Recent ECJ Judgment and References on Brussels I and Brussels II bis

I. Judgment on Brussels II *bis*

On 23 December 2009, the ECJ delivered its judgment in case C-403/09 PPU (Jasna Deticek v Maurizio Squeglia).

The case, which was decided under the urgent preliminary ruling procedure, concerns the interpretation of Art. 20 Brussels II *bis* Regulation.

The referring Slovenian court asked the ECJ whether a court of a Member State has jurisdiction under Art. 20 Brussels II *bis* to take protective measures if a court of another Member State having jurisdiction as to the substance on the basis of the Regulation has already taken a protective measure which has been declared enforceable in the first Member State.

Further, the referring court asked whether – in case of an affirmative answer regarding the first question – protective measures can be taken under Art. 20 Brussels II *bis* pursuant to national law amending or rendering inoperative a final and enforceable protective measure taken by a Member State court having jurisdiction as to the substance.

In its reasoning, the Court referred in particular to the three cumulative conditions which have to be satisfied to take provisional or protective measures under Art. 20 Brussels II *bis*: The measures concerned have to be urgent, must be taken in respect of persons or assests in the Member State where the courts are situated and must be provisional (para. 39 of the judgment).

According to the Court, already the first requirement, urgency, is not fulfilled since the change of circumstances resulted from the child's integration into a new environment. The Court held in this respect (para. 47): "If a change of circumstances resulting from a gradual process such as the child's integration into a new environment were enough, under Article 20 (1) of Regulation No 2201/2003, to entitle a court not having jurisdiction as to the substance to adopt a

provisional measure amending the measures in matters of parental responsibility taken by the court with jurisdiction as to the substance, any delay in the enforcement procedure in the requested Member State would contribute to creating the conditions that would allow the former court to block the enforcement of the judgment that had been declared enforceable. Such an interpretation would undermine the very principles on which that regulation is based."

As a further argument, the Court emphasised *inter alia* that the change in the child's circumstances resulted from a wrongful removal. According to the court, "the recognition of a situation of urgency in a case such as the present one would run counter to the aim of Regulation No. 2201/2003 to deter the wrongful removal or retention of children between Member States […]." (para. 49)

Thus, the Court held:

> *Article 20 [Brussels II bis] must be interpreted as not allowing, in circumstances such as those of the main proceedings, a court of a Member State to take a provisional measure in matters of parental responsibility granting custody of a child who is in the territory of that Member State to one parent, where a court of another Member State, which has jurisdiction under that regulation as to the substance of the dispute relating to custody of the child, has already delivered a judgment provisionally giving custody of the child to the other parent, and that judgment had been declared enforceable in the territory of the former Member State.*

II. References

1. Reference on Art. 1 Brussels I Regulation (C-406/09; *Realchemie Nederland BV v. Bayer CropScience AG*)

There is a new reference for a preliminary ruling on the interpretation of the term "civil and commercial matters" which has been referred to the ECJ by the Supreme Court of the Netherlands (Hoge Raad der Nederlanden) asking *inter alia* the following question:

> *Is the phrase 'civil and commercial matters' in Article 1 of Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in*

civil and commercial matters to be interpreted in such a way that this regulation applies also to the recognition and enforcement of an order for payment of 'Ordnungsgeld' (an administrative fine) pursuant to Paragraph 890 of the German Code of Civil Procedure (Zivilprozessordnung)?

"Ordnungsgeld"-decisions are contempt fines issued by German courts on the basis of § 890 ZPO. The State is responsible for enforcing these decisions: it collects the fine ex officio through its own public authorities, the fine is to be paid to the State ('Gerichtskasse'). Therefore the question whether these decisions can be enforced under the Brussels Convention/Regulation is controversial: The Higher Regional Court of Munich has refused to confirm a contempt fine as a European Enforcement Order in a recent decision based on the argument that the judgment creditor had no legitimate interest to apply for this confirmation since under German law the responsibility for the enforcement was attributed exclusively to the State (OLG München, 3 December 2008 – 6 W 1956/08 (the case is now pending before the Bundesgerichtshof (I ZB 116/08); see with regard to this case Giebel in IPRax 2009, p. 324 et seq.).

