of section 95 Judiciary Act, whether merchant status is present – also in the case of foreign parties – only lex fori can be decisive.

- ***Peter-Andreas Brand***: Cross-border consumer protection within the EU – Inconsistencies and contradictions in the European System of Conflict of Law Rules and Procedural Law

The endeavours throughout the European Union to create a harmonized European Procedural Law, in particular in the context of jurisdiction and recognition and enforcement, and also the process of harmonisation of the Conflict of Law Rules within the EU have realised the importance of cross-border consumer protection. Both the Rome I Regulation and Regulation No. 44/2001 on Jurisdiction and Recognition and Enforcement of Judgements in Civil and Commercial Matters contain specific provisions for the protection of

consumers. It is the aim of this article to consider the practical implications of the most important provisions of the EU-Conflict of Law Rules and the Procedural Rules with respect to the applicable law, jurisdiction and the exequator proceedings. Furthermore, current inconsistencies and sometimes contradicting intentions in European legislation shall be highlighted.

- ***Christian Heinze:*** Keine Zustellung durch Aufgabe zur Post im Anwendungsbereich der Europäischen Zustellungsverordnung – the English abstract reads as follows:

The rules for judicial service in some EU Member States allow service of documents on parties domiciled abroad by a form of "fictitious" service within the jurisdiction. Under these rules, service is deemed to take effect at the moment when a copy of the document is lodged with a national authority, placed in the court's case file or at the time when it is sent abroad for service, irrespective of the time when the recipient actually receives the document, if the foreign party has failed to appoint a representative in the forum state who is authorised to accept service. The following case note discusses two judgments of the German Bundesgerichtshof and the Court of Justice of the European Union (Case C-325/11 – Alder) which hold that this practice is, for inner-EU cases, incompatible with the European Service Regulation (EC) No 1393/2007 (ECJ) and German domestic law (Bundesgerichtshof). The Court of Justice has rightly coined an autonomous definition of service of a judicial document between Member States for the purposes of Article 1(1) of the Service Regulation. As a consequence, the Service Regulation provides, with the exceptions of Article 1(2) and Recital 8, for an exhaustive list of the means of transmission of judicial documents. The Service Regulation therefore excludes the application of national rules on fictitious service which would deprive the rules of the Service Regulation, in particular the right of the person to be served to benefit from actual and effective receipt, of all practical effect.

- ***Christoph Thole***: Verbrauchergerichtsstand aufgrund schlüssiger Behauptung für eine Kapitalanlegerklage gegen die Hausbank des Anlagefonds? – the English abstract reads as follows:

In its judgment, the German Federal Supreme Court held that in a case brought by a consumer against the house bank of a Ponzi scheme in which the consumer

had invested money, the courts in his home country enjoy jurisdiction under Art. 15, 16 Brussels I-Regulation. The Austrian bank was considered to have committed itself to the plaintiff to transfer the money paid in by the consumer into the bank's own account in Germany to the Austrian bank account of the Ponzi scheme. The defendant was thus held to have entered into a contractual relationship with the consumer. Christoph Thole argues the judgment to be feasible, however, the ruling must not be generalized too easily. Furthermore, he emphasizes that the burden of demonstration with respect to jurisdictional issues has a Community law dimension rather than being solely based on national law.

- ***Stefan Arnold***: On the scope of the jurisdiction over consumer contracts and on the nature of the doctrine of culpa in contrahendo and actions based on an infringements of sec. 32 German Banking Act (Kreditwesengesetz)

According to the Federal Court of Justice (Bundesgerichtshof), sec. 13 and 14 Lugano Convention 1988 give German courts jurisdiction in proceedings brought by German consumers concerning investments in Switzerland. Actions based on an infringement of § 32 German Banking Act (Kreditwesengesetz) and on culpa in contrahendo (here: breach of precontractual duties of disclosure) must be considered as "proceedings concerning a contract" in the sense of sec. 13 Lugano Convention 1988. The jurisdiction of German courts does not depend on the consumer's material vulnerability. It is equally irrelevant whether the consumer took the initiative as regards the investment and whether the "specific invitation" addressed to the consumer did not constitute a legally binding offer but merely an invitatio ad offerendum. Thus, the Bundesgerichtshof implicitly argues for a formal analysis in matters of the jurisdiction over consumer contracts and acknowledges the crucial importance of legal certainty in International Procedural Law. The judgment is also relevant for the interpretation of sec. 15 Brussels I Regulation/Lugano Convention 2007.

