Application of foreign law (Sellier, 2011)

APPLICATION OF FOREIGN LAW

Edited by Carlos Esplugues, José Luis Iglesias and Guillermo Palao

(Sellier, Munich, March 2011)

I am delighted to announce the publication of the book "APPLICATION OF FOREIGN LAW" (Sellier, Munich, March 2011, ISBN 978-3-86653-155-0), edited by Carlos Esplugues, José Luis Iglesias and Guillermo Palao, all of them Professors of Private International Law at the University of Valencia (Spain).

The book deals in depth with one of the most complex issues of Private International Law directly affecting the process of harmonization of Private Law and Private International Law in Europe: the application of foreign law by judicial and non-judicial authorities. During the last decade Europe has undertaken an active and broad process of harmonisation of Private International Law. Many areas of law of diverse nature have been influenced by this trend to the point that nowadays a growing set of common choice-of-law rules exist within the EU. This process, directly grounded on Article 81 of the Treaty on the Functioning of the European Union, is yet far from being finished. It will seemingly increase in the near future covering many domains so far not governed by European instruments. However, this movement towards a harmonised system of choice-of-laws rules within the EU has so far left aside a highly relevant issue which may directly affect the viability of the whole process of harmonisation under way; the application of the foreign law referred to by harmonized choice-of-law rules by judicial and non-judicial authorities in Europe. The analysis of the several solutions embodied in the different legal systems of the EU Member States shows both the existence of some recurring problems as to this issue and of very different responses to it in all of them. The current situation is hardly consistent with the existing trend towards harmonization of Private International Law within the EU; in fact, it seemingly runs against it. It violates legal certainty and contradicts the objective of ensuring full access to justice to all European citizens within the European Union.

The book approaches the situation existing as regards this issue in every EU Member State, analyzing in depth the solutions provided by their respective legal systems and their treatment by case law. Besides, a general comparative study rendering a comprehensive overview of the existing situation in Europe is included. Standing on the different national reports and on the general study, some basic principles for a future European instrument on this field are proposed as well.

This book is the first one in Europe dealing in a joint manner with the issue of application of foreign law both by judicial and non-judicial authorities in the European Union. It provides an exhaustive analysis of an issue of very practical relevance. We are sure that it will become a highly useful tool for all legal practitioners –lawyers, judges, notaries, land registries, academics, ministry officials, public servants, prosecutors…- from the European Union and abroad.

The book is the final result of the Action Grant awarded in 2008 to the Universities of Valencia (Spain) and Genoa (Italy) and the Spanish Land Registry Association by the European Commission within the framework of the Specific Programme "Civil Justice". The study has been developed by a team of academics and other legal professionals belonging to some 20 different Universities and legal entities of the EU.

Index and extract are available here.

Trimble on Foreigners and Patent Litigation in the US

Marketa Trimble, who teaches at the William S. Boyd School of Law in Nevada, has posted When Foreigners Infringe Patents: An Empirical Look at the Involvement of Foreign Defendants in Patent Litigation in the U.S. on SSRN. The abstract reads:

> *This paper presents results from a multiple-year project concerned with the*

involvement of foreign (non-U.S.) entities in U.S. patent litigation. A comparison of data from 2004 and 2009 that cover 5,407 patent cases filed in U.S. federal district courts in those two years evidences an increase in the number of cases involving foreign defendants, and thus an increasing potential for cross-border enforcement problems. With this basic finding the research supports the proposition advanced by a number of intellectual property scholars in the U.S. and abroad that rules need to be established to facilitate a smooth process for recognition and enforcement of foreign judgments in intellectual property cases. The research fills a significant gap in the existing literature, which has relied so far on only isolated individual cases to illustrate cross-border enforcement problems; comprehensive empirical evidence has not existed to show a growing need for improved rules for recognition and enforcement. In addition to providing this missing evidence the paper uses data concerning the involvement of foreign defendants to reveal remarkable facts about the changing landscape of patent litigation in the U.S.

The Paper is forthcoming in the *Santa Clara Computer and High Technology Law Journal* (2011, Vol. 3).

Orejudo on the Law Applicable to Mediation Contracts

Patricia Orejudo Prieto de los Mozos, who is a professor of private international law at the University of Oviedo (Spain), has posted The Law Applicable to International Mediation Contracts on SSRN. The abstract reads:

Mediation entails the provision of the services of a professional, the mediator, who holds a legal relationship with the disputants: the mediation contract. Where there are transnational elements in the mediation process, the contract is of an international character. In such situation, the Laws of the diverse States involved could claim to be applicable to the same contract. The determination of the (only) Law applicable is of utmost interest in spite of the high degree of

standardization of the obligations of both parties in the mediation contract. First, for such lex contractus establishes the limits of the freedom of the contracting parties. And second, for there are important matters that the parties do not usually tackle within the wording of mediation contracts and that model rules and standards do not either regulate. The present paper aims at illustrating about the functioning of the present and the future instruments of Private International Law that solve the conflict-of-laws issue: Rome Convention and Rome I Regulation.

The paper is forthcoming in *InDret* 2011.

