Spanish International Adoption Act (Law 54/2007, of December 28)

The International Adoption Act (Law 54/2007, of December 28), is the first special Private International Law act issued in Spain. It contains a heterogeneous, extensive (possibly the most comprehensive in Comparative Law, with 34 long articles) regulation of international adoption and other measures for protecting incapables. It revokes the previous legislation dating back to 1974, amended several times since 1987. Spanish former regulation generated different types of problems; some derived from its interpretation, which was not very clear and at some points confusing and dense. Others were due to the fact that all the Spanish Comunidades Autónomas have jurisdiction regarding the protection of minors and have issued their own rules, including administrative aspects and mediation in international adoptions.

The IAA has several goals; together with the wish to put an "end to the regulatory dispersion characteristic of the previous legislation", providing full regulation of international adoption, we find the "interests of the minor" as a guide to all adoption processes.

As a matter of fact, the Act has already missed the first goal -which, to tell the truth was too difficult to accomplish, considering Spanish state legislator and the Autonomous Regions share responsibilities in matters concerning the protection of minors. As for the second goal (the interests of the adopted minor), it has given rise to a complex model where calls for cooperation between authorities coexist with conflict of laws for the establishment of adoption, its modification and its declaration of nullity. A queer mixture of unilateralism and bilateral conflict rules has been chosen for the conversion of adoption; as for recognition, the Spanish legislatior has set up a difference between the recognition of simple adoption, through the national law of the child, and the recognition of other adoptions, which requires unilateral conditions calling to the conflict and international jurisdiction rules of the foreign authority. As some author has already said, a "truly strange methodological puzzle"…

The IAA has generated already a lot of doctrinal polemic in Spain, with very strong defenders and equally critical opponents. Opinions are mostly published in Spanish, in Spanish magazins; a short article in English will soon appear in the Yearbook of Private International Law. The law itself can be found in French at the Revue Critique de Droit International Privé, 2008.

Proposal EC on Signing of Hague Choice of Court Convention

On 5 September 2008 a Proposal for a Council Decision on the signing by the European Community of the Convention on Choice-of-Court Agreements of 2005 (COM(2008) 538 final was presented. The text of the proposal reads as follows:

> *Article 1 – Subject to a possible conclusion at a later date, the signing of the Convention on Choice-of-Court agreements concluded at The Hague on 30 June 2005 is hereby approved on behalf of the Community. The President of the Council is hereby authorised to designate the person(s) empowered to sign, on behalf of the European Community, the Convention on Choice-of-Court Agreements concluded at The Hague on 30 June 2005, subject to the conditions set out in Article 2.*
>
> *Article 2 – When signing the Convention, the Community shall make the following declaration in accordance with Article 30 of the Convention:*
>
> *"The European Community declares, in accordance with Article 30 of the Convention, that it exercises competence over all the matters governed by this Convention. Its Member States will not sign, ratify, accept or approve the Convention, but shall be bound by the Convention by virtue of its conclusion by the European Community.*
>
> *For the purpose of this declaration, the term "European Community" does not include Denmark by virtue of Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing*

the European Community [and the United Kingdom and Ireland by virtue of Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and the Treaty establishing the European Community]".

Thanks to Helene van Lith for the tip-off.

Article: Muir Watt on Economics of Adjudication and Int'l Arbitration

In an article forthcoming in the French *Revue de l'arbitrage*, Horatia Muir Watt (Paris I University) explores further the economics of adjudication and wonders what the implications of the lead taken by international arbitration are for the governance of the global economy.

The article is in French. Its title is *Economie de la justice et arbitrage international (réflexions sur la gouvernance privée dans la globalisation)*. The English abstract reads:

Arbitration has conquered a dominant part of the global market for dispute resolution in the field of international commerce, where it is now widely held to be a preferable alternative to adjudication before State courts. Indeed, it may be observed that access to the latter is being privatized in international litigation through the generalisation of choice of forum clauses, while the commercial courts of the more competitive national systems tend in turn to behave like private umpires. This article looks at the consequences of this contractualisation of adjudication for the governance of the global economy. In the light of the distinction set out three decades ago by the first analyses of the economics of adjudication, between the regulatory function of the courts (whether through precedent or other modes of creating case-law), seen as a

> *public good provided by the collectivity, and the mere adjustment of private interests, which might legitimately be financed by the parties to the dispute, the transfer of international commercial adjudication to the private sector is synomynous with private appropriation of the regulatory function of of the courts, of which States are progressively divested. This transformation of international commercial adjudication into a private good, subject to a global market, is an invitation to think about normativity through the de-centered lens of legal pluralism, rather than from an exclusively State-centered perspective. On a more practical level, it should also lead to redesign the offer of private justice, so as to adapt its content to the regulatory function it is now called upon to perform*

To my knowledge, articles of the *Revue de l'arbitrage* cannot be downloaded.

