ABA practitioner survey on the functioning of the Hague Evidence and the Hague Service Conventions

In connection with the February 2009 Hague Conference on Private International Law meeting that will consider the practical operation of a number of Hague Conventions, the US State Department has asked the International Litigation Committees of the International and Litigation sections of the ABA to survey its members in order to get practitioner input about the functioning of the Hague Evidence and the Hague Service Conventions.

The International Litigation Committees of the International and Litigation sections of the ABA has established two short surveys, one for each Convention, that invite practitioners to complete with practitioners` first hand experiences. The surveys will be open until January 15, after which date the responses will be compiled and provided to the Hague Conference.

This input is particularly valuable in the decentralized US federal system; under the Evidence Convention, for example, the State Department as the US Central Authority receives incoming Letters of Request from abroad, but does not centralize all outbound requests to foreign jurisdictions, which in the US are most often addressed directly by litigants or their counsel to the foreign Central Authority (either directly or through a vendor). As a result, the only way to bring pertinent information about the practical operation of certain aspects of these conventions is by way of informal survey, and the Section has worked closely with the State Department in recent months to identify those questions that would be most relevant to the Hague Conference meeting that is scheduled for early February 2009.

The online survey for the Hague Evidence Convention is here, and for the Hague Service Convention Survey here.

Conference: Hague Conference on Private International Law

A Special Commission on the practical operation of the Hague Apostille, Service, Taking of Evidence and Access to Justice Conventions will be held in The Hague from 2-12 February 2009. The meeting is open ONLY to experts designated by the Members of the Hague Conference, invited non-Member States and International Organisations that have been granted observer status. A provisional programme for the Special Commission meeting is taking shape as follows: the first week (2-6 February) will be devoted to discussions on the Service, Evidence and Access to Justice Conventions, to be followed by a discussion of the draft Conclusions & Recommendations relating to these three Conventions (Saturday morning 7 February). The Apostille Convention will be the subject of discussions during the second week of the meeting (9 12 February), with the draft Conclusions & Recommendations relating thereto to be discussed on Thursday morning (12 February). A detailed agenda will be published in due course. On the conference website, there are links to documentation relating to the four Conventions.

New Release of DeCITA, the leading Latin American Legal Review on Private International

Law and International Trade Law

DeCITA (Derecho del Comercio Internacional – Temas y Actualidades) (semi-annual publication in spanish, english, portugese or french) has released its 9th issue. As usual it covers topics concerning not only Latin American Private International Law but also European and North American Law. Each issue is devoted to one specific subject and adresses also the latest development of Private International Law in Latin America and the law of international organizations such as Mercosur or Andean Community as well as the current works in matter of international unification of the law (UNCITRAL, Hague Conference, CIDIP/OAS, UNIDROIT). (for further information, see here.)

The 9th issue (Winter 2008) deals with International Contracts (Contratos Internacionales). The contents:

On the main topic "International Contracts":

Doctrina

- Opiniones del CISG-AC: Consejo Consultivo en materia de compraventa internacional de mercancías
  Alejandro M. GARRO / Pilar PERALES VISCASILLAS
- Interpretación del derecho mercantil uniforme internacional: el artículo 7.1 de la Convención de las Naciones Unidas sobre compraventa internacional de mercaderías
  Anselmo MARTÍNEZ CAÑELLAS
- Os Princípios do UNIDROIT na prática arbitral:
  Uma análise de casos (1994-2007)
  Lauro GAMA JR.
- La cesión de la posición contractual en el derecho colombiano y los Principios de UNIDROIT
  Jorge OVIEDO ALBÁN
- Los INCOTERMS en el derecho internacional privado
  Jorge R. ALBORNOZ
- La Convención de México (CIDIP-v, 1994) como modelo para la actualización de los sistemas nacionales de contratación internacional en América Latina

Eugenio HERNÁNDEZ-BRETÓN

- Les contrats conclus par les consommateurs dans la Convention de Lugano révisée
  Andrea BONOMI