Many thanks to Sierd J. Schaafsma (The Hague).

2. Reference on Art. 5 No. 3 Brussels I and Art. 3 e-commerce-Directive

The German Federal Court of Justice (Bundesgerichtshof) referred with decision of 10 November (VI ZR 217/08) questions on the interpretation of Art. 5 No. 3 Brussels I Regulation as well as Art. 3 e-commerce-Directive to the ECJ for a preliminary ruling.

The case concerns an action for an injunction brought in Germany based on an impending threat of violation of personal rights due to publications on a website. The defendant, the operator of the website in question, is established in Austria. Thus, the question arose whether German courts are competent to hear the case under the Brussels I Regulation and therefore how the term "place where the harmful event may occur" in Art. 5 No. 3 Brussels I has to be interpreted.

Since the Bundesgerichtshof had doubts which requirements have to be satisfied for establishing jurisdiction on the basis of Art. 5 No. 3 Brussels I under the circumstances of the present case and – should German courts be competent to

hear the case – whether German law is applicable, the Bundesgerichtshof referred the **following questions** to the ECJ for a preliminary ruling:

1. Is the phrase "place where the harmful event may occur" in Art. 5 No.3 Brussels I in case of (impending) violations of personal rights due to the content of an internet website to be interpreted as meaning

that the person concerned can bring an action for an injunction against the operator of the website before the courts of every Member State where the website can be accessed regardless of the Member State the operator is established

or

does the jurisdiction of the courts of a Member State where the operator of the website is not established require a particular connecting link either between the forum and the content in question or the website itself which goes beyond the mere technical accessibility of the website?

2. In case such a particular connecting link to the forum is required:

Which criteria are decisive for establishing this link?

Is it decisive whether the website is directed – according to the operator's purpose – (also) at the internet users in the forum or is it sufficient if the accessible information shows a connection to the forum in this sense that, according to the circumstances of the specific case, a conflict of interests – namely the claimant's interest in the respect of his personal rights and the operator's interest in the design of his website as well as in reporting – could actually have arisen or may actually arise in the forum state?

Is it decisive for the determination of the connecting link to the forum how often the website has been accessed in this Member State?

3. In case a particular connecting link to the forum is not necessary for establishing jurisdiction or in case it is sufficient for establishing this link that the information in question shows a connection to the forum in this sense that a conflict of interests could actually have arisen or may arise in the forum state according to the circumstances of the specific case in particular due to the content of the website and the assumption of a link to the forum does not require

the ascertainment that the website has been accessed in the forum in a minimum number of cases:

Are Art. 3 (1) and (2) Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) to be interpreted as meaning

that these rules have the character of choice of law rules in this sense that they declare also with regard to civil law – by overriding national choice of law rules – the law of the country of origin to be exclusively applicable

or

do these rules constitute a corrective at the level of substantive law modifying the substantive result of the law applicable according to national choice of law rules and reducing this result to the requirements of the country of origin?

In case Art. 3 (1) and (2) Directive on electronic commerce have to be interpreted as choice of law rules:

Do the mentioned rules declare only the substantive law rules of the country of origin to be applicable or do they also refer to the private international law rules of the country of origin leading to the result that a renvoi to the law of the country of destination is possible?

(Own approximate translation from the German referring decision.)

The case is pending at the ECJ under C-509/09; the (German) text of the referring decision can be found at the website of the Bundesgerichtshof.

ERA conference on cross-border

successions in the EU

The forthcoming ERA conference on cross-border successions is designed to cover the recent developments in the drafting and negotiating 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. There are interesting topics which arise out of the differences between the national legal conceptions, such as the issues of clawback and the international competence of courts or non-judicial authorities, including notaries. The automatic recognition of the proposed European Certificate of Succession seems to be equally worthy of debate.

