Articles on Rome II and Hague Convention on Choice of Court Agreements

The current issue (Vol. 73, No. 1, January 2009) of the Rabels Zeitschrift contains inter alia two interesting articles on the Rome II Regulation and the Hague Convention on Choice of Court Agreements:

Thomas Kadner Graziano: "The Law Applicable to Non-Contractual Obligations (Rome II Regulation)" – the English abstract reads as follows:

> *As of 11 January 2009, Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) will be applicable in twenty-six European Union Member States. The Rome II Regulation applies to events giving rise to damage which occur after its entry into force on 19 August 2007 in proceedings commenced after 11 January 2009. This Regulation provides conflict of law rules for tort and delict, unjust enrichment and restitution, negotiorum gestio and culpa in contrahendo. It has a wide scope covering almost all issues raised in cases of extra-contractual liability.*
>
> *The majority of the rules in the Rome II Regulation are inspired by existing rules from European countries. Others are pioneering, innovative new rules. Compared to many of the national systems of private international law of non-contractual obligations, Rome II will bring significant changes and several new solutions. The Rome II Regulation introduces precise, modern and well-targeted rules on the applicable law that are well adapted to the needs of European actors. It provides, in particular, specific rules governing a certain number of specific torts (e.g. product liability, unfair competition and acts restricting free competition, environmental damage, infringement of intellectual property rights, and industrial action). The provisions of the Regulation will considerably increase legal certainty on the European scale, while at the same time giving courts the freedom necessary to deal with new or exceptional situations. This contribution presents the rules designating the applicable law set out in the Rome II Regulation. The raisons d'êtres behind these rules are explored and*

ways in which to interpret the Regulation's provisions are suggested. Particular attention is given to the interplay between Rome II and the two Hague Conventions relating to non-contractual obligations. Finally, gaps and deficiencies in the Regulation are exposed, in particular gaps relating to the law applicable to violations of privacy and personality rights and traffic accidents and product liability continuing to be governed by the Hague Conventions in a number of countries, and proposals are made for filling them.

Rolf Wagner: "The Hague Convention of 30 June 2005 on Choice of Court Agreements" – the English abstract reads as follows:

In 1992 the United States of America proposed that the Hague Conference for Private International Law should devise a worldwide Convention on Enforcement of Judgments in Civil and Commercial Matters. The member states of the European Community saw in the US proposal an opportunity to harmonize the bases of jurisdiction and also had in mind the far-reaching bases of jurisdiction in some countries outside of Europe as well as the dual approach of the Brussels Convention which combines recognition and enforcement of judgments with harmonization of bases of jurisdiction (double convention). Despite great efforts, the Hague Conference did not succeed in devising a convention that laid down common rules of jurisdiction in civil and commercial matters. After long negotiations the Conference was only able to agree on the lowest common denominator and accordingly concluded the Convention of 30 June 2005 on Choice of Court Agreements (Choice of Court Convention). This Convention aims to do for choice of court agreements what the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards has done for arbitration agreements.

The article provides an overview of the negotiations and explains in detail the content of the Choice of Court Convention. In principle the Convention applies only to exclusive choice of court agreements. However an opt-in provision allows contracting states to extend the rules on recognition and enforcement to non-exclusive choice of court agreements as well. The Convention is based on three principles. According to the first principle the chosen court in a contracting state must hear the case when proceedings are brought before it and may not stay or dismiss the case on the basis of forum non conveniens. Secondly, any court in another contracting state before which proceedings are

brought must refuse to hear the case. Thirdly, a judgment given by the chosen court must be recognized and enforced in principle in all contracting states. The European instruments like the Brussels I Regulation and the Lugano Convention will continue to apply in appropriate cases albeit with a somewhat reduced scope. The article further elaborates on the advantages and disadvantages of the Choice of Court Convention and comes to the conclusion that the advantages outweigh the disadvantages. The European Community has exclusive competence to sign and ratify the Convention. The author welcomes the proposal by the European Commission that the EC should sign the Convention. Last but not least the article raises the question what has to be done in Germany to implement the Convention if the EC decides to ratify the Convention.