Jurisprudencia

- Argentina
  Jurisprudencia argentina sobre contratos internacionales
  María Blanca NOODT TAQUELA, con la colaboración de Julio C. CÓRDOBA
- Brasil
  Contratos Internacionais no Brasil: posição atual da jurisprudência no Brasil
  Nadia DE ARAUJO / Daniela Corrêa JACQUES
- Uruguay
  Jurisprudencia uruguaya en materia de contratos internacionales
  Cecilia FRESNEDO DE AGUIRRE
- Venezuela
  Los contratos internacionales en la jurisprudencia venezolana
  Claudia MADRID MARTÍNEZ
- Europa
  Jurisprudencia europea en materia de contratos
  Aurelio LÓPEZ-TARRUELLA MARTÍNEZ

Novedades legislativas

- Unión Europea
  Aprobación del Reglamento de Roma I sobre ley aplicable a las obligaciones contractuales

On the "Actualidades":

Doctrina

- Tendencias anti-arbitraje en América Latina
  Emmanuel GAILLARD
- La sentencia arbitral parcial desde la perspectiva del orden jurídico brasileño

Carlos Alberto CARMONA

Jurisprudencia

[…]

Actividades de los organismos internacionales

- UNIDROIT
  Actividades del Instituto Internacional para la Unificación del Derecho Privado durante el año 2007
  Carolina HARRINGTON
- Conferencia de La Haya de Derecho Internacional Privado
  Actividades de la Conferencia de La Haya de Derecho Internacional Privado
  María Mayela CELIS AGUILAR
- UNCITRAL
  The Year in Review: The Work of the United Nations Commission on International Trade Law (UNCITRAL) from 2006 to 2007
  Kate LANNAN
- OEA
  Informe sobre la Séptima Conferencia Especializada Interamericana sobre Derecho Internacional Privado
  John M. WILSON

Sistemas de integración regional

- MERCOSUR
  La CSJN (Argentina) aprueba Acordada para reglamentar la elevación de opiniones consultivas al Tribunal Permanente de Revisión del MERCOSUR
  Adriana DREYZIN DE KLOR
- Novedades y avances en materia de cooperación y asistencia jurisdiccional en el marco del MERCOSUR y sus Estados asociados
  Juan José CERDEIRA CAN
- Novedades de la Comunidad Andina
  María Clara GUTIÉRREZ
- SICA
  Aspectos relevantes del año 2007
  Ana E. VILLALTA VIZCARRA

- Tratado de Libre Comercio de América del Norte
  Actividad durante el año 2007
  Carolina HARRINGTON

[…]

American Surrogacy and Parenthood in France: Update

In earlier posts, I had reported how the Paris Court of Appeal had accepted to recognize Californian birth certificates after a French couple had resorted to surrogacy in San Diego. Surrogacy is illegal in France.

An appeal was lodged before the French Supreme Court for private and criminal matters (*Cour de cassation*). The *Cour de cassation* delivered its decision on December 17, 2008. It allowed the appeal and set aside the judgment of the Paris Court of Appeal, but did so on purely procedural ground (standing of French prosecutors). The case will have to be relitigated before the same Paris Court of Appeal, with different judges.

Not much to say from a conflict perspective then. The decision, as it is often the case with judgments from the *Cour de cassation*, is hard to interpret. There is much debate at the moment in France as to whether surrogacy should be allowed. It might be that the solution of the court is a convenient one enabling the judiciary to wait for a political decision. All this, of course, will be at the expense of the children, who might not be told who their parents are before they are teenagers, if not young adults.

The decision of the court can be found here (in French). As French cases are barely understandable, the court also had to make a press release.

Australian difficulties for “service of suit” clauses in insurance contracts

AIG UK Ltd v QBE Insurance (Europe) Ltd [2008] QSC 308 (28 November 2008) reveals some of the difficulties that can be created for insurers and reinsurers of Australian liabilities by the form of “service of suit” clauses often found in Lloyds and other non-Australian insurance contracts. Typically of such clauses, the service of suit clause in the insurance contract in this case provided that any dispute concerning the contract would be governed by “Australian Law” and that the insurers and the insured agreed “to submit to the jurisdiction of any Court of competent jurisdiction within Australia” and that “[a]ll matters arising hereunder shall be determined in accordance with the law and practice of such Courts”. The reinsurance contract defined “jurisdiction” as “Commonwealth of Australia and New Zealand only, as original”, and this appears to have been accepted to “pick up” the service of suit clause in the underlying insurance contract.