The speakers at the conference are:

> ***Ms Mari Aalto***, Legal Officer, DG Justice, Freedom and Security, European Commission, Brussels
> ***Professor Andrea Bonomi***, University of Lausanne
> ***Dr Anatol Dutta***, Max Planck Institute for Comparative and International Private Law, Hamburg
> ***Professor Sjef van Erp***, University of Maastricht
> ***Mr Rafael Gil Nievas***, Permanent Representation of Spain to the EU, Brussels
> ***Professor Jonathan Harris***, Barrister, Serle Court, London; University of Birmingham
> ***Mr Christian Hertel***, Notary, Weilheim
> ***Dr Marius Kohler***, Director, Federal Chamber of German Civil Notaries, Brussels
> ***Mr Kurt Lechner***, MEP, European Parliament, Brussels/Strasbourg
> ***Mr Hugues Letellier***, Managing Partner, Hohl & Associés, Paris
> ***Professor Paul Matthews***, Consultant, Withers LLP; King's College, London
> ***Ms Michaela Navrátilová***, JUDr Zden?k Hromádka Law Firm, Zlín
> ***Ms Salla Saastamoinen***, Head of Unit, Civil Justice, DG Justice, Freedom and Security, European Commission, Brussels.

The conference is scheduled for 18 and 19 February 2010 and will take place at the ERA Congress Centre in Trier, Germany. Detailed information on the conference is available here, and the registration details here.

18th International Congress of Comparative Law: Washington D.C.

On July 25 through August 1, 2010, the 18th International Congress of Comparative Law will be held at the Ritz-Carlton Hotel in Washington D.C. Sponsored by the International Academy of Comparative Law and the American Society of Comparative Law, it will be jointly hosted by American University Washington College of Law, George Washington University Law School and Georgetown Law Center. The topics of this year's Congress include:

I. A. Legal history and ethnology
Legal culture and legal transplants

I. B. General legal theory
Religion and the secular state

I. C. Comparative law and unification of laws
Complexity of transnational sources

I. D. Legal education
The role of practice in legal education

II. A. Civil law
Catastrophic damages-liability and insurance
Surrogate motherhood
Same-sex marriages

II. B. Private international law
Consumer protection in international transactions
Recent private international law codifications

II. C. Civil procedure
Cost and fee allocation rules

Collective actions

II. D. Agrarian and environmental law
Climate change and the law

III. A. Commercial law
The regulation of private equity, hedge funds and state funds
Harmonization of finance leases by UNIDROIT
Corporate governance
Insurance contract law between business law and consumer protection

III. B. Intellectual property law
The balance of copyright in comparative perspective
Jurisdiction and applicable law in intellectual property

III. C. Labour law
The prohibition of discrimination in labour relations (age discrimination)

III. D. Air and maritime law
The law applicable on the continental shelf and in the exclusive economic zone

IV. A. Public international law
The protection of foreign investment
International law in domestic systems: a comparative approach

IV. B. Constitutional law
Foreign voters
Constitutional courts as “Positive Legislators”

IV. C. Public freedoms and human rights
Plurality of political opinions and the concentration of media
Are human rights universal and binding? Limits of universalism

IV. D. Administrative law
Public-private partnerships

IV. E. Tax law
Regulation of corporate tax avoidance

V. A. Penal law

Corporate criminal liability

V. B. Criminal procedure
The exclusionary rule

VI. Computers
Internet crimes

There will also be Special Sessions dedicated to law and development, torture and cultural relativism, comparative perspectives on the role of transparency in administration of law, protection of privacy from the media, comparative family law, comparative constitutional law, and comparative and international government procurement law. Sessions dedicated to regional studies will include a "Panel on Africa: Comparative Private Law and Transitional Social Justice," a "Panel on Latin America: Comparative Legal Interpretation," and a "Panel on the Middle East: Islamic Finance and Banking in Comparative Perspective."