- ***Florian Eichel***: Judicial power and international jurisdiction for the enforcement of a judgment for a specific act (§§ 887 et seq. German Code of Civil Procedure) in case of a foreign place of performance

The German Federal Court of Justice (Bundesgerichtshof – BGH) held that

German courts have international jurisdiction to take measures for enforcing a judgment for a specific act even when the act has to be performed abroad. This essay agrees with the outcome of the decision, discusses questions of state sovereignty and suggests that personal jurisdiction should have been derived from the Brussels I-Regulation (EC) No. 44/2001 as an unwritten annex-competence.

- ***Björn Laukemann***: Actions for separate satisfaction and the European jurisdictional regime

In the case ERSTE Bank, the ECJ had to decide on the applicability ratione temporis of Article 5 of the European Insolvency Regulation (EIR) in the context of Hungary's accession to the European Union. Thereby, the Court left out the contentious issue whether international jurisdiction over actions for the determination of collateral securities on assets belonging to the debtor's estate is to be determined by the Brussels I regime or rather the EIR. Exemplified by actions for separate satisfaction, this article will focus on the jurisdictional delimitation between both Regulations which is now, concerning insolvency related actions in general, regulated by Article 3a of the EU-Commission's proposal for a recast of the EIR. The article points out that the criteria underlying the principle of vis attractiva concursus are not suitable for actions for separate satisfaction and unfolds the consequences on the dispute at issue.

- ***Klaus Bartels***: Interim regulations on corporate headquarters in Europe

The annotated judgment of the OLG Nürnberg deals with questions of cross-border transfer of corporate headquarters. The concrete case shows a moving-in-concept of a Société responsabilité limitée heading from Luxembourg to Germany. The immigration had been planned as a change into a German GmbH with fitting new firm and varied statute, but with affirming its outgoing law-identity. Especially the formation of a new company like in "Vale Építési" wasn't aimed. Though transfers like that are welcome in Luxembourg, the German Umwandlungsgesetz doesn't accept immigrations of that kind. In the court's opinion a request according to Article 267 (2) AEUV is not needed, for even a German duty (with European origin) to create and to offer immigration-friendly statutes wouldn't help to have the aimed transfer. The court misses the

prerequisites of the national Umwandlungsgesetz as well as of the regulations of EWIV, SE and SCE.

Nevertheless, concrete process history and the decision itself introduce to extensive problems of European cross-border transfer of corporate headquarters as they occur at the present and (up to now) without adjusting help of the European Union. This article tries to demonstrate the interim rules and their method intricacies, caused by the conflict of national corporate law on the one hand and the European legal principles on the other. It furthermore offers support by introducing basic rules of intertemporal law.

- ***Bernd Reinmüller/Alexander Bücken***: Provokation eines inländischen Deliktsgerichtsstandes im Urheberrecht – the English abstract reads as follows:

This contribution deals with a decision by the French Cour de cassation (1ére civ. 25.3.2009 – ref. no. 08.14.119) on the admissibility of the provocation of domestic tort jurisdiction under copyright law at the application of Article 5.3 of the European Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. In conformity with German case law, the Cour de cassation distinguishes between an admissible test order through which domestic jurisdiction can be established and a manipulative subreption of jurisdiction which does not have the effect of establishing jurisdiction in accordance with the principles of good faith. Furthermore, the "mosaic theory" developed by the ECJ for press law offences is transferred to copyright law. Consequently, the tort jurisdiction established by an admissible provocation of jurisdiction is always restricted to the damage caused in the forum state.

- ***Herbert Roth***: Zur verbleibenden Bedeutung des deutsch-österreichischen Anerkennungs- und Vollstreckungsvertrags 1959 – the English abstract reads as follows:

The decision of the OGH addresses problems of foreign lis pendens and their impacts to domestic disputes. Subject matter of the judgment is a proceeding for the division of assets in accordance with Art. 81 et seqq. of the Austrian Marriage Act brought to Austrian Courts prior to the German counterpart. The OGH qualifies the Austrian proceeding for the division of assets as part of the

matrimonial property regime and therefore lawfully applies the German-Austrian Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed on 6 June 1959. Pursuant to Art. 17 of this Convention the sole recourse to the Court shall not be sufficient to prevent proceedings abroad. Instead, the barrier effect depends on the pendency of the suit, which according to the Austrian and German Law requires the formal service of the complaint. In the present case the OGH therefore correctly refers not to the prior recourse to the Austrian Courts, but the formal service of the claim, which was effected by the German authorities earlier than the Austrian delivery. Therefore the Austrian Courts lawfully had to decline their international jurisdiction in favor of the German Courts.