The case arose out of an accident which occurred during a motor race in New South Wales. The driver sued the Confederation of Australian Motor Sports (“CAMS”) in Victoria, apparently attempting to avoid the operation of a New South Wales statute which would have barred the claim. The proceedings settled. CAMS was insured by QBE. QBE was reinsured by AIG and two other reinsurers (together, “the reinsurers”). The reinsurers took action against QBE in the Supreme Court of Queensland, seeking a declaration that they were not liable to indemnify QBE on the reinsurance contract, because QBE had failed to comply with a condition precedent to liability that it advise the reinsurers of any loss which might give rise to a claim as soon as practicable and without undue delay.

QBE sought orders staying the proceedings or setting aside the originating process. Mackenzie J refused to make such orders, considering that the effect of the service of suit clause was that QBE and the reinsurers had submitted to the jurisdiction of the Supreme Court of Queensland, it being a “Court of competent

jurisdiction within Australia".

QBE also sought a transfer of the proceedings to the Supreme Court of Victoria pursuant to the Australian Cross-Vesting Scheme, which provides for a transfer from the Supreme Court of one Australian state to the Supreme Court of another state if it is "more appropriate" that the proceedings be heard in another state. QBE's application appears to have been motivated, at least in part, by the fact that a provision in the Victorian *Instruments Act* 1958 of assistance to insureds and reinsureds in cases of non-disclosure had no analogue in Queensland. Indeed, the absence of such a provision in Queensland may have been the reason the reinsurers instituted proceedings there. Mackenzie J declined to order the transfer, considering that any connection with Victoria was incidental and that no preference was expressed in the service of suit clause for one Australian jurisdiction over another.

This case serves as a reminder that service of suit clauses like the one considered often mean that proceedings may be instituted in the courts of *any* Australian state, and that obtaining a stay or a transfer in the face of such a clause may be difficult.

One issue not decided by this case is whether the Victorian *Instruments Act* will apply even if the proceedings continue in Queensland, if the governing law of the reinsurance contract is Victorian law. This highlights a difficulty with the specification in the service of suit clause of the governing law as "Australian Law", together with the submission to the jurisdiction of any Court of competent jurisdiction within Australia and the reference to matters being determined "in accordance with the law and practice of such Courts", rather than the selection of the law of a particular Australian state.

As part of the argument in this case, the parties disagreed as to the effect of this clause. QBE submitted that it mandated the application of the law of the Australian state with the closest and most real connection with the transaction. This was said to call for consideration of the particular claim in question, with its Victorian connections, and consequently the application of Victorian law, ie Commonwealth statutes, the common law of Australia and Victorian statutes (including the Victorian *Instruments Act*). In contrast, the reinsurers submitted that the service of suit clause could not be read as directing application of the law of any particular Australian state, and either was not a choice of law clause at all

(resulting in the application of English law as the proper law of the contract) or mandated only the application of Commonwealth statutes and the common law of Australia, ignoring any state statutes.

Mackenzie J did not need to resolve this issue for the purposes of QBE's application, but it is one which will presumably need to be resolved if the proceedings continue. More generally, it is an issue which inevitably can arise in cases involving service of suit clauses such as that considered here. Perhaps a clearer choice of law clause would be advisable.

Forum non conveniens, anti-suit injunctions, and concurrent US and Australian copyright proceedings

In *TS Production LLC v Drew Pictures Pty Ltd* [2008] FCAFC 194 (19 December 2008), the Full Court of the Federal Court of Australia considered difficult issues concerning *forum non conveniens* and anti-suit injunctions in the context of concurrent US and Australian copyright proceedings.