Tokyo International Symposium: "Intellectual Property and International Civil Litigation"

The Copyright Group, the Industrial Property Right Group, and International Civil Procedure Group all working within the "Transparency of Japanese Law" Project are jointly organising the international symposium on the ever more challenging issues arising in the field where private international law meets intellectual property law. The sessions are classically divided into three parts: jurisdiction, applicable law, and recognition and enforcement. The presentations will focus on the CLIP proposal and the counterpart Japanese proposal, whereas the ALI Principles will be generally described in the introduction. The symposium will be held on 8 and 9 May 2009 in Tokyo, Japan.

The latest program may be retrieved here. Any questions in regard to this symposium may be addressed to Professor Toshiyuki Kono (Kyushu University) at tomeika-sympo@law.kyushu-u.ac.jp.

A new Spanish Magazine: Cuadernos de Derecho Transnacional

On March 16, 2009 the first issue of a new legal journal dedicated to Private International Law has seen the light. "Cuadernos de Derecho Transnacional"(CDT) ("TransnationalLaw Review") is published by the Private International Law Section of the University Carlos III of Madrid, Spain. CDT is directed by Professors Alfonso-Luis Calvo and Javier Carrascosa.

The new legal journal offers high quality articles, papers and notes on the most interesting current trends of private International Law.

"Cuadernos de Derecho Transnacional" appears in a completely free on line format. No password is required. It is possible to have access to all the contents of this new legal journal from any country in the world.

All the contributions offered by CDT are presented in PDF (complete text). They all are preceded by an abstract and a set of key-words in two languages.

Articles, papers, essays and other contributions to "Cuadernos de Derecho Transnacional" can be written in any of the principal European languages. "Cuadernos de Derecho Transnacional" has a previous rigorous quality control of any contribution before it is published.

This first issue of CDT (vol. 1, 2009, number 1), contains the following contributions:
Tito Ballarino, Il Regolamento Roma I: forza di legge, effetti, contenuto, pp. 5-18.
Hilda Aguilar Grieder, Los contratos internacionales de distribución comercial en el Reglamento Roma I, pp. 19-35.
Alfonso-Luis Calvo Caravaca, Javier Carrascosa González, La Ley aplicable al divorcio en Europa: el futuro reglamento Roma III, pp. 36-71.
María del Pilar Diago Diago, El comercio internacional de diamantes: sistema de

certificación del Proceso Kimberley, pp. 72-91.
Pietro Franzina, Las relaciones entre el Reglamento Roma I y los convenios internacionales sobre conflictos de leyes en materia contractual, pp. 92-101
Antonio Leandro, La legge applicabile alla revocatoria fallimentare nel Regolamento (CE) nº 1346/2000, pp. 102-111
Andrés Rodríguez Benot, La exclusión de las obligaciones derivadas del Derecho de familia y sucesiones del ámbito material de aplicación del Reglamento Roma I, pp. 112-130.
Francisco Martínez Rivas, Traslado internacional de sede social en la Unión Europea: del caso "Daily Mail" al caso "Cartesio". Veinte años no son nada, pp. 132-142.
MaríaDolores Ortiz Vidal, El caso Grunkin-Paul: notas a la STJUE de 14 de octubre de 2008, pp. 143-151.

Many thanks to Professor Carrascosa González for providing this brief presentation of the new magazine

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Webcast of the 2008 Venice Conference on the Rome I Regulation

We pointed out in a previous post the programme of the conference on the Rome I reg. hosted by the University of Venice "Ca' Foscari" on 28 November 2008: **"La nuova disciplina comunitaria della legge applicabile alle obbligazioni contrattuali"** (The new EC regime on the law applicable to contractual obligations).

