COM(2009)154 final in Spanish

Just a brief post to report a "minor" error in the Spanish version of the Proposal for 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: see art. 27.2 in Spanish

"En particular, la aplicación de una disposición de la ley designada por el presente Reglamento *solo podrá considerarse contraria al orden público del foro si sus disposiciones relativas a la reserva hereditaria son diferentes de las disposiciones vigentes en el foro".*

and compare it with English (French, Italian…) versions:

"In particular, the application of a rule of the law determined by this Regulation *may not be considered to be contrary to the public policy of the forum on the sole ground that its clauses regarding the reserved portion of an estate differ from those in force in the forum".*

But, who knows, may be there is a way to reach a common understanding of the texts.

Michaels on the U.S. Conflict ofLaws

Ralf Michaels, who is a professor of law at Duke University School of law, has posted After the Revolution – Decline and Return of U.S. Conflicts of Laws on SSRN.

> *Scholars in the US have become uninterested in conflict of laws, at least in the*

core issues that spurred the conflict of laws revolution, especially questions of method and areas of tort and contract law. Proposals for a new (third) Restatement have not yet led very far. By contrast, new interest comes from the fringes: special political questions and interdisciplinarity. As to the first, I use the example of same?sex marriages to discuss the extent to which discussions about politics are inseparably linked with discussions over conflict of laws. Conflict of laws is here not a mere additional field in which policy interests clash; rather, conflict of laws is central to these clashes themselves. As to interdisciplinarity, I discuss (drawing on an issue of Law & Contemporary Problems co-edited with Karen Knop and Annelise Riles, Vol. 71, Summer 2008) the new interdisciplinary interest in the discipline: especially law and economics, but also political science and sociological and anthropological ideas about legal pluralism. We should welcome these developments, because the return of politics and (interdisciplinary) theory may be necessary if we want to make progress in the discipline, including if we want to start working on a new Restatement.

The paper is forthcoming in the *Yearbook of Private International Law* 2009 (Vol. 11, pp. 11-30). It can be downloaded here.

Conference on Transnational Securities Class Actions

The British Institute of International and Comparative Law will host a conference on Transnational Securities Class Actions on July 6th, 2010.

The speaker will be Linda Silberman, the Martin Lipton Professor of Law at New York University School of Law, and a Scholar-in-Residence at Wilmer Cutler Pickering Hale and Dorr LLP.

The Conference will be chaired by The Rt Hon the Lord Collins of Mapesbury, Justice of the Supreme Court of the United Kingdom.

The topic is transnational securities class actions, and in particular, the problem of the "f-cubed" (foreign-cubed) securities case. The f-cubed case presents the situation where claims in state A are brought by purchasers who reside outside state A and who purchased their securities from non-state A issuers on exchanges outside state A. The United States Supreme Court has this paradigm case pending before it (Morrison v. National Australia Bank Ltd) and will shortly determine the reach of U.S. jurisdiction and application of U.S. securities law in this situation. Courts in other countries are confronting similar questions. Among the issues raised by these cases are:
(1) In what circumstances should a court exercise jurisdiction over a multinational securities action? (2) Which country's securities laws should apply in such a case? (3) Will court decisions or settlements of these actions be recognized in other jurisdictions?

Where: BIICL, Charles Clore House, 17 Russell Square, London WC1B 5JP

When: Tuesday 6 July 2010 17:30 to 19:00

More information is available here.

Recent scholarship of Professor Silberman includes an article co-authored with Stephen Choi on *Transnational Litigation and Global Securities Class-ActionLawsuits*, which can be downloaded here.

Calamita on International Parallel Proceedings

N. Jansen Calamita, who teaches at the University of Birmingham School of Law, has posted Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings on SSRN. Here is the abstract:

The treatment of international parallel proceedings remains one of the most unsettled areas of the law of federal jurisdiction in the United States. There is

no consensus in the U.S. federal courts as to the appropriate legal framework for addressing cases involving truly parallel, concurrent proceedings in the courts of a foreign country. This is true whether the U.S. court is asked to issue an anti-suit injunction or asked to stay or dismiss its own proceedings in deference to the pending foreign action. Given that the Supreme Court has never spoken to the appropriate framework to be employed in parallel proceedings cases involving the courts of foreign countries, it may be unsurprising that the federal courts are divided in their approaches. What is surprising, however, is that while the academic literature has paid considerable attention to the problem of anti-suit injunctions in international cases (i.e., cases in which a party asks a foreign court to enjoin a parallel proceeding in a U.S. court), scant attention as been paid to the alternative course available to a domestic court: the stay or dismissal of its own proceedings. Instead, the majority of the articles that have been written on the topic have merely chronicled the divergent approaches taken by federal courts in the stay/dismissal context; there has been almost no effort in these articles to propose a constitutional framework to allow the federal courts to deal with these cases.