ERA Conference on Brussels I Revision

A conference organized by the European Law Academy (ERA) on the recast of the Brussels I Regulation will take place in Trier (Germany) on 26 and 27 May 2011. Renowned speakers will discuss the main issues of the revision: abolition of exequatur, provisional and protective measures, disputes involving third country defendants, efficiency of choice of court agreements, and the interface between litigation and arbitration.

The conference aims to provide an in-depth analysis of the recast and to promote a far-reaching and thorough debate concerning the most important or complex issues inherent to cross-border litigation in Europe.

For more information and registration click here.

Cuadernos de Derecho Transnacional, Issue 1/2011

The first issue for 2011 of the Cuadernos de Derecho Transnacional, the Spanish journal published twice a year by the Área de Derecho Internacional Privado of Univ. Carlos III of Madrid under the editorship of *Alfonso Luis Calvo-Caravaca* (Univ. Carlos III) and *Javier Carrascosa-González* (Univ. of Murcia), has been recently published. It contains twenty articles, shorter articles and casenotes, encompassing a wide range of topics in conflict of laws, conflict of jurisdictions and uniform law, all freely available for download from the journal's website.

Here's the table of contents (each contribution is accompanied by an abstract in English):

Estudios

- *Dário Moura Vicente*, Principios sobre conflictos de leyes en materia de Propiedad Intelectual;
- *Hilda Aguilar Grieder*, El impacto del Reglamento «Roma I» en el contrato internacional de agencia;
- *Celia Caamiña Domínguez*, El secuestro internacional de menores: soluciones entre España y Marruecos;
- *Celia Caamiña Domínguez*, La «supresión» del exequátur en el R 2201/2003;
- *Sergio Cámara Lapuente*, El concepto legal de «consumidor» en el Derecho privado europeo y en el Derecho español: aspectos controvertidos o no resueltos;
- *Maria Ersilia Corrao*, Il diritto internazionale privato e processuale

europeo in materia di obbligazioni alimentari;
- *Pietro Franzina*, La garanzia dell' osservanza delle norme sulla competenza giurisdizionale nella proposta di revisione del Regolamento «Bruxelles I»;
- *Miguel Gómez Jene*, Inmunidad y transacciones mercantiles internacionales;
- *Aurora Hernández Rodríguez*, El contrato de transporte aéreo de pasajeros: algunas consideraciones sobre competencia judicial internacional y Derecho aplicable;
- *Mónica Herranz Ballesteros*, Prohibiciones y limitaciones del artículo 4 de la Ley 54/2007: entre los objetivos de la norma y la realidad en su aplicación;
- *Stefan Leible*, La importancia de la autonomía conflictual para el futuro del Derecho de los contratos internacionales;
- *Clelia Pesce*, Sottrazione internazionale di minori nell'Unione Europea: il coordinamento tra il Regolamento (CE) n. 2201/2003 e la Convenzione dell'Aja del 1980.

Varia

- *Alfonso-Luis Calvo Caravaca*, *Javier Carrascosa González*, Notas críticas en torno a la Instrucción de la Dirección General de los Registros y del Notariado de 5 octubre 2010 sobre régimen registral de la filiación de los nacidos mediante gestación por sustitución;
- *María Pilar Canedo Arrillaga*, Notas breves sobre la sentencia del TJUE (Sala Cuarta) de 25 febrero 2010 (Car Trim: asunto C-381/08): los contratos de compraventa y los contratos de prestación de servicios en el Reglamento 44/2001;
- *Federico F. Garau Sobrino*, La literalidad interpretada desde la coherencia del sistema. Las relaciones entre el Reglamento Bruselas I y los convenios sobre materias particulares según el TJUE;
- *Federico F. Garau Sobrino*, Notas sobre la colisión de fuentes de Derecho internacional privado español sobre responsabilidad parental y protección del niño;
- *Natividad Goñi Urriza*, La concreción del lugar donde se ha producido el hecho dañoso en el art. 5.3 del Reglamento 44/2001: nota a la STJCE de 16 de julio de 2009;

- *Carlos Andrés Hécker Padilla*, Denial of justice to foreign investors;
- *Aurora Hernández Rodríguez*, El Derecho aplicable al contrato en ausencia de elección por las partes: el asunto Intercontainer Interfrigo y su repercusión en el Reglamento Roma I;
- *Julia Suderow*, Nota sobre la sentencia del TJCE Akzo Nobel y otros de 14 de septiembre de 2010: límites al privilegio legal de las comunicaciones entre abogados y sus clientes.

See also our previous posts on past issues of the CDT (1/2009, 2/2009 and 2/2010). The journal's website provides a very useful search function, by which contents can be browsed by issue of publication, author, title, keywords, abstract and fulltext.