Registration information is available here, and a detailed agenda is available here. Note that early-bird registration ends on January 30. Updates to the agenda and schedule will follow on this site.

Publication – Electronic Consumer Contracts in the Conflict of Laws

Hart Publishing has kicked off its new Studies in Private International Law series with Zheng Sophia Tang's excellent *Electronic Consumer Contracts in the Conflict of Laws* (2009). It is based upon Sophia's PhD thesis, completed at the University of Birmingham in 2007. The blurb:

> *The application of private international law to electronic consumer contracts raises new, complex, and controversial questions. It is new because consumer protection was not a private international law concern until very recently and e-commerce only became an important commercial activity within the last ten*

years. E-consumer contracts generate original questions which have not been considered under traditional private international law theories. It is complex because it has to deal both with difficulties raised by consumer contracts and the challenges of e-commerce. Reasonable resolutions to consumer contracts may prove inappropriate in e-commerce, while effective approaches to resolving private international law problems in e-commerce may be improper for consumer contracts. It is controversial because it concerns the conflicting interests of consumers and businesses in a fast-moving commercial environment – a fair balance is therefore hard to achieve.

Without proper solutions provided by private international law, consumers will not be confident about purchasing online, and businesses will face unreasonable risk and participation costs in e-commerce. Updated and properly designed private international law rules are essential to the further development of e-commerce. This book aims to provide an answer to the urgent requirement for legal certainty, security and justice in e-consumer contracts. It is primarily concerned with existing approaches to jurisdiction and choice of law issues in e-consumer contracts in the European Community and England, but some typical approaches in other jurisdictions are also examined. Based on the analysis and the comparative study of the existing law, the book seeks to provide a proposal as to what the law should be in order to provide certainty to both parties, to provide reasonable protection to consumers, and to promote the development of e-commerce.

You can purchase it from Hart Publishing for £50.00, or from Amazon for £47.50.

Publication – Resolving International Conflicts

Peter Hay (Emory Univ. – Law), **Lajos Vékás** (ELTE – Law), **Yehuda Elkana** (Central European Univ.), & **Nenad Dimitrijevic** (Central European Univ. – Political Science) have published *Resolving International Conflicts: Liber*

Amicorum Tibor Várady (Central European Univ. Press 2009). The contents:

- John J. Barceló III, Expanded judicial review of awards after Hall Street and in comparative perspective
- David J. Bederman, Tibor Várady's advocacy before the international court of justice
- Peter Behrens, From "real seat" to "legal seat": Germany's private international company law revolution
- László Burián, The impact of community law on the determination of the personal law of companies
- Richard M. Buxbaum, Public law, Ordre public and arbitration: a procedural scenario and a suggestion
- Richard D. Freer, Forging American arbitration policy: judicial interpretation of the Federal Arbitration Act
- Guy Haarscher, The decline of free thinking
- Attila Harmathy, Questions of arbitration and the case law of the European court of justice
- Peter Hay, Recognition of a recognition judgment within the European Union: "double exequatur" and the public policy barrier
- László Kecskés, European Union legislation and private international law: a view from Hungary
- János Kis, Constitutional democracy: outline of a defense
- Ferenc Mádl, The European dream and its evolution in the architecture of the treaties of integration
- Vladimir Pavi?, 'Non-signatories' and the long arm of arbitral jurisdiction
- Hans-Eric Rasmussen-Bonne, The pendulum swings back: the cooperative approach of German courts to international service of process
- Kurt Siehr, Internationale schiedsgerichtsbarkeit über kulturgut-streitigkeiten
- Lajos Vékás, About the Rome II regulation: the European unification of the conflict rules to torts
- Johan D. van der Vyver, The United States and the jurisprudence of international tribunals

I cannot find the book on the CEU Press website, but here's a link to it on Amazon, where it is £30.35.