Hague Convention on Int'l Protection of Adults to Enter into Force

The Hague Conference on Private International Law reports that the Hague Convention of 13 January 2000 on the International Protection of Adults will enter into force on January 1st, 2009.

This is because a third country, France, has ratified the Convention on September 18th, 2008. There are thus three countries which ratified the Convention: France, Germany in 2007 and the U.K., but for Scotland only, in 2003. Pursuant to article 57 of the Convention, this is what was necessary to trigger the entry into force in those states on the first day of the third month after the third ratification.

On the same date, the Convention was also signed by five new states: Finland, Greece, Poland, Ireland and Luxembourg.

There are now ten signatories altogether. They may eventually all ratify the Convention. If they do not, will someone assess the efficiency of the whole enterprise? This is a lot of transaction costs for harmonizing the law of three states only.

UPDATE: for a discussion of whether the Convention applies in England and Wales irrespective of the fact that the UK only ratified the Convention for Scotland, see below the comments of Michelle S. de Bruin.

Eighteen Publications on South African Private International Law 2007-2008

- Sieg Eiselen "Goodbye arrest *ad fundandam*. Hello *forum non conveniens*?" 2008 *Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law* 794
- Thalia Kruger *Civil Jurisdiction Rules of the EU and their Impact on Third States* Oxford University Press 2008
- Thalia Kruger "Regional organisations and their dispute settlement bodies" 2008 *De Jure* (to be published)
- Jan L Neels "Falconbridge in Africa. *Via media* classification (characterisation) and liberative (extinctive) prescription (limitation of actions) in private international law – a Canadian doctrine on safari in Southern Africa (*hic sunt leones!*); or: *simper aliquid novi Africam adferre*" (2008) 4 *Journal of Private International Law* 167
- Jan L Neels "Tweevoudige leemte: bevrydende verjaring en die internasionale privaatreg" 2007 *Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law* 178
- Jan L Neels "Revocation of wills in South African private international law" (2007) 56 *International and Comparative Law Quarterly* 613
- Jan L Neels "The proprietary effect of reservation-of-title clauses in South

African private international law" in *Prof Dr Ergon A Çetingil ve Prof Dr Rayegân Kender'e 50. Birlikte Çali?ma Yili Arma?ani* (2007) (Istanbul) 903 (originally published in 2006 *South African Mercantile Law Journal* 66)

- Jan L Neels and Eesa A Fredericks "The music performance contract in European and Southern African private international law" (part 1) (2008) 71 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg / Journal of Contemporary Roman-Dutch Law* 351
- Jan L Neels and Marlene Wethmar-Lemmer "Constitutional values and the proprietary consequences of marriage in private international law – introducing the *lex causae proprietatis matrimonii*" 2008 *Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law*
- Richard Frimpong Oppong "A decade of private international law in African courts 1997-2007" (part 1) (2007) 9 *Yearbook of Private International Law* 223
- Richard Frimpong Oppong "Roman-Dutch law meets the common law on jurisdiction in international matters" (2008) 4 *Journal of Private International Law* 311
- Elsabe Schoeman and Christa Roodt "South Africa" in B Verschraegen (ed) *Private International Law* in R Blanpain *International Encyclopaedia of Laws* Kluwer Law Interational 2007
- Christa Roodt "A wider vision in choice of prescription law" (2007) 9 *Yearbook of Private International Law* 357
- Christian Schulze "The 2005 Hague Convention on Choice of Court Agreements" (2007) 19 *South African Mercantile Law Journal* 140
- Christian Schulze "Should a peregrine plaintiff furnish security for costs for the counterclaim of an incola defendant?" (2007) 19 *South African Mercantile Law Journal* 393
- Christian Schulze "International jurisdiction in claims sounding in money: is *Richman v Ben-Tovim* the last word?" (2008) 20 *South African Mercantile Law Journal* 61
- Omphemetse Sibanda "Jurisdictional arrest of a foreign *peregrinus* now unconstitutional in South Africa" (2008) 4 *Journal of Private International Law* 167 329
- Marlene Wethmar-Lemmer "When could a South African court be expected to apply the United Nations Convention on Contracts for the International Sale of Goods (CISG)?" 2008 *De Jure* (to be published)

Forum Non Conveniens and Australian Family Law Cases

Frank Bates, Professor of Law at the University of Newcastle (New South Wales), has a short article entitled 'Stay Proceedings and *Forum Non Conveniens* in Recent Australian Family Law' at (2008) 57(3) *International and Comparative Law Quarterly* 649. The article discusses the decision of the Full Court of the Family Court of Australia in *Kwon v Lee* [2006] FamCA 730; (2006) FLC 93-287, which considered the interaction between the Australian common law test for *forum non conveniens* applications (whether the forum is clearly inappropriate) and the legislative requirement that, in deciding whether to make a parenting order in relation to a child, the Family Court must regard the best interests of the child as the paramount consideration.