(Many thanks to Federico Garau, Conflictus Legum blog, for the tip-off)

Promoting a Spanish Law on International Civil Cooperation

In 2000, the Spanish Civil Procedure Act stated that within six months after its entry into force the Government would propose a draft law on international cooperation. Many years have elapsed, and the law, obviously needed, has not yet seen the light. The last Foro de Arbitraje y Litigación Internacional, celebrated in FIDE (Fundación para la Investigación sobre el Derecho y la Empresa) in February, addressed the issue, having F.J. Garcimartín Alférez (professor of private international law) and A. Mejía Errasquín (General Director for International Legal Cooperation and Relations with the Confessions of the Ministry of Justice) as speakers. Numerous references were made to a draft prepared in 2001 by M. Virgos Soriano, professor of private international law, where all the important issues of a future law on international cooperation, especially exequatur, are dealt with. For those interested in this topic here is a summary of the meeting.

Many thanks to Carlos Espósito, of aquiescencia.

Swiss Conference on the Brussels I Review

The Swiss Institute of Comparative Law will hold a conference on the Brussels I Review and its impact on the Lugano Convention on April 8th at the Institute in Lausanne.

The full programme can be downloaded here, and the registration document is available here.

UAM Conference on EU Law. Call for Papers

The UAM (Universidad Autónoma de Madrid) Faculty of Law will host the 1st *UAM International Conference on EU Law. Recent trends in the case law of the Court of Justice of the EU* (2008-2011) the 14-15 July 2011. This Conference is meant to be a forum for the critical analysis of the most recent ECJ case law. The programme includes two plenary lectures and eight specialized panels, one of them devoted to judicial cooperation in civil matters. Informants for the panel will be selected on the basis of proposals and abstract submitted in response to a Call for Papers.

The deadline for the call for papers is 10th April 2011.

For more information see here

Antisuit Injunctions

My colleague Roger Alford has an excellent post up at Opinio Juris regarding the recent comings and goings in the Chevron Ecuador Litigation. See here for more.

Fourth Issue of 2010's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains two articles and several casenotes. The full table of content can be found here.

In the first article, Dr. Marius Kohler and Dr. Markus Buschbaum discuss the concept of recognition of authentic instruments in the context of cross-border successions (*La « reconnaissance » des actes authentiques prévue pour les successions transfrontalières. Réflexions critiques sur une approche douteuse entamée dans l'harmonisation des règles de conflits de lois*). The English abstract reads:

> *However advantageous the introduction of a European inheritance certificate may be, as envisaged by the Commission's proposed Regulation on international successions, it is in its current form likely to create friction because of the way in which it organises the relationship with national inheritance certificates. It would therefore be wise to restrict the use of the European certificate to international successions, where it could then be drafted on basis of the national one, and to limit its effects to the Member*

States of destination. Moreover, as far as the free circulation of authentic instruments in general is concerned, the Regulation raises serious misgivings as to the use made by the proposal of the concept of mutual recognition. It appears that this concept – appropriate as it is for judicial decisions – is unsuitable to promote the circulation of authentic instruments.

In the second article, Professor Malik Laazouzi, who teaches at St Etienne University, discusses the impact of the recent *Inserm* decision of the French *Tribunal des conflits* (a translation of which can be found here) on choice of law in administrative contracts (*L'impérativité, l'arbitrage international des contrats administratifs et le conflit de lois. A propos de l'arrêt du Tribunal des conflits du 17 mai 2010,* Inserm c/ Fondation Saugstad). I am grateful to the author for providing the following summary:

The Inserm case deals primarily with international arbitration issues. But the way of reasoning used to decide the case could also interfere with the handling of public law matters involving French public entities in private international law by French jurisdictions.

How did the issue occur ?

A French public law entity (Inserm) entered into a contract with a Norwegian Fondation (Letten F. Sugstad) in order, inter alia, to achieve the implementation of a research facility in France, including a construction project. An arbitration occurred to decide over the termination of the agreement by the Fondation. The arbitral award, rendered in France, dismissed Inserm's claims. The French entity then applied to set aside the award simultaneously before french civil and administrative courts. To assert the jurisdiction of the letter, Insermargued that the dispute arose out of a French administrative contract.

The case has given rise to the intricate issue of allocation of jurisdiction between civil and administrative courts. As a matter of consequence, it has been brought before the Tribunal des conflits.

The question which the Tribunal des conflits had to solve is complicated to enunciate. Which one of the French civil or administrative courts have jurisdiction to set aside an international arbitral award rendered in France, in a

dispute arisen out of the performance or termination of a contract to be performed on the French territory and entered into between a French public law entity and a foreign individual or entity ?

The Tribunal des conflits decided, on 17 may 2010, that the application to set aside the award in such a case is to be brought before civil courts, even if the contract is an administrative one under French law. This solution allows an exception when the contract entered into by a french public entity is governed by a mandatory administrative regime. In this particular case, administrative courts retain jurisdiction to decide over challenges to the arbitral award.

This decision is strictly limited to some international arbitration matters involving a contract entered into by a french public entity. When it is not the case – i.e. when no french public entity is involved – French administrative courts does not intervene at all.

This case is worth mentioning within the field of private international law. The distinction it introduces between mandatory and non mandatory administrative rules in the international arena could reshape the very idea of the split in methods to solve conflict of laws issues according to the public or private law nature of the rules at stake.