For those who could not attend the event, most of the reports were recorded and are available for viewing on the website of the Italian Society of International Law (SIDI-ISIL). Here's the list:

Problemi generali (General Problems)

- *Paul Lagarde* (University of Paris I – Sorbonne): Introduction. Considérations de méthode (*in French*);
- *Fabrizio Marrella* (University "Ca' Foscari" of Venice): Funzione ed oggetto dell'autonomia della volontà: il problema della mancata "delocalizzazione" (Function and Object of Party Autonomy: the Issue of "delocalization");
- *Nerina Boschiero* (University of Milan): I limiti al principio di autonomia derivanti dalle norme imperative, dall'ordine pubblico e dal diritto comunitario derivato (Limits to Party Autonomy: Mandatory Provisions, Public Policy and Secondary EC Law);
- *Ugo Villani* (University LUISS-Guido Carli of Rome): La legge applicabile in mancanza di scelta dei contraenti (Applicable Law in the Absence of Choice);

Questioni Specifiche (Specific Issues)

- *Paolo Bertoli* (University of Insubria): Ambito di applicazione e materie escluse: in particolare, la responsabilità precontrattuale (Scope of Application and Excluded Matters: in particular, Precontractual Liability);
- *Paola Piroddi* (University of Cagliari): I contratti di assicurazione (Insurance Contracts);
- *Francesco Seatzu* (University of Cagliari): I contratti conclusi con i consumatori e i contratti individuali di lavoro (Consumer Contracts and Individual Employment Contracts);
- *Gianluca Contaldi* (University of Macerata): I contratti di trasporto (Contracts of Carriage);
- *Angelica Bonfanti* (University of Milan): Le relazioni con le convenzioni internazionali in vigore (Relationships with Existing International Conventions).

Concluding remarks: *Tullio Treves* (University of Milan; Judge, ITLOS).

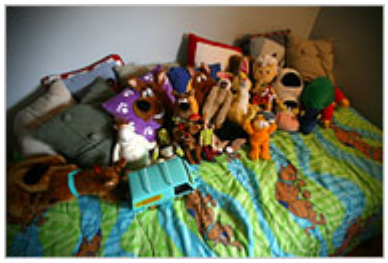
Discovery in Aid of Litigation Post-"Intel": The Continuing Split

Law.com just posted a good article on the follow-on litigation after the Supreme Court's decision in Intel *Corp. v. Advanced Micro Systems, Inc.*, 542 U.S. 241 (2004). That decision, in short, held that 28 U.S.C. 1782–which empowers federal district courts to compel discovery "for use in a proceeding in a foreign or international tribunal"–could be utilized in aid of the EC Directorate-General for competition. That body was a "foreign or international tribunal" in the eyes of the Court. The next logicial question, though, is "what about private arbitral tribunals?" Is that a "foreign or international tribunal" within the meaning of Section 1782?

Despite the broad guidance given by the Court in *Intel*, the lower courts remain split: two district courts in three seperate districts have held that private arbitral tribunals are not included in the statute, while three others have held that they are. The authors of this article provide a good summary of the post-*Intel* case law, up to and including the most recent decision denying discovery in aid of private arbitration by the Southern District of Texas.

International Custody Case between the U.S. and Brazil

See this post of Solangel Maldonado @ *Concurring Opinions* :



> *Some of my family law students have been following the international custody case involving Brazil and the United States. According to David Goldman, a*

> *New Jersey resident, in June 2004, his wife took their four year-old son, Sean, to Brazil on vacation where he was supposed to join them a week later. However, a few days after arriving in Brazil, his wife informed him she was divorcing him and would remain in Brazil with their son. This case is not unique. Thousands of parents each year remove children from their country of residence and retain them in another country without the other parent's consent, in breach of the other parent's custodial rights. Lawmakers around the world have long known that international child abduction by a parent is a serious problem and have attempted to create a mechanism to ensure that children are returned to their country of residence. Under the 1980 Hague Convention on the Civil Aspects of International Child Abduction, ratified by 68 nations, the signatory countries agree to promptly return a child who has been wrongfully removed to or retained in another signatory country.*
>
> *Unfortunately, the Hague's procedural mechanisms do not always work for two reasons. First, courts do not always comply with the Hague and second, even when they do, abducting parents sometimes go into hiding with the child and cannot be found. The retaining country and its law enforcement officials often make little effort to find the child.*
>
> *The Goldman case clearly illustrates the first reason. (…)*

End of the post here.