- ***Patrizia Levante***: Der materielle ordre public bei der Anerkennung von ausländischen Scheidungsurteilen in der Schweiz – Blick auf die Rechtsprechung – the English abstract reads as follows:

In Switzerland, the question of recognition of foreign divorce judgments arises more and more often. In many international marriages, the divorce is filed and granted abroad. In these cases, the only task that remains to the Swiss courts is to examine whether the foreign divorce judgment can be recognized in Switzerland. This article discusses questions of Swiss substantive public policy (ordre public) in connection with the recognition of foreign divorce judgments. The first section of the article presents the relevant legal provisions. The second section gives an overview of the current jurisdiction of Swiss courts. With regard to the dissolution of marriage, the article highlights in particular, under which circumstances foreign extrajudicial divorces and repudiations can be recognized in Switzerland. Considering the recognition of the financial consequences of the divorce (spousal maintenance, matrimonial property, occupational pension fund), the article shows that the Swiss authorities have to look at the rationale behind a certain order (or lacking order) in the foreign judgment, and to examine whether an adequate financial compensation has been ordered. Regarding children, it is required that the competent authorities act ex officio and settle children's issues (custody, visiting rights, child maintenance) in a coherent and united manner. In the process of recognizing a foreign judgment, the best interest of the child must be considered.

- ***Gerhard Hohloch***: Hans Stoll † (4.8.1926–8.11.2012)
- ***Konrad Duden***: „Leihmutterschaften“ – Abschlussveranstaltung der Jahresfachtagung des Bundesverbandes der Deutschen Standesbeamtinnen und Standesbeamten
- ***Céline Camara***: Cross-border successions within the EU – Report on a conference by the ERA
- ***Christel Mindach:*** Staatlicher Schadensersatz bei Verschleppung von Gerichtsverfahren und der Vollstreckung von Gerichtsentscheidungen
- ***Heinz-Peter Mansel***: Beschlüsse der Sitzung der Ersten Kommission des Deutschen Rates für Internationales Privatrecht zur Reform des Ehe- und Lebenspartnerschaftsrechts am 9./10.11.2012 in Würzburg

---

What Will Happen to the Alien Tort Statute?

As many of our readers know, we are anxiously awaiting the United States Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum*. Although the Supreme Court initially granted certiorari in *Kiobel* to decide the issue of corporate civil tort liability under the ATS, it subsequently orderd reargument on the broader question of "[w]hether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." Comments by the justices in the *Kiobel* oral arguments raise the possibility that the Court may require exhaustion of local remedies in ATS litigation. Some believe it is likely that the Court will limit ATS litigation—perhaps substantially. All of this raises an important question: What will human rights litigation look like after *Kiobel*? The *Kiobel* decision is unlikely to end ATS litigation in the federal courts, but it is likely that many post- *Kiobel* human rights claimants will consider alternative strategies.

A year ago, right after the first oral argument and before the reargument was ordered, Chris Whytock, Mike Ramsey, and I convened a group of private international law and public international law scholars and practitioners to examine the question of what might happen after *Kiobel*. In particular, we were curious to see whether pleading ATS-like claims in state courts under state law was viable. See here for one view. The UC Irvine Law Review is about to go to press with the papers from that conference. For those interested, here is a link to the issue's introduction where we provide an overview of the papers.

Here is the abstract:

Litigation in domestic courts is only one of many ways to promote and protect international human rights, but it has received much attention from lawyers and scholars. Attention has focused above all on litigation in the U.S. federal courts under the Alien Tort Statute (the "ATS"). However, plaintiffs are facing growing barriers to ATS human rights litigation in the U.S. federal courts, and it is likely that the Supreme Court's upcoming decision in Kiobel v. Royal Dutch Petroleum Co. will further restrict this type of litigation — perhaps substantially.

This Essay provides an overview of the legal issues surrounding one possible alternative human rights litigation strategy: human rights litigation in U.S. state courts or under U.S. state law. It highlights both the attractions and the limits of this strategy, and it identifies the challenging legal issues that this strategy will raise for judges, lawyers and scholars, ranging from choice of law and extraterritoriality, to jurisdiction and federal preemption. This Essay also serves as the foreword to a symposium issue of the UC Irvine Law Review that contains articles by leading practitioners and scholars of human rights, international law, and conflict of laws providing in-depth analysis of these and other aspects of human rights litigation in state courts and under state law.

Owusu and National Lis Pendens Doctrines

In *Owusu*, the Grand Chamber of the Court of Justice of the European Communities held that English courts may not decline jurisdiction on the ground that a third state court is *Forum Conveniens* when the Brussels Convention applies. English courts have no discretion when Article 2 of the Convention grants them jurisdiction.

What is the impact of this decision in continental Europe? Civil law jurisdictions do not have *forum non conveniens* doctrines, but they apply instead national doctrines of *lis pendens* and related actions. Are these doctrines impacted at all by *Owusu*?

