López de Tejada on the Abolition of Exequatur

María López de Tejada holds a PhD in law from the University of Paris II with a thesis on the abolition of the exequatur procedure. She has recently published an article on the topic in the Spanish journal La Ley (Diario La Ley, Nº 7766, Sección Tribuna, 30 Dic. 2011). Here is a summary of the contents.

The execution of foreign judgments has traditionally been subject to an enforcement procedure in the European judicial area. However, the Community lawgiver wants to get rid of that process so that any judicial decision could deploy its effects and be enforced throughout the community, without prior declaration of enforceability or control in the executing Member State. Several regulations of limited material scope have already achieved that objective, but the idea is to go further and abolish the exequatur procedure for all civil and commercial matters. Such an objective looks like praiseworthy at first sight, because it tends to break with a traditional legal lack of openness and to restore the continuity of the right to enforcement of anyone who has obtained a favorable judgment. But a deeper analysis of the issue shows that right now, the abolition of exequatur would be a hasty, even dangerous step for both the citizens and the harmony of the juridical systems of the Member States. The suppression of the exequatur procedure is based on the assumption that foreign court rulings, delivered under common jurisdictional criteria, provide similar guarantees and should be regarded as national decision. The truth is that until a higher level of integration has been reached such presumption, which implies the perfect equivalence of all national decisions, is simply excessive and unrealistic. On the one hand, the European system of jurisdiction set in regulations is still far from perfect; and the practical application of the rules leads too often to unpredictable consequences. On the other hand, the judicial area is characterized by a profound heterogeneity in as far as procedural law is concerned; and unfortunately both the ECHR and the ECJ case law still show scenarios of violations of fundamental rights by the States -in particular of Article 6 of the ECHR.

The suppression of all kind of control (meaning, public order clause included) of foreign rulings opens the door to the community space of judgments contrary to the fundamental rights enshrined in the ECHR and in the European Charter of

Fundamental Rights, notwithstanding the Member States commitment to abide by both them.

Agreements in EU Council on Abolition of Exequatur and Succession

During its meeting of December 13-14, 2011, the Council of Ministers of the European Union has made decisions regarding some forthcoming private international law legislation. The Press Release states:

Main Results:

> *Ministers also reached agreement on the text of a regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of* ***succession*** *and the creation of a European Certificate of Succession. On the recast of a regulation on* ***jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*** *(the so-called "Brussels I" regulation), the Council approved political guidelines for further work.*

More specifically, the Council agreed:

Judgments in Civil and Commercial Matters

> *The Council agreed on political guidelines on the abolition of exequatur on judgements given on matters falling within the scope of the so-called Brussels I regulation.*
>
> *(…)*
>
> *The UK and Ireland have decided to take part in the adoption of the revised*

regulation. Once adopted, the revised regulation will also be applicable to Denmark in the context of the existing agreement between the EU and Denmark on the matter.

Succession

The Council reached very broad general agreement on the text of the regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (18745/11 + ADD 1). (…)

In order to reach a general approach, further work is needed, in particular on two issues:

– the question of restoration of lifetime gifts ("clawback") where considerable differences between member states' legal systems exist: While some member states allow for clawback, others don't.

– the question of the administration of a deceased person's estate: Work will start immediately in order to prepare incoming negotiations with the European Parliament.

Open questions also exist on the recitals as well as the proposed standard forms.

In general, the proposed rules aim to make life easier for heirs, legatees and other interested parties.

The main provisions are:

– The draft act provides for the application of a basic connecting factor for determining both the jurisdiction of the courts and the law applicable to a succession with cross-border implications, namely the deceased's habitual residence at the time of death. The proposed Regulation will also allow a person to choose the law to govern the succession the aw of the State of his/her nationality. This rule would take some of the stress out of estate planning by creating predictability.

– The proposed rules will ensure mutual recognition and enforcement of

decisions and mutual acceptance and enforcement of authentic instruments in succession matters.

– A European Certificate of Succession would be created to enable persons to prove their status and/or rights as heirs or their powers as administrator of the estate or executor of the will without further formalities. This should result in faster and cheaper procedures for all those involved in a succession with cross-border implications.
The UK and Ireland have not yet notified the Council that they will participate in the final adoption of the regulation, but have participated actively in the negotiations. Denmark will not take part in the adoption of the proposed regulation.