Preemptive Jurisdiction Trumps Forum Non Conveniens in Panama

I am grateful to Henry Saint Dahl, the President of the Inter-American Bar Foundation, for contributing this report.

On March 17, 2009, the First Superior Court of the First Judicial District of Panama affirmed a ruling for lack of jurisdiction in *Sara Grant Tobal et al v.*

Multidata Systems International Corp. et al., a lawsuit filed in Panama pursuant to a forum non conveniens (FNC) dismissal order issued by a U.S. court, in Saint Louis, Missouri. Multidata had manufactured and sold X-ray machinery used in a Panamanian hospital. Patients who used this machine were overexposed to radiation and died painfully. A lawsuit was initially filed by relatives of the victims in Missouri, USA, where defendants were domiciled. Defendants raised FNC. In 2003 the case was refiled in Panama, from where it was dismissed for lack of jurisdiction all the way to the Panamanian Supreme Court.

A motion for reinstatement was then filed in August 2005, before the original US court. Defendants argued that the Panamanian case had been manipulated by plaintiffs to secure a dismissal. Defendants argued that the suit was filed in the wrong venue in Panama. American court accepted defendants' arguments and in March 2006 it dismissed the case again, on FNC grounds.

For the second time plaintiffs re-filed in Panama. The Panamanian District Court dismissed for lack of jurisdiction and the Appellate Court, as stated, affirmed the ruling. Defendants classified the case as one about *lis pendens*, raising Art. 232 of the Judicial Code: "*National jurisdiction is not excluded by the pendency of the case, or of a connected case, before a foreign judge.*" Plaintiffs relied on preemptive jurisdiction, contemplated in Art. 238 of the same code, which states: "*Preemptive jurisdiction happens when there are two or more courts with jurisdiction over a case. The first court to hear the matter preempts and precludes the jurisdiction of the other courts.*"

Defendants argued that preemptive jurisdiction only applies to domestic cases. Plaintiffs' position was that preemptive jurisdiction applies internationally as well. The Appellate Court affirmed the District Court's decision finding that preemptive jurisdiction dissolves Panamanian jurisdiction when the lawsuit is filed first in another country that has jurisdiction according to its own legal system.

This case is interesting because it decides an issue that usually arises in Latin American – US FNC disputes. Sometimes the party raising FNC alleges that preemptive jurisdiction is a misconstruction or a ploy by plaintiffs in order to block Latin American jurisdiction. Actually preemptive jurisdiction has an impeccable pedigree in Roman law where it was known as *perpetuatio iurisdictionis* or *forum praeventionis*, making its way to Latin American jurisdictions through French, Spanish and Italian law (Conf. Chiovenda,

Instituciones de Derecho Procesal, Argentina, 2005, p. 46).

In 2006 Panama enacted a statute on international litigation that rejects FNC: "*Lawsuits filed in the country as a consequence of a forum non convenience judgment from a foreign court, do not generate national jurisdiction. Accordingly they must be rejected sua sponte for lack of jurisdiction because of constitutional reasons or due to the rules of preemptive jurisdiction*." (Section 1421). An English copy can be seen here. The decision under analysis did not deem it necessary to reach this source, relying on the traditional rule of preemptive jurisdiction. The clear lesson from this case is that in Panama preemptive jurisdiction denies an alternative forum in a FNC situation. The same is true of Mexico, Costa Rica, Venezuela and other Latina American countries where the issue the issue of FNC has been considered.

The text of the case was facilitated by the Panamanian attorney Ramón Ricardo Arosemena Quintero, Counsel for plaintiffs.