This article seeks to begin a debate on the appropriate constitutional framework for U.S. courts faced with the question of whether to decline the exercise of their jurisdiction in international, parallel proceedings cases. Specifically, this article proposes a judicial approach rooted in and based on historic common law principles of adjudicatory comity. Principles of comity empower the federal courts, as a matter inherent to their judicial function, to exercise discretion with respect to their jurisdiction in cases of international parallel proceedings. Moreover, in exercising this comity-based discretion, the courts are not bound by the Supreme Court's domestic abstention jurisprudence and its attendant federalism concerns, but instead are empowered to craft rules based upon the fundamental concerns both addressed by principles of comity and raised in international cases. And, as this article demonstrates, historically the courts have been able to craft sensible and workable rules for translating the theoretical concept of comity into practice in the context of federal jurisdiction.

The paper was published in the *University of Pennsylvania Journal of International Economic Law* (Vol. 27, No. 3) in 2006. It can be downloaded here.

A.G. Opinion on Pammer and Hotel Alpenhof

The Opinion of Advocate General Ms Verica Trstenjak in Case C-585 / 08 (Pammer) and Case C-144 / 09 (Hotel Alpenhof) was presented on May 18, 2010. Both cases involve the interpretation of Regulation (EC) No 44/2001. The national court asks if, in order to imply that a business or professional activity is addressed to the Member State where the consumer is domiciled within the meaning of Article 15, paragraph 1,c) of Regulation No 44/2001, access to the website in the Member State of domicile of the consumer is enough. The essential question raised is therefore how to interpret Article 15 paragraph 1 c), and specifically how to interpret the notion that a person engaged in a commercial or professional activity "directs" this activity to the Member State of domicile of the consumer, or to several Member States including that Member State. This is the first time that the ECJ will interpret the concept of "directing" trade or business to the Member State of domicile of the consumer.

As noted by the AG, interpretation of this concept is particularly important when the direction of activity to the Member State of the consumer occurs through the Internet, since this activity has some specific characteristics which should taken into account in the interpretation of Article 15, paragraph 1 c) of Regulation nº 44/2001. The specificity of the Internet is that consumers can generally access the website of a dealer anywhere in the world; a very narrow interpretation of the concept of "direction of activity" would mean that the creation of a website could already mean that the trader directs its business to the state of domicile of the consumer. Therefore, in interpreting the concept of "directing activity", a balance must be sought between the protection of consumers entitled to special rules of jurisdiction under Regulation nº 44/2001, and the consequences for the professional, to whom these special rules of jurisdiction should only apply if he knowingly chose to direct its activity to the Member State of the consumer.

The A. G. interpretation relies initially on four pillars: the usual sense of the concept of "directing an activity"; the teleological interpretation; the historical

interpretation; and the systematic interpretation of the concept. She concludes that the notion is not broad enough to cover the mere accessibility of a website. She also notes that -leaving aside the historical interpretation – in assessing the meaning of the direction of business within art. 15, the fact that the website is interactive or passive can not be an important point. On the other hand, she argues that several criteria will be relevant in assessing whether a person who pursues commercial or professional activities directs them towards the Member State of domicile of the consumer – ie, whether he invites and encourages the consumer to pass a distance contract. Among these criteria we find:

.- The information published on the site: indication of the international code before the telephone or fax number, or indication of a special telephone number for help and information of consumers abroad; information indicating the route to get from other Member States to the place where the professional operates (eg international connections by train, the names of closest airports); information on the possibility to check the availability of the stock of a commodity, or on the possibility to provide a particular service. Conversely, the only indication of an email address on the website is not enough to conclude that the merchant "directs its activity" within the meaning of Article 15, paragraph 1 c) of Regulation No 44/2001.

.- The business done in the past with consumers of other Member States: if the professional concludes traditionally distance contracts with consumers of a given Member State, there is no doubt that he directs its activities towards that Member State. On the contrary, the conclusion of one contract with one consumer of a particular Member State will not suffice for the direction of the activity to that Member State.