Let's take an example. Here is a contractual dispute between a Gabonese company and a French company. The French company initiates proceedings in Gabon. Shortly after, the Gabonese company initiates proceedings in France. The French company is domiciled in France, so the jurisdiction of the French court is governed by Article 2 of the Brussels I Regulation. May the French court apply its national doctrine to decline jurisdiction?

The relevant doctrine is not FNC, but it has interesting features. It is a special form of *lis pendens*. On the one hand, a number of conditions must be met: proceedings must have been initiated first before the foreign court, the dispute must be the same (triple identity), the foreign jugdment would be recognised in the forum. On the other hand, the French court only has discretion to decline jurisdiction.

In a judgment of February 19th, 2013, the French supreme court for private and criminal matters (*Cour de cassation*) affirmed a decision whereby the Paris court had declined jurisdiction in that very same circumstances. It seems that the *Owusu* decision was neither mentioned nor discussed before the *Cour de cassation*.

H/T: Severine Menetrey

Regulation Nº 650/2012: Some Open Issues

The new Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession was published in the OJEU on 27 July 2012 and will apply on a general basis "*to the succession of persons who die on or after 17 August 2015*". The need for an instrument at Community level has been emphasized in order to solve the difficulties due to the treatment of the different international succession aspects by means of the respective national rules of Private International Law.

Nowadays, before the general application of the rules contained in the new EU Regulation, in the specific area of the determination of international jurisdiction in matters of succession problems such as positive and negative conflicts of jurisdiction, lack of legal certainty, contradictory answers to situations of international *lis pendens* and the following obstacles of recognition and enforcement of decisions arise. An interesting question is if the new Regulation will totally or only partially solve this situation.

One of the most delicate issues in this field is that the new legal instrument foresees the problematic term "court" when it refers to the competent authority to deal with an international succession case, establishing an important limitation on the total unification of this aspect at European level, due to the fact that the determination of the competent non-judicial authorities and legal professionals in matters of succession, such as notaries, will be still possible under some circumstances by means of the national legislations of the Member States. This situation will probably entail some compatibility problems.

The new EU Regulation 650/2012 provides different common rules for the allocation of international jurisdiction, starting from the premise of the unity of

forum with some exceptions. As it has already been pointed out by the legal literature, this part of the EU instrument causes considerable problems of interpretation, and it does not regrettably incorporate certain aspects which were underlined in the previous legislative proposals. The choice of the last habitual residence of the deceased as a general criterion seems to be reasonable, although in some cases it may be difficult to identify it. Besides, party autonomy plays an important role in this chapter of the Regulation; in this sense, the different mechanisms of choice of the competent authority are formulated in a very complex way that will also probably imply practical problems. Besides, the new instrument in matters of succession allows an exceptional possibility of remission of jurisdiction between authorities of Member States. The wording of this aspect in the final text also presents some significant difficulties relating to the operation and the effects of this flexibility mechanism.

Moreover, the new Regulation on Succession and Wills contains a rule on subsidiary or residual jurisdiction, giving an answer for cases where the deceased's last habitual residence is not located in a Member State. In this context, it is important to know if this rule will certainly allow identifying a real link between the specific case and the Community territory. Regulation 650/2012 also provides for jurisdiction based on *forum necessitatis*, an interesting option which had been supported in legal literature and which tries to avoid a loss of effective legal protection.

Besides, the new EU legal instrument incorporates some rules in order to establish a partial declaration of acceptance, waiver or limitation of liability and to adopt provisional measures. The treatment of *lis pendens* and related actions is also foreseen. Among other questions, providing further details on these rules would have been appropriate, such as time-limits or exceptions to the solution based on the chronological order of the bringing of the claims in the case of *lis pendens*.

All the aforementioned aspects are examined in a new book entitled *La autoridad competente en materia de sucesiones internacionales: el nuevo Reglamento de la UE* (Prólogo de *Alegría Borrás*), Marcial Pons, 2013 (translated into English, it would be "The competent authority in international succession matters: the new EU Regulation (Prologue by *Alegría Borrás*)"), written by Maria Álvarez Torné, a Postdoctoral Researcher in Private International Law of the University of Barcelona. This work analyzes the different criteria on international jurisdiction in

the new Regulation on Succession and Wills, describing the interesting previous decision-making process and also including a brief chapter dealing with the rules on applicable law, recognition and enforcement of decisions, acceptance and enforcement of authentic instruments and the European Certificate on Succession. Facing the new scenario, this book essentially aims to answer to the question of the advantages and missed opportunities in the way of allocation of international jurisdiction contained in the EU Regulation, taking into account that this aspect will condition the following treatment of a succession case with cross-border elements. It is necessary to use the time prior to the application of the EU Regulation to prepare for the application of all its rules, and in this sense opening up forums of debate to discuss about the numerous interpretation difficulties has an increasingly importance.