Both proceedings arose out of a dispute concerning a film, and a book based on the film, called *The Secret*. Finkelstein J described the film as follows:

> *The film is a documentary-style narrative presentation of a philosophy known as the "law of attraction". It is told through a series of interviews with authors and inspirational speakers. The message is that positive thinking will improve one's health, wealth and love life. The film was reviewed in the New York Times. The reviewer said it was "the biggest thing to hit the New Age movement since the Harmonic Convergence". Obviously he had in mind the film's staggering commercial success: gross revenue from the sale of the film has exceeded USD$69.9 million and book sales have brought in more than*

USD$215.55 million.

The film was produced by an Australian company, which claimed to have been the original copyright owner and to have assigned that copyright to TS Production. The film was directed by an Australian citizen, Mr Drew Heriot, who claimed to have done so on behalf of his own company, Drew Pictures. Substantial steps in the production of the film took place in Australia. At the time of production, Mr Heriot was resident in Australia, though he subsequently moved to the US.

The Australian proceedings were brought by TS Production against Drew Pictures and Mr Heriot, seeking a declaration that it owned copyright in the film and the book under the Australian *Copyright Act* 1968 (Cth) ("the Australian Act") and an injunction restraining Drew Pictures and Mr Heriot from asserting any claim to copyright under the Australian Act. The US proceedings were instituted subsequently by Drew Pictures and Mr Heriot against TS Production and others, seeking a declaration that Drew Pictures was a joint owner of copyright in the film and the book under the US *Copyright Ac*t (17 USC §§101, 201) and the common law of Illinois (together, "US law"), an account of profits and damages. In both proceedings, a significant factual dispute concerned the role of Mr Heriot in the production of the film.

After instituting the US proceedings, Drew Pictures and Mr Heriot sought a stay of the Australian proceedings on *forum non conveniens* grounds. For such a stay to be granted, it was necessary that the Australian court be a "clearly inappropriate forum" for the resolution of the dispute, which would be so only if continuance of the Australian proceedings there amounted to "vexation" or "oppression": see, recently, *Puttick v Tenon Ltd* (2008) 250 ALR 582; [2008] HCA 54, discussed here. The primary judge granted the stay. It was therefore not necessary for the primary judge to consider an application by TS Production for an anti-suit injunction, restraining Drew Pictures and Mr Heriot from prosecuting the US proceedings.

The Full Court unanimously concluded that the primary judge erred in granting a stay of the Australian proceedings on *forum non conveniens* grounds. The key consideration, expressed in different ways by Finkelstein J on one hand and Gordon J (with whom Stone J agreed) on the other, was the distinct nature of the two proceedings, notwithstanding the common factual substratum and the

common description of the rights as "copyright". Gordon J emphasised that the Australian proceedings concerned rights arising under the Australian Act, in respect of events which occurred at least partially in Australia between parties then resident in Australia, whereas the US proceedings concerned rights arising under US law which the parties accepted were not able to be vindicated in an Australian Court. Finkelstein J went somewhat further. He noted the Australian case law that, as an application of the *Moçambique* rule, an Australian court will not deal with questions of ownership of foreign copyright. In the absence of evidence presented by the parties, he presumed that US law was the same on this point, and, by a brief review of US cases, satisfied himself that that presumption was well founded. Accordingly, as between the US court and the Australian court, only the latter could resolve the claim to copyright under the Australian Act. Finkelstein J also considered that neither any duplication of costs nor the fact that the US proceedings were more advanced justified a stay of the Australian proceedings. In the result, it could not be said that the Australian court was a "clearly inappropriate forum" for the resolution of the Australian proceedings.

However, as to the anti-suit injunction, the Court split: Gordon J (with whom Stone J agreed) considered that an anti-suit injunction should not be granted; Finkelstein J, in dissent, considered that such an injunction should be granted. It was accepted by all members of the Court that, since it was not suggested that the US proceedings interfered with the Australian proceedings or that they had been instituted to prevent pursuit of the Australian proceedings, an anti-suit injunction could only be granted where continuance of the US proceedings amounted to "vexation" or "oppression". Applying the language adopted by the High Court to explain the concepts of "vexation" and "oppression" in the context of an application for a stay on *forum non conveniens* grounds, all members of the Court considered that they meant "productive of serious and unjustified trouble and harassment" or "severely and unfairly burdensome, prejudicial or damaging", and that the mere existence of simultaneous proceedings did not suffice.