.- The language used on the website – although in the twenty-fourth recital Rome I Regulation this criterion is considered not important, Ms Trstenjak nevertheless argues that the language may in some borderline cases be an index of the direction of activity towards a particular Member State or to several Member States: for example, if a website is presented in a given language, but this language can be changed. This is relevant because it is an indication that the merchant directs its activity also to other Member States. Through the possibility to change languages, the merchant shows knowingly his wish that consumers from other Member States also conclude contracts with him.

.- The using of a top level domain of a given country, primarily in cases where a trader based in a given Member State uses the domain of another Member State in which he has no seat.

– If the merchant, using the various technical possibilities offered by the Internet (eg, the email), has sought to ensure that consumers of concrete Member States are informed of the offer.

.- If a trader who has a website also directs its activities towards the Member State of domicile of the consumer through other means of publicity.

.- If the merchant explicitly includes/excludes the direction of his activity to some Member States (and actually behaves in accordance with this inclusion/exclusion).

Finally, the AG suggests the ECJ to answer that the "direction of an activity" requirement within the meaning of Article 15, paragraph 1 c) of Regulation No 44/2001, is not met merely because the website of the person who carries the activity is accessible in the State where the consumer is domiciled. The national court must, on the basis of all the circumstances of the case, judge whether the person who carries on business and professional conducts his activities to the Member State where the consumer is domiciled. The important factors for this assessment include the contents of the website, the former activity of the person conducting the trade or professional activity, the type of Internet domain used, and the using of the possibilities of advertising offered by Internet and other media.

(The Parmer case also raises the question whether a tourist trip on board of a cargo ship can be considered as part of a contract for a fixed price combining travel and accommodation within the meaning of section15, paragraph 3 of Regulation nº 44/2001. According to Ms Trstenjak, the ECJ must answer affirmatively. She adds that in her view, the concept of a "contract which, for an inclusive price, provides for a combination of travel and accommodation" in Article 15, paragraph 3 of Regulation nº 44/2001 must be interpreted in the same way as the concept of "package" of Article 2, paragraph 1 of Directive 90/314 of 13 June 1990 on package travel, package holidays and package tours).

Ph.D. Grant – International Max Planck Research School for Maritime Affairs

Also this year, the International Research School for Maritime Affairs at the University of Hamburg will award for the period commencing 1 August 2010 **one Ph.D. grant** for a term of two years (with a possible one year extension). The particular area of emphasis to be supported by this grant is **Maritime Law and Law of the Sea.**

The deadline for applications is 30 June 2010.

More information on the scholarship can be found here.

First Issue of 2010's ERA Forum

The first issue of *ERA Forum* for 2010 was released recently. It includes several articles dealing with various aspects of European private law, either in English, German or French.

Some discuss more specifically topics of private international law. Here is the relevant part of the editorial of the journal by Leyre Maiso Fontecha:

> ***1 European civil procedure***
>
> *The Brussels I Regulation lays down rules governing the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters in the Member States of the European Union. It supersedes the Brussels Convention of 1968, which was applicable between the Member States*

before the Regulation entered into force in 2002. The Brussels I Regulation is currently under review by the European Commission. Among the issues raised are those concerning the treatment of choice of court agreements. By an exclusive choice of court agreement, the parties designate which court will decide disputes in connection with a particular legal relationship, to the exclusion of the jurisdiction of any other courts. Two of the articles illustrate current issues dealing with choice of court agreements.

The first one concerns the admissibility of damages in case of breach of a choice of court agreement. Gilles Cuniberti and Marta Requejo explain how, in the last decade, English and Spanish Courts have awarded damages in case of a breach of this clause. Until recently, the most efficient remedy was to seek an antisuit injunction in England, an order restraining a party from commencing or continuing proceedings in a foreign jurisdiction. This was however considered incompatible with European Union law in several cases decided by the European Court of Justice. The European Commission has nevertheless suggested in the Green Paper on the review of the Brussels I Regulation that the efficiency of jurisdiction agreements could be strengthened by granting damages for breach of such agreements.

The second article by Marta Pertegás presents the Hague Convention of 30 June 2005 on Choice of Court Agreement. This instrument, not yet in force, establishes uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters. The Convention would prevail over the Brussels I Regulation in cases where one party resides in an EU Member State and the other in a non-EU Member State that is a party to the Convention. The author argues that, in order to ensure that co-ordination is achieved between the Convention and the future revised European regulation, the Convention should serve as a source of inspiration as to possible amendments to the Brussels I Regulation with regard to choice of court clauses.