Article: How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflicts of Law

Sonya Bichkov Green (John Marshall Law School) has written an article on the conflict-of-laws issues arising out of Assisted Reproductive Technologies (ART), focusing on the current legal and judicial framework in the United States (see our previous posts by *Gilles Cuniberti* on a case of surrogate parenthood involving French authorities: 1, 2): "**Interstate Intercourse: How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflicts of Law**". The paper is available for download in the Selected Works of Berkeley

Electronic Press.

The abstract reads as follows:

> *New technologies have always posed challenges to established legal norms. Assisted Reproductive Technologies (ART) in particular pose legal and ethical challenges to the law, and create never before seen legal problems. Although the ABA House of Representatives recently approved the Model Act Governing Assisted Reproductive Technology, differences in laws and rules will continue to exist. The legal issued involved are wide-ranging, including: liability issues arising from the failure of ART technology, parentage issues, disposition of embryos, and many others. As ART becomes more widely used, it is also used more in an interstate and international context. Thus, when a dispute arises, it often involves litigants from different states, and therefore creates the potential of conflicting laws.*
>
> *This article discusses how many ART procedures can be done, and often times are done, across state lines, and between individuals from different states. This creates challenging legal situations for the courts, both in deciding what the law is, or should be, and second in deciding which state's law to apply. Recent scholarship has addressed the first question but this article focuses on the second. It proposes solutions to complicated – and current – ART choice of law conundrums.*
>
> *The first section describes Assisted Reproductive Technologies, so that the reader understands the background to the potential problems that may arise. The second section discusses possible problems with ART and lawsuits that have arisen, some, within the last year. The third section describes current choice of law options, and how these might be applied, and have been applied, to ART lawsuits. The last section proposes solutions for resolving multi-state ART lawsuits, including the best choice of law approach for this area of the law, and how parties can protect themselves through more proactive choices of law in contract formation.*

As an appendix, readers wil also find three pieces of poetry on the complexity of conflict of laws, written by *Thurman Arnold*, *James A. McLaughlin* and the author herself:

The field of Conflicts of Law inspired two great legal thinkers – separately – to write poetry about its complexity. To their efforts, this author adds her addition to the poem, considering the particular problems created by ART.

Article: Liberating the Individual from Battles Between States – Justifying Party Autonomy in Conflict of Laws

Matthias Lehmann has written an article that, while trying to give a theoretical justification for the principle of party autonomy, attacks the dominant conception of conflict of laws. It has been published in vol. 41 of the Vanderbilt Journal of Transnational Law, pp. 381-434 (2008).

Here is the abstract:

Current theories of conflict of laws have one common feature: they all consider the question of the applicable law in terms of a conflict between states. Legal systems are seen as fighting with each other over the application of law to a certain case. From this perspective, the goal of conflicts methods is to assign factual situations to the competent rule maker for resolution. Party autonomy presents a problem for this view: if individuals are allowed to choose which law will be applied to their dispute, it seems as if private persons could determine the outcome of the battle between states—but how is this possible? This Article tries to give a theoretical solution to this puzzle. The underlying idea is that conflicts theory has to be recalibrated. Its goal should not be to solve conflicts between states, but to serve the individual, its needs and wants. Through this shift of focus, it becomes not only possible to justify party autonomy, but also to answer a number of practical questions raised by it. Furthermore, this Article

will propose a new normative category, "relatively mandatory rules" and discuss some important implications that the new approach may have for conflict of laws generally.

AG Opinion in Case "Ilsinger"

On 11 September 2008, Advocate General Trstenjak's opinion in case C-180/06 (*Renate Ilsinger v. Martin Dreschers (administrator in the insolvency of Schlank & Schick GmbH*) has been published.

The case basically concerns the question whether international jurisdiction for consumer claims against undertakings for prizes ostensibly won can be established under Art. 15 No. 1 (c) Brussels I Regulation (Regulation (EC) No. 44/2001). The problem in this case is whether it concerns a consumer contract in terms of Art. 15 Brussels I Regulation since the claiming of the prize was not made conditional upon actually ordering goods.

When faced with a comparable case under the Brussels *Convention*, the ECJ had decided that Art. 13 Brussels Convention was not applicable in a situation where a professional vendor made contact with a consumer by sending a personalised letter containing a prize notification where the vendor's initiative was not followed by the conclusion of a contract between the consumer and the vendor since the action brought by the consumer for the payment of the prize could not be regarded as being contractual in nature for the purposes of Art. 13 Brussels Convention (C-27/02 – Engler). However, the ECJ had not to decide on this issue under the Brussels *Regulation* so far.