Many thanks to Niklaus Meier for the tip-off.

Kono on Intellectual Property and PIL

Toshiyuki Kono, who is a professor of law at Kyushu University – Graduate School of Law, has posted Jurisdiction and Applicable Law in Matters of Intellectual Property on SSRN.

The Hague Judgments Project, initiated in the early 1990 sat the Hague Conference on Private International Law, aimed to harmonize rules on international jurisdiction and the recognition and enforcement of foreign judgments. As this project faltered, supporters continued this work under an American Law Institute Project that developed comprehensive rules on international jurisdiction, particularly in cross-border intellectual property (IP) disputes. Other initiatives in Europe and Asia worked to harmonize the settlement of multi-state IP disputes. This report synthesizes reports

enforcement of judgments in IP matters. It also presents 12 hypothetical cases to determine how a given jurisdiction deals with various matters, including: personal jurisdiction and jurisdiction over infringement actions, subject-matter jurisdiction, consolidation of proceedings, choice of court agreements, Parallel proceedings, territoriality principle of IP rights, and applicable law regarding transfer of IP rights and agreements.

It is an abbreviated version of the General Report on Intellectual Property and Private International Law for the XVIIth Congress of the International Academy of Comparative Law (Washington, 2010) .

Symeonides on Choice of Law in American Courts in 2011

Dean Symeon C. Symeonides (Willamette University – College of Law) has posted Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey on SSRN. It is, as usual, to be published in the *American Journal of Comparative Law* (Vol. 60, 2012). Here is the abstract:

This is the 25th Annual Survey of American Choice-of-Law Cases. It is intended as a service to fellow teachers and students of conflicts law, both within and outside the United States. The Survey covers cases decided by American state and federal appellate courts in 2011. The following are some of the cases discussed:

• Three Supreme Court decisions, one on general jurisdiction, one on specific jurisdiction, and one holding that the Federal Arbitration Act preempts state court rulings that protected consumers by refusing to enforce certain class-arbitration waivers.

• Two state supreme court cases refusing to enforce arbitration clauses that waive tort claims arising from gross negligence and criticizing the Supreme

Court for "tendentious reasoning" and for creating new doctrines "from whole cloth."

• A New York case struggling with the Neumeier rules in a case involving the same pattern as Schultz, and a California case worthy of Traynor's legacy in delineating the extraterritorial reach of California statutes.

• A Delaware case holding that Delaware has an interest in "regulating the conduct of its licensed drivers," even when they drive in states with lower standards; a conflict between a dram shop act and an anti-dram shop act; and a product liability case in which a driver who crushed his car after taking a sleeping pill prevailed on the choice-of-law question.

• A case enforcing a foreign arbitration and choice-of-law clause prospectively waiving a seaman's federal statutory rights, even though there was little possibility for a subsequent review of the arbitration award.

• Several cases illustrating the operation of four competing approaches to statutes of limitation conflicts.

• A case rejecting a claim that a Sudanese cultural marriage was invalid because the groom had paid only 35 of the 50 cows he promised as dowry to the bride's father. • Two cases recognizing Canadian same-sex marriages.

• A case holding that the court had jurisdiction to terminate a father's parental rights without in personam jurisdiction over him, as long as the children were domiciled in the forum state.

• A case holding that a state's refusal to issue a revised birth certificate listing two unmarried same-sex partners as the child's parents after an adoption in another state did not violate the Full Faith and Credit clause.

• A case characterizing as penal and refusing to recognize a sister-state judgment imposing a fine for a violation of zoning restrictions.

• Several cases involving sex offenders required by sister-state judgments to register their place or residence, or terminating the obligation to register.

• Four federal appellate decisions holding that corporate defendants can be sued under the Alien Tort Statute for aiding and abetting in the commission of

international law violations.