2 Private international law

The Rome Convention of 1980 on the law applicable to contractual obligations entered into force on 1 April 1991 to complement the Brussels Convention of 1968 by harmonising the rules of conflict of laws applicable to contracts. Like the Brussels Convention, the Rome Convention has been recently converted into a Community instrument. The Rome I Regulation,4 applicable since 17

December 2009, also modernises some of its rules. The article of Monika Pauknerová looks into the changes brought by the Rome I Regulation regarding mandatory rules and public policy. Mandatory rules are those which cannot be derogated by contract and which are declared binding by a legal system. In international cases, these can be "overriding" mandatory rules, which cannot be contracted out by the parties by choosing the law of another country. These must be differentiated from the public policy exception, which occurs when the application of a rule of the law of any country specified by the conflict rules may be refused if such application is manifestly incompatible with the fundamental principles of national public policy of the forum State. The author assesses positively the regulation of mandatory rules in the Rome I Regulation, which clearly distinguishes between mandatory rules and overriding mandatory rules, but notes that many issues still remain unsolved, such as the scope and conditions of application of the overriding mandatory provisions.

The conflict of law rules for non-contractual obligations have also been harmonised at EU level to complement both the Brussels I Regulation (which relates to both contractual and non-contractual obligations) and the Rome I Convention (nowadays a Regulation). The Rome II Regulation5 creates a harmonised set of rules within the European Union to govern choice of law in civil and commercial matters concerning non-contractual obligations. One of the fields of tort law it regulates is product liability. The article of Guillermo Palao Moreno, which is of high practical importance, analyses the conflict of law rule for product liability cases contained in Article 5 of the Rome II Regulation. In his thorough analysis of Article 5 of the Rome II Regulation, read in conjunction with the other provisions of the Regulation, the author points out that its application could however lead to an undesirable result. Although the inclusion of a specific provision for product liability primarily aims at avoiding the application of the general conflict of law rule of the law of the country in which the damage occurs, Article 5 maintains those solutions present in paragraphs 2 and 3 of Article 4. Furthermore, the author calls for clarification as to the coordination of the Rome II Regulation with the Hague Convention of 2 October 1973 on the Law Applicable to Products Liability.

The last three articles are written in English. The first is written in French.

Forum on the electronic Apostille Pilot Program, Madrid 2010

The Hague Conference on Private International law has announced the holding of the 6th Forum on the electronic Apostille Pilot Program (e-APP) in Madrid on 29 & 30 June 2010.

The e-Apostille is a digital document communicated in electronic form; it allows a country to improve the issuance of reports of an administrative or notarial character, certifications of authority or of civil servants, in order to produce full effects in a foreign State.

Under the electronic Apostille Pilot Program (e-APP), the Hague Conference on Private International Law (HCCH) and the National Notary Association of the United States (NNA) are, together with any interested State (or any of its internal jurisdictions), developing, promoting and assisting in the implementation of low-cost, operational and secure software technology for the issuance of and use of electronic Apostilles (e-Apostilles), and the creation and operation of electronic Registers of Apostilles (e-Registers).

This is the current list of operational e-registres:

Andorra (since July 2009)
Belgium (since October 2007)
Bulgaria (since November 2009)
Colombia (since October 2007)
Georgia (since July 2009)
Mexico (since February 2010)
New Zealand (since April 2010)
Republic of Moldova (since January 2009)
USA – Rhode Island (since February 2007)
USA – Texas (since November 2008)

Recently, the European Union has accorded substantial financial support to the e-

APP. This support will allow for the further development, implementation and operation of e-Registers of Apostilles and the promotion of the e-APP in the European Union and beyond. The e-APP for Europe is a transnational e-justice/e-administration project designed to develop best practices in relation to the Apostille Convention by promoting the e-APP, in particular the use of e-Registers of Apostilles. The 18-month project comprises 3 interrelated elements:

1.The development and implementation of a central e-Register of Apostilles for all Competent Authorities in Spain*
2.The holding of 3 regional meetings across Europe to encourage all participating States to implement e-Registers
3.The holding of the 6th International Forum on the e-APP

The first highlight of the project will be the the above mentioned forum. It will be open to any interested State and targeted to government officials, Competent Authorities, IT experts, judges, practitioners and scholars who are interested in the most recent developments with the e-APP; an open dialogue on the best practices for the implementation of the e-APP; or learning from the experiences of those with first hand knowledge of the e-APP.