Publication: Intellectual Property and Private International Law

Happy New Year to everybody. I have not posted in a while, but am now freed from the shackles of teaching (well, mostly) for this year, and so can devote myself to conflictoflaws.net once again (not, I'm sure, that anyone noticed my absence, given the dedication of my co-editors).

In any event, a few new publications dropped into my pigeon-hole in late 2009, and here's the first: Intellectual Property and Private International Law, edited by Stefan Leible and Angsar Ohly (Mohr Siebeck, 2009). The blurb:

> *The relationship between intellectual property law and private international law has not always been an easy one. To many intellectual property lawyers, private international law seems like an esoteric and complicated field of law with many potential pitfalls. Hence there is a tendency to look for simple, straightforward rules such as the principle of territoriality and the lex loci protectionis rule and to solve more complex issues such as the collision of signs on the internet within substantive law. Private international lawyers, on the other hand, resent the territorial segmentation which results from the application of both principles. The fact that both fields of law are specialist matters, difficult to penetrate for outsiders, has complicated the discourse between both legal disciplines. Nevertheless there is a growing awareness that choice of law issues in this field really matter. The importance of intellectual property rights in a knowledge-based economy is increasing steadily. At the same time, the traditional principles governing the choice of law in intellectual property disputes have come under challenge in a globalized world dominated by internet communication. Eminent American und European scholars of both fields discussed different topics concerning the relationship between intellectual property law and private international law at the Bayreuth Conference "Intellectual Property and Private International Law" (4/5 April 2008). This volume comprises the papers which were presented.*

ISBN 978-3-16-150055-8. Price: € 59.00. Purchase it direct from the Mohr website.

French Conference on Breach of Jurisdiction Agreements

The Master of arbitration and international commercial law of the university of Versailles Saint-Quentin will organize a conference on January 19th on *Damages for Breach of Jurisdiction and Arbitration Agreement*.

The speaker will be professor Koji Takahashi, from Doshisha University (Kyoto, Japan). Prof. Takahashi has published several articles on the topic, both in Japanese and in English. In particular, he has published an article on Damages for Breach of Choice of Court Agreements at the 2008 Yearbook of Private Int'l Law.

The conference will begin at 5 pm and will be held in English. It is free of charge.

Details can be obtained from Ms Chantal Bionne, Tél. : 01 39 25 52 55 ou courriel: chantal.bionne@uvsq.fr

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Approach to Jurisdiction under the CJPTA

The British Columbia Court of Appeal's decision in *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592 (available here) is an important contribution to the developing Canadian jurisprudence on the Civil Jurisdiction and Proceedings Transfer Act, a statute governing the taking of jurisdiction that has been adopted in several provinces.

A leading common law approach to the question of whether there is a real and substantial connection between a dispute and the forum (the test for jurisdiction) is that outlined in the Court of Appeal for Ontario's decision in *Muscutt v. Courcelles* (available here). There is an ongoing controversy about the extent to which that approach has any relevance after a province has adopted the CJPTA. This is because the statute sets out an open-ended list of situations in which a real and substantial connection is presumed to exist (s. 10). However, it remains open to a plaintiff (under s. 3) to otherwise establish such a connection, and on one view the approach in *Muscutt* is relevant to that analysis. See in Nova Scotia the decision in *Bouch v. Penny* (available here).

In *Stanway* the court expresses considerable hostility towards the *Muscutt* approach. It references academic and judicial criticism of the decision, while selectively omitting any reference to the competing academic and judicial support for it. It makes clear that it has no application in cases that are caught by s. 10. It does not indicate what should happen in cases outside that section, but the overall tone suggests that it would not welcome using *Muscutt* in such cases.

My own view is that the *Muscutt* analysis should remain relevant to cases that are not caught by the statutory presumptions – cases which the statute has deliberately chosen to leave governed by the open-ended language of the real and substantial connection test.