ERA Conference on the Optional European Sales Law

On 9 and 10 February 2012, the European Law Academy will host a conference on the Optional European Sales Law in Trier, Germany. The objective of the conference is to discuss the Proposal for a Common European Sales Law, which was published by the EU Commission in October 2011. Registration and further information can be found on the ERA website. The programm reads as follows:

Thursday, 9 February 2012

08:30 Arrival and registration
09:00 **Welcome**, *Angelika Fuchs*
Chair: *Hugh Beale*

I. SETTING THE SCENE

09:05 **The ongoing political debate**
• European Parliament: *Diana WallisPolish*
• EU Presidency: *Aneta Wiewiórowska*
• Danish EU Presidency: *Morten Fogt*

09:45 **Discussion**

II. LEGAL CHALLENGES FOR THE CESL

10:00 **Legal basis, content and scope**
Christiane Wendehorst

10:20 **CESL and the conflict of laws**
Gilles Cuniberti

• CESL and Rome I
• How to fill the gaps? Set-off, assignment, representation and other issues

10:45 **Discussion**
11:00 Coffee break

Chair: *Diana Wallis*

III. CESL RULES FOR B2C SALES CONTRACTS

11:30 **Pre-contractual information**
Eric Clive
• Distance / off-premises contracts
• Contents and sanctions

11:50 **Making a binding contract**
Anna Veneziano
• Offer and acceptance
• Defects in consent
• Right of withdrawal

12:15 **Discussion**

12:30 **Unfair contract terms: assessing unfairness**
Friedrich Graf von Westphalen

12:50 **Discussion**
13:00 Lunch

Chair: *Friedrich Graf von Westphalen*

14:00 **Obligations and remedies of the parties**
Hugh Beale
• Consumer choices
• Requirements
• Prescription periods

14:25 **Discussion**

14:40 **Goods, supply of digital content and pprovision of related services**
Matthias Storme

15:00 **Discussion**

IV. WORKSHOP (with coffee & tea)

15:15 **Life-cycle of a contract: a case study on the CESL in legal practice**
Martin Schmidt-Kessel

17:00 End of the first conference day
19:00 Evening programme and dinner

Friday, 10 February 2012

Chair: *Anna Veneziano*

V. CONSUMER AND COMMERCIAL CONTRACTS

09:00 **Comparing B2C and B2B contracts,** *Dora Szentpaly-Kleis*
Ursula Pachl
• Which rules are different
• Why?

09:40 **What is required to make the optional instrument work in practice?**
Dirk Staudenmayer

10:00 **Discussion**
10:30 Coffee break

Chair: *Morten Midtgaard Fogt*

VI. PANEL DISCUSSION

11:00
B2C: Added value for consumers or cost driver for enterprises?
Hanne Melin
Bob Schmitz

B2B: What does the CESL offer to businesses?
Tina Sommer
Andreas Dietzel

13:00 **Lunch and end of the conference**

Buxbaum and Michaels on International Antitrust Law

Hannah Buxbaum (Indiana) and Ralf Michaels (Duke) have posted Jurisdiction and Choice of Law in International Antitrust Law – A U.S. Perspective on SSRN.

> *This essay was written for a forthcoming book on international antitrust litigation in Europe. It provides a comparative perspective on the U.S. approach to the jurisdictional and choice-of-law issues raised in international antitrust litigation. The chapter examines personal jurisdiction over foreign defendants involved in anticompetitive conduct, as well as the question of applicable law in cross-border antitrust litigation — including the possibility of applying foreign antitrust law. It also focuses on the intersection between antitrust claims and contract claims, and on the special conflict-of-laws issues that arise in the context of class actions.*

Sciences Po PILAGG Workshop Series, January-February 2012

The list of speakers at the workshop on Private International Law as Global Governance at the Law School of the Paris Institute of Political Science (*Sciences Po*) has been updated and is available on the PILAGG website.

The speakers for January and February will be:

• 20th January: Mads ANDENAS ("*External effects of national ECHR judgments*")
• 25th January (doctoral workshop): Shotaro HAMAMOTO ("*L'arbitrage investisseur-État est-il hostile aux intérêts publics?*")
• 27th January: Ingo VENZKE ("*On words and deeds: How the practice of interpretation develops international norms*")
• 9th February (doctoral workshop): Benoit FRYDMAN ("*Approche pragmatique du droit global*")
• 11th February (doctoral workshop): David KENNEDY ("*The renewal of political economy and global governance*")
• 16th February: Michael WEIBEL ("*Privatizing the adjudication of sovereign defaults*")

PILAGG has also launched a new stream on epistemology and methodology of human-rights in transnational context.