Applying these principles, Gordon J considered that while maintaining the simultaneous proceedings may be burdensome, it was not "unjustified" or "unfair" to do so as they concerned different legal rights and remedies. Her Honour considered that this "restrictive" approach was mandated by the statement of the High Court in *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at

393; [1997] HCA 33 that an anti-suit injunction can be granted "only if there is nothing which can be gained by [the foreign proceedings] over and above what may be gained in local proceedings", as where there is "complete correspondence" between the foreign and local proceedings.

In contrast, Finkelstein J considered that it was sufficient that the two sets of proceedings here had an overlapping factual dispute, notwithstanding the different legal rights asserted in each proceeding. He considered that the High Court in *CSR* did not intend to narrow the test from that of "vexation" and "oppression", in the relevant sense. That test was made out here, as there was no reason to put the parties to the inconvenience of having two trials to resolve the one issue. Since the Australian proceedings were instituted first, the Australian court should resolve the dispute and, subsequently, the US proceedings could continue.

It remains to be seen whether the parties seek special leave to appeal to the High Court.

Hague Abduction Convention Before the U.S. Supreme Court: Abbott v. Abbott

On this blog, we have long noted the splits of authority among U.S. courts regarding the operation of the Hague Abduction Convention. (See here, and here.)A new cert petition in the United States Supreme Court brings one of these disagreements to the forefront.

In No. 08-645, *Abbott v. Abbott*, the issue is whether a *ne exeat* clause – which precludes a parent from taking his or her child out of the country without the other parent's permission – is a "right of custody" for purposes of the Hague Convention on the Civil Aspects of International Child Abduction, thereby requiring the child's return. The courts of appeals are not only divided on this

question, but the approach taken by the majority of circuits is at odds with the approach employed by the overwhelming majority of foreign courts that have considered the question.

The petition for writ of certiorari currently pending before the court makes a strong case for a grant. And, just last week, the Permanent Bureau of the Hague Conference on Private International Law – which is responsible for monitoring the implementation of the Convention – filed an amicus brief supporting the petition.

The brief in opposition to certiorari, and the reply thereto, have also been filed.

Updates on this case are posted on the SCOTUSblog. We will mirror those updates when they become available.

A Network for Legislative Cooperation

A Resolution of the Council and of the Representatives of the Governments of the Member States, on the establishment of a Network for legislative cooperation between the Ministries of Justice of the European Union has been published in OJ C 326, 20.12.2008. The Resolution acknowledges that obtaining information about foreign law may prove unpredictable and complicated; therefore, a network for legislative cooperation should be set up to give effective access to the national legislation of other Member States. Unfortunately, although the Council's Resolution bears in mind the "objective of providing [European] citizens with an area of freedom, security and justice", she addresses the problem mainly regarding Ministries of Justice concerns (first Whereas: "Knowledge of the legislation of other Member States or even of certain third countries is an essential tool for the Ministries of Justice of the Member States of the European Union, in particular for drafting legislation and for transposing lawof the European Union"). They (the Ministries of Justice) will be the senders and addresses of the requests for information.

To build the net, each Member State should designate a correspondent -or a limited number of other correspondents if this were considered necessary because of the existence of separate legal systems or the domestic distribution of competences. The Network should in particular provide its members with coherent and up-to-date information on legislation, and with case-law on selected subjects; make accessible the results of comparative law research carried out by or for the Ministries of Justice of each State in fields of law falling within the sphere of competence of those Ministries, including in the context of reforms carried out by the Member States or of transposition of law of the European Union; and be aware of major legal reform projects.

The Resolution does note indicate any closing date (not even an approximated one) for the creation of the network.

Merry Christmas and a Happy New Year!