Some might find it interesting that despite the difference in analysis between the appellate court and the motions court judge in *Stanway*, this is one of many cases where the two competing analyses reach the same conclusion (here that the court of British Columbia has jurisdiction).

The approach in *Muscutt* is the dominant one in Ontario, which has not enacted the CJPTA. However, last October the Court of Appeal for Ontario heard submissions about whether that approach should be modified. The decision in those appeals is eagerly awaited.

Private International Law Dispute before the ICJ (Belgium v. Switzerland on the Interpretation and Application of the Lugano Convention)

The increasing intertwining between private international law and public international law has been once again and very recently proved. The International Court of Justice will indeed be the theatre of a promising interesting debate between Belgium and Switzerland in respect of the Lugano Convention.

On 21 December 2009, Belgium initiated proceedings against Switzerland in respect of a dispute concerning the interpretation and application of the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (see the Press Release).

The dispute has arisen out of the pursuit of parallel judicial proceedings in Belgium and Switzerland concerning the alleged misconduct of the Swiss shareholders in Sabena, the former Belgian airline now in bankruptcy. The Swiss shareholders SAirgroup (formerly Swissair) and its subsidiary SAirLines, also now in bankruptcy, and the Belgian shareholders (the Belgian State and three companies directly or indirectly hold by the Belgian State) in Sabena entered into different contracts between 1995 and 2001 for among other things the financing and joint management of Sabena. These contracts provided for the exclusive jurisdiction of the Brussels courts and for the application of Belgian Law.

Proceedings were first initiated by the Belgian Shareholders before the Brussels courts for contractual liability and tort. The Brussels Court found its jurisdiction on the basis of art. 17 and 5(3) of the Lugano Convention but rejected the claims for damages brought by the Belgian shareholders. The Court of Appeal of Brussels by a partial judgment upheld the Belgian court's jurisdiction over the dispute. The proceedings on the merits are still pending before that court.

In the mean time, the Swiss shareholders (Swissair and its subsidiary) submitted

to the Zurich courts an application for a debt-restructuring moratorium, which ended in the bankruptcy of the Swiss shareholders. The Belgian shareholders sought to declare their debt claims (whose existence and amount depended on the proceedings before the Brussels court) against them in these proceedings.

In a decision rendered on 30 September 2008, the Swiss Federal Court rejected the application of the Lugano Convention on this matter and declined to stay its proceedings on the basis that the Swiss courts had exclusive jurisdiction because of the territoriality principle and the procedural nature of the dispute. According to Belgium, the refusal by the Swiss Courts and more particularly the Federal Supreme Court to apply the Lugano Convention and consequently the refusal to recognize the future Belgian decision and to stay their proceedings, violate various provisions of the Lugano Convention and "the rules of general international law that govern the exercise of State authority, in particular in the judicial domain".

It is worth noticing that according to Belgium, the Lugano convention does not provide for a dispute settlement mechanism and the standing committee established by the protocol 2 on the uniform interpretation of the convention does not have jurisdiction in this matter. In its application (§48), Belgium submits also that the European Court of Justice does not have jurisdiction since the "new Lugano Convention", for which the European commission has exclusive jurisdiction, is not applicable.

Swiss Institute of Comparative Law: Conference on the EU's Proposal on Succession

On Friday, 19th March 2010, **the 22nd *Journée de droit international privé***, organised by the **Swiss Institute of Comparative Law** (ISDC) and the **University of Lausanne** (Center of Comparative Law, European Law and

Foreign Legislations), will analyse the **Commission's Proposal on Succession**: "Droit international privé des successions – quel futur en Europe et en Suisse?".

The list of confirmed speakers includes *Prof. Andrea Bonomi* (Univ. of Lausanne), *Prof. Paul Lagarde* (Univ. of Paris I – Sorbonne) and *Prof. Oliver Remien* (Univ. of Würzburg). A detailed programme and further information will be posted as soon as available.