The programme of the Forum will also highlight the development of a central e-Register for all Competent Authorities issuing Apostilles in Spain. The successful roll-out of the Spanish e-Register of Apostilles will serve as a model for implementing this component of the e-APP in other European jurisdictions and indeed any other Contracting State.

There is no cost to attend the Madrid Forum, but registration will be required. Additional details, including information on registration, venue, and the draft programme, will soon be published at the Hague Conference site.

Source: Hague Conference on Private International Law

Local languages in the European area of justice

The Ministry of Justice of France has warned the General Council of the Spanish Judiciary on the bad practices of some Catalonian judges and magistrates, who send their resolutions to their French colleagues written in Catalan. France has raised a complaint to the CGPJ, which in turn has sent a letter to the president of the Superior Court of Justice of Catalonia, reminding that France will only accept foreing judicial communications in French, English, Italian, German or Spanish, and "do not accept any other language."

The CGPJ explains the case of a Court of Cassa de la Selva (Girona), which sent a letter of request to the neighboring country drafted exclusively in Catalan. In the CGPJ's opinion, this attitude amounts to a violation of the rules of linguistic uses. The CGPJ also points out that European countries have the power to decide which foreign languages other than their own they accept for judicial documents to be referred to them. It also notes that the French Huissiers de Justice are annoyed by the frequent use of Catalan in the forms and letters sent by Catalan courts.

According to a journalist point of view (see El Mundo, 17.05.2010), this approach of the judiciary may be influenced by the fact that both Catalonian police and justice are instructed to prioritize the Catalan language in their writings. In case their documents have to be sent to another Spanish court outside Catalonia, they must be translated. This obligation can not be extrapolated to countries where the language of communication is not recognized as official.

The CGPJ has urged Catalonian judges not to send more documents written in Catalan to the neighboring country.

Abbott v. Abbott: A Ne Exeat Right is a "Right of Custody" Under the Hague Abduction Convention

In a 6-3 decision announced yesterday morning, the United States Supreme Court reversed the decision of the United States Court of Appeals for the Fifth Circuit, and held that a ne exeat right—which typically allows a non-custodial parent to resist a child's move out of his country of habitual residence—constitutes a right of custody under the Hague Abduction Convention, requiring a prompt return of the child. This settles a long-running split among the federal courts in the United States, and (though the parties and even the Court disagree on this to some extent) it also signals an emerging consensus among the courts of the various contracting states on this issue. You can get the decision here. Early commentary is also available from the SCOTUSBlog, Opinio Juris and the National Law Journal.

Aside from the holding, though, this decision was interesting for other reasons. As foreshadowed by the transcript of the oral argument, there was an interesting line-up of the justices, not at all following along the usual ideological lines. The exchange between the majority and the dissent sparred over big topics like the primacy of the Treaty's text over its intent, the importance of the Executive's view of a Treaty, and the effect of judicial decisions of foreign courts; they also sparred over some smaller things, too, like how to read Webster's dictionary.

As we've discussed before on this site, this case concerns a custodial mother who removed a child from his habitual residence in Chile to the United States against the wishes of a non-custodial father. The mother clearly had a "right of custody" under the Hague Convention; the father clearly had a "right of access"—or visitation rights—under the same Convention. Chilean law, however, gives all parents with such visitation rights an automatic ne exeat right as well. The question is whether that statutory entitlement gives the father a "right of custody," or whether he retains a mere "right of access," under the Convention. This classification is important: under the text of the Convention, the child must be returned to Chile if he was taken in violation of the former, but not if he is taken in violation of the latter.

The Convention defines a "right of custody" as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." The majority concluded that Mr. Abbott had both. Citing Webster's dictionary, the Court held that he could "set bounds or limit" the child's country of residence by virtue of the right he was given under Chilean law, thus giving him right to "determine" that place of residence. He also had rights "relating to the care of the person of the child" because, in its view:

> *Few decisions are as significant as the language the child speaks, the identity he finds, or the culture and traditions she will come to absorb. These factors, so essential to self definition, are linked in an inextricable way to the child's country of residence. One need only consider the different childhoods an adolescent will experience if he or she grows up in the United States, Chile, Germany, or North Korea, to understand how choosing a child's country of residence is a right "relating to the care of the person of the child."*

The majority then moved quickly into supporting its textual holding with evidence of intent and broader, systemic concerns. Though notably avoiding much discussion of the travaux preparatoires, it held that:

> *Only this conclusion will "ensure[] international consistency [by] foreclose[ing] courts from relying on definitions of custody confined by local law usage, definitions that may undermine recognition of custodial arrangements in other countries or in different legal traditions."*
>
> *Only this conclusion will "accord[s] with the Treaty's object and purpose . . . of deterring child abductions by parents who attempt to find a friendlier forum for deciding custodial disputes"; and*
>
> *Only this conclusion "is supported . . . by the State Department's view on the issue" and "the views of other contracting states."*

Justice Stevens, joined by Justices Thomas and Breyer, stated their disagreement in a lengthy dissent. They contended that "the Court's analysis is atextual—at least as far as the Convention's text goes." In their view, the majority's conclusion that Mr. Abbott has rights "relating to the care" of his son depends on an overly-

broad reading of the phrase "relating to." Under the Court's formulation of it, "any decision on behalf of a child could be construed as a right 'relating to' the care of a child"—a position which is unhelpful to precisely defining the right at issue. The majority's reading of the "right to determine the child's place of residence," too, "depends upon its substitution of the word 'country' for the word 'place.'" This is especially troubling in the minds of the dissenting Justices because "[w]hen the drafters wanted to refer to country, they did; indeed, the phrase "State of habitual residence" appears no fewer than four other times elsewhere within the Convention's text. Thus, the mere right to prevent foreign travel does not equate with the right to determine "where a child's home will be." That decision, like nearly all others that directly relate to the care of the child (like what he will eat and where he will go to school), is left to the custodial parent, with no input from a non-custodial parent who possess only visitation rights.

The majority's "preoccupation with deterring parental misconduct," the Justice Stevens wrote, "has caused it to minimize important distinction[s]" in the Convention's text. The crux of the dissent is how this case "eviscerates the distinction" between rights of custody and rights of access in the Convention. "[A]s a result of this Court's decision, all [Chilean] parents—so long as they have the barest of visitation rights—now also have joint custody within the meaning of the Convention and the right to utilize the return remedy." The majority opinion, Justice Stevens found, allows a Chilean statute to "essentially void[] the Convention's Article 21, which provides a separate remedy for breaches of rights of access."

The dissent found no support for the majority's "atextual" reading in the State Department's views. For starters, the dissent saw no need to resort to "supplementary means of interpretation" when a clear answer lies in the text of the Convention. And, even it were to consider these sources, it would give the Executive's position little weight because that position has been inconsistent and is here unsubstantiated by relevant conduct. "Instead, the Department offers us little more than its own reading of the treaty's text. Its view is informed by no unique vantage it has, whether as the entity responsible for enforcing the Convention in this country or as a participating drafter." The dissent also eschewed any reliance on foreign court decisions, stating that "we should not substitute the judgment of other courts for our own" (which is an interesting

position for Justice Breyer to take).

As has already been noted by commentators, this decision will be cited more often—at least in the United States—for its Treaty-interpretation guidance than its precedent for custody cases. On this front, the dissent puts forward a very convincing case when the issue is strictly confined to the text of the Convention. But when you factor in secondary interpretive aids—like the treaty's object and purpose, state practice, the negotiating history, and the views of publicists—the majority approach tends to emerge as the right one. The winner of this case prevailed on how the Convention worked in practical operation—not on how it looked in black-and-white—which suggests that the Court may begin to take a more dynamic approach to treaty interpretation issues in the future.

Another interesting undercurrent is flowing here on the degree of deference to give foreign law and foreign courts. The dissent gives little deference to foreign court decisions defining the Convention, and would not allow a peculiar foreign law—like the one at issue here—to blur the categorical line between access and custody rights, expand the scope of the Convention's return remedy, and thus effectively mandate the abdication of U.S. jurisdiction over the matter. The majority purports to follow foreign court decisions defining the Convention, and gives short-shrift to this practical effect of this Chilean statute—barely mentioning it at all. The result is freely abdicating this custody decisions to the Chilean court, allowing the "best interests of the child" to be determined elsewhere. Interestingly though, and in nearly the same breathe as it's stated deference, the majority reminds those foreign courts that: "Judges must strive always to avoid a common tendency to prefer their own society and culture, a tendency that ought not interfere with objective consideration of all the factors that should be weighed in determining the best interests of the child. . . . Judicial neutrality is presumed from the mandate of the Convention, . . . [and] international law serves a high purpose when it underwrites the determination by nations to rely upon their domestic courts to enforce just laws by legitimate and fair proceedings."