Publication: Bariatti, "Casi e materiali di diritto internazionale privato comunitario"

The Italian publishing house Giuffré has recently published the second edition of a very rich reference book on EC Private International Law, authored by ***Prof. Stefania Bariatti*** (University of Milan): "**Casi e materiali di diritto internazionale privato comunitario**".

The volume (which is updated to October 2008, but includes later material, such as the ECJ judgment in *Cartesio*) is a valuable source of reference, providing a comprehensive and thorough coverage of the current state of EC legislation and case law in PIL matters, as well as of the ongoing initiatives in the field.

The complete table of contents is available on the publisher's website. A brief

presentation has been kindly provided by the author:

> *The volume is divided into chapters where all the EC private international law provisions may be found, whether the relevant legislative instrument is based on Article 65 EC or not.*
>
> *After the general rules, including provisions concerning external competence (Chapter 1), fundamental principles, public policy and mandatory norms (Chapter 2) and EU and double nationality (Chapter 3), the relevant acts are divided into jurisdiction in civil and commercial matters (Chapter 4), insolvency proceedings (Chapter 5), law applicable to contractual (Chapter 6) and non contractual obligations (Chapter 7), rights in rem and IP rights (Chapter 8), company law (Chapter 9), social security (Chapter 10), privacy, personal status and family relationships (Chapter 11), judicial assistance (Chapter 12). All ECJ interpretative judgments on the 1968 Brussels Convention and on the regulations based upon Article 65 EC are reported, as well as the most important judgments that touch upon conflicts-of-laws issues in the other acts.*
>
> *An introduction by the author describes the general framework and the development of the Community competence in the field of private international law and discusses the solutions already adopted for solving some topical problems.*

Title: "**Casi e materiali di diritto internazionale privato comunitario**", by *Stefania Bariatti* (in collaboration with *Serena Crespi*, *Eva de Gotzen*, *Cristina Mariottini*, *Giuseppe Serrano'*, *Carola Ricci*), Giuffrè (Milano), II edition, 2009, XXXIV – 1126 pages.

ISBN: 8814143366. Price: EUR 68,00. Available at Giuffrè.

Harris: "The Proposed EU

Regulation on Succession and Wills: Prospects and Challenges”

As has already been noted on this site, the European Commission will present its proposed Regulation on Succession and Wills on 24th March 2009. In anticipation of that announcement, Professor Jonathan Harris (who has been advising the UK Ministry of Justice throughout the process) has written a lengthy article on the proposed Regulation: “**The Proposed EU Regulation on Succession and Wills: Prospects and Challenges**” (2008) 22 Trust Law International 181-235. The scope of the article is described thus:

> *In March 2005, the European Commission issued its Green Paper on Succession and Wills. In it, it argued that:*
>
> *‘… the growing mobility of people in an area without internal frontiers and the increasing frequency of unions between nationals of different Member States, often entailing the acquisition of property in the territory of several Union countries, are a major source of complication in succession to estates. The difficulties facing those involved in a transnational succession mostly flow from the divergence in substantive rules, procedural rules and conflict rules in the Member States. Succession is excluded from Community rules of private international law adopted so far. There is accordingly a clear need for the adoption of harmonised European rules.’*
>
> *In the spring of 2009, it is expected to publish a draft Regulation in this area. This article reflects upon the challenges that the Regulation is likely to present, particularly for the UK.*

The full text of the article is available to Westlaw subscribers, as well as Trust Law International subscribers. Highly recommended reading for all those interested in the proposed Regulation.

Colloquium on Choice of Law Clauses

On 10 June 2009, the Institute for Civil and Business Law (Vienna University of Economics and Business Administration) will host together with the Austrian Academy of Sciences, Insitute for European Tort Law and the University of Vienna a colloquium on the limits and chances of choice of law clauses: "**Rechtswahl – Grenzen und Chancen**".

There is no booking fee, registration is recommended until 1 June 2009.

More information on the venue and the programme can be found here.

Many thanks to Thomas Thiede for the tip-off.