From everyone at Conflict of Laws .net, we wish you a very Merry Christmas (or Happy Holiday, as the case may be), and an excellent New Year. Just in case you're not yet in the festive spirit, here's White Christmas, as sung by The Drifters, performed by Santa and his reindeers:

State Immunity: Germany Institutes Proceedings Against

Italy Before the ICJ

The "legal saga" that involved in recent years the Federal Republic of Germany, brought before Italian courts in a number of judicial cases regarding civil claims for atrocities committed during WWII (see our previous post here, and the ones on similar issues in other countries by Marta Requejo Isidro and Gilles Cuniberti), has finally found its way to the International Court of Justice in The Hague.

As stated in a press release issued by the Information Department of the ICJ, on 23 December 2008 "**[t]he Federal Republic of Germany […] instituted proceedings before the International Court of Justice (ICJ) against the Italian Republic, alleging that '[t]hrough its judicial practice . . . Italy has infringed and continues to infringe its obligations towards Germany under international law'**".

Here's an excerpt of the press release (*external links added*):

> *In its Application, Germany contends: "In recent years, Italian judicial bodies have repeatedly disregarded the jurisdictional immunity of Germany as a sovereign State. The critical stage of that development was reached by the judgment of the Corte di Cassazione of 11 March 2004 in the Ferrini case, where [that court] declared that Italy held jurisdiction with regard to a claim . . . brought by a person who during World War II had been deported to Germany to perform forced labour in the armaments industry. After this judgment had been rendered, numerous other proceedings were instituted against Germany before Italian courts by persons who had also suffered injury as a consequence of the armed conflict." The Ferrini judgment having been recently confirmed "in a series of decisions delivered on 29 May 2008 and in a further judgment of 21 October 2008", Germany "is concerned that hundreds of additional cases may be brought against it".*
>
> *The Applicant recalls that enforcement measures have already been taken against German assets in Italy: a "judicial mortgage" on Villa Vigoni, the German-Italian centre of cultural exchange, has been recorded in the land register. In addition to the claims brought against it by Italian nationals, Germany also cites "attempts by Greek nationals to enforce in Italy a judgment*

obtained in Greece on account of a . . . massacre committed by German military units during their withdrawal in 1944".

The Applicant requests the Court to adjudge and declare that Italy:

"(1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945 to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;

(2) by taking measures of constraint against 'Villa Vigoni' [the German-Italian centre for cultural exchange], German State property used for government non-commercial purposes, also committed violations of Germany's jurisdictional immunity;

(3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany's jurisdictional immunity.

Accordingly, the Federal Republic of Germany prays the Court to adjudge and declare that:

(4) the Italian Republic's international responsibility is engaged;

(5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable;

(6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above."

Germany reserves the right to request the Court to indicate provisional measures in accordance with Article 41 of the Statute of the Court, "should measures of constraint be taken by Italian authorities against German State assets, in particular diplomatic and other premises that enjoy protection against such measures pursuant to general rules of international law".

As the basis for the jurisdiction of the Court, Germany invokes Article 1 of the European Convention for the Peaceful Settlement of Disputes adopted by members of the Council of Europe on 29 April 1957, ratified by Italy on 29 January 1960 and ratified by Germany on 18 April 1961. […]

Germany asserts that, although the present case is between two Member States of the European Union, the Court of Justice of the European Communities in Luxembourg has no jurisdiction to entertain it, since the dispute is not governed by any of the jurisdictional clauses in the treaties on European integration. It adds that outside of that "specific framework" the Member States "continue to live with one another under the regime of general international law".

The Application was accompanied by a Joint Declaration adopted on the occasion of German-Italian Governmental Consultations in Trieste on 18 November 2008, whereby both Governments declared that they "share the ideals of reconciliation, solidarity and integration, which form the basis of the European construction". In this declaration Germany "fully acknowledges the untold suffering inflicted on Italian men and women" during World War II. Italy, for its part, "respects Germany's decision to apply to the International Court of Justice for a ruling on the principle of state immunity [and] is of the view that the ICJ's ruling on State immunity will help to clarify this complex issue".

The full text of the Federal Republic of Germany's application ~~will be available shortly~~ is available on the Court's website. See also this post by Jacob Katz Cogan over at the International Law Reporter blog.