Another Comment on Aguirre Pelz

Dr. Mónica Herranz, full time Professor of Private International Law at the National Distance Education University in Madrid (Spain), has just published a paper on the ECJ ruling *Aguirre Pelz* (C- 491/10 PPUU), under the title "El control por el juez de origen de las decisiones dictadas en aplicación del artículo 42 del R. 2201/2003: el asunto *Aguirre Pelz*", *Revista General de Derecho Europeo*, (25) 2011.

The author analyzes critically the reasoning of the parties in the proceedings, as well as the approach taken by the General Advocate and the solution adopted by the ECJ. Other relevant ECJ rulings in kidnapping cases are discussed. The paper also includes an explanation of the different legal channels for appealing a decision when a fundamental right has been violated (in the State of origin, in the destination State and before the ECHR).

The study shows the need to review the legal solution for intra-community kidnapping cases.

Mónica Herranz: mherranz@der.uned.es

Cross-Border Civil Litigation in Peru: a New Draft

A Bill for International Litigation was presented to the Congress of Peru in November 2011. Based on the Latin American Model Bill for International Litigation of 2004, it is an apparently simple draft – just ten articles-, which nevertheless covers some of the most important topics in cross-border litigation: service of process; evidence; damages (compensation); appeals; settlements; *lis pendens*; actionability; and mass claims.

The Peruvian project aims to provide a practical tool for Peruvians plaintiffs in Peruvian cross-border conflicts. Article 1 makes this task easier by accepting summons in any form admitted in the country where the documents are to be served, therefore allowing an enormous saving of time and money.

Article 2 declares the admissibility of evidence already used in a foreign proceeding; such materials will nevertheless be considered again by the Peruvian judge "according to the principles of sound criticism." Only the relevant part of the foreign documents needs translation: again, a measure to save time and money.

Article 3 deals with damages, which will be awarded (calculated) following the parameters of the relevant foreign law. Though the conflict rule is adequate, it could still be improved through a *favor laesi.*

Appeal as a delaying tactic is prevented by Article 4. Appeal will normally deploy only suspensive effect, thus allowing the international procedure to be carried out speedily.

Article 5 prevents defendant and plaintiff from reaching an agreement without the latter's counsel being informed. The purpose of the rule is to protect both the

lawyer who has invested time and money in the process and the actor who, pressed by necessity, accepts an inconvenient settlement.

Article 6 recalls an already existing rule: in cases of concurrent international proceedings the court where the lawsuit was filed first keeps jurisdiction, just as it happens in domestic cases.

Article 7 of the Bill provides with a separate action against all unjustifiable harm committed abroad. The rule tends to the protection of Peruvians interests when no other remedy is available.

The project includes a ten-year statute of limitations that can be extended to fifteen years in case of debtor's bad faith. Prescription is interrupted under several circumstances: for instance, when the creditor did not know about the damage or its source; the fact of filing overseas also suspends the limitation period. This is reasonable and should be welcomed in view of the technical development that has led, for example, to diseases with a long period of latency, as it happens with exposure to chemicals products.

Consolidation of claims in cases involving a large number of actors or defendants is provided for in Article 9. It is for the judge to take "practical steps for the case to develop rapidly within the limits of due process." It seems that this Article contains the seeds of mass action or class actions.

The overall conclusion is that the Bill, if approved, will certainly help cross-border litigation to be easier and more efficient in Peru.

Many thanks to Henry Saint Dahl, Inter-American Bar Foundation, for the hint.

Brand on Rome I and Party

Autonomy

Ronald Brand, who is a professor at the University of Pittsburgh School of Law, has posted Rome I's Rules on Party Autonomy for Choice of Law: A U.S. Perspective on SSRN.

> *This chapter was presented at a conference in Dublin on the (then) new Rome I Regulation of the European Union in the fall of 2009. It contrasts the Rome I rules on party autonomy with those in the United States. In particular, it considers the rules in the Rome I Regulation that ostensibly protect consumers by discouraging party agreement on a pre-dispute basis to the law governing a consumer contract. These rules are compared with the absence of private international law restrictions on choice of forum and choice of law in the United States, even in consumer contracts. The result in Europe is the "protection" of the right of the consumer to his or her home law, but often with the resulting reduction of consumer choice and increase of consumer cost. In the United States, cases have instead provided more of an economic analysis, often tying a consumer to the merchant's choice of law (and choice of forum), but resulting in increased access to goods and services at what is generally a lower cost. Both systems "protect" consumers, they just choose to protect different consumer interests.*