Thus, the *Oberlandesgericht Wien* referred the **following questions** to the ECJ for a preliminary ruling:

Does the provision in Paragraph 5j of the Konsumentenschutzgesetz (Law on consumer protection; KSchG), BGBl 1979/140, in the version of Art I, para. 2 of the Fernabsatz-Gesetz (Law on distance selling), BGBl I 1999/185, which

entitles certain consumers to claim from undertakings in the courts prizes ostensibly won by them where the undertakings send (or have sent) them prize notifications or other similar communications worded so as to give the impression that they have won a particular prize, constitute, in circumstances where the claiming of that prize was not made conditional upon actually ordering goods or placing a trial order and where no goods were actually ordered but the recipient of the communication is nevertheless seeking to claim the prize, for the purposes of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('the regulation'): a contractual, or equivalent, claim under Article 15(1)(c) of the regulation?

If the answer to question 1 is in the negative:

Does a claim falling under Article 15(1)(c) of the regulation arise if the claim for payment of the prize was not made conditional upon ordering goods but the recipient of the communication has actually placed an order for goods?

The Advocate General points out in her **opinion** that the reference raises the question of continuity of interpretation between the Brussels Convention and the Regulation, i.e. whether Art. 15 No. 1 (c) Brussels I Regulation has to be interpreted in the same way as Art. 13 Brussels Convention. In general it should be adhered to a continuous interpretation which is also shown by recital No. 19 Brussels Regulation (para. 37). Thus, the question in the present case is as to whether there are – in particular in view of the differing wording of Art. 13 Brussels Convention and Art. 15 Brussels Regulation as well as the necessity to ensure a high standard of consumer protection – good reasons to interpret Art. 15 Brussels I Regulation in a different way the ECJ has done with regard to Art. 13 Brussels Convention in "Engler". To answer this question, the Advocate General refers to arguments based on a literal, historical, systematical and teleological interpretation:

While agreeing with Advocate General Tizzano's assessment in "Kapferer" that the modifications with regard to Art. 15 Brussels I Regulation in comparison to Art. 13 Brussels Convention do not question the requirement of the conclusion of a contract (para. 42), she argues that the Community legislature did not intend to limit Art. 15 No. 1 (c) Brussels I Regulation to synallagmatic contracts by

modifying the wording of Art. 15 Brussels I Regulation (para. 40 et seq.).

On the basis that the application of Art. 15 Brussels I Regulation requires a contract, she examines the general requirements for the conclusion of contracts within the framework of Community law by referring to the Court's case law, several directives and – and this might be particularly emphasised – to the Draft Common Frame of Reference (DCFR) and the Principles of European Contract Law (PECL). She concludes that one of the basic prerequisites for the conclusion of a contract was that the parties agree on the conclusion of a contract by means of "offer" and "acceptance" (para. 44 et seq.).

She argues that – also in view of the necessity to ensure a high standard of consumer protection (para. 64) – that prize notifications can, in principle, lead to the conclusion of a contract. However, whether this was the case in the main proceedings, had to be answered by the national court by examining whether the prize notification can be regarded as an offer in the specific case and whether the consumer has accepted this offer (para. 59 et seq.).

Concluding, the **Advocate General suggests to answer the referred questions** as follows (para. 81):

Art. 15 No. 1 (c) Brussels I Regulation has to be interpreted as meaning that a right which entitles consumers under the law of the Member State where they are domiciled to claim from undertakings domiciled in another Member State prizes ostensibly won by them where the undertakings send them prize notifications and give – by means of the design of the communications – the impression that they have won a particular prize without making claiming of that prize conditional upon actually ordering goods or placing a trial order and where no goods were actually ordered but the recipient of the communication is nevertheless seeking to claim the prize, can constitute a claim arising from a contract in terms of Art. 15 Brussels I Regulation if a consumer contract in terms of this provision has actually been concluded. The question whether a consumer contract in terms of Art. 15 Brussels I Regulation has actually been concluded in the main proceedings has to be examined by the national court.

The right entitling the consumer to claim the prize ostensibly won from the undertaking, constitutes a claim arising from a contract in terms of Art. 15 No. 1 (c) Brussels I Regulation if the claiming of the prize was not made conditional

upon actually ordering goods, but when the consumer has ordered goods nevertheless.

(Approximate translation from the German version of the opinion.)

The full opinion can be found (in French, German, Italian, Slovene and Finnish) at the ECJ's website.

Papers Published from the Duke Symposium on the European Choice of Law Revolution

The papers presented at the Duke University School of Law Symposium on 'The New European Choice of Law Revolution: Lessons for the United States?' have now been published in the *Tulane Law Review* (Vol. 82, No. 5, May 2008). Here's the table of contents:

- *Ralf Michaels*, Introduction – The New European Choice-of-Law Revolution (available on SSRN);
- *Patrick J. Borchers*, Categorical Exceptions to Party Autonomy in Private International Law (available on SSRN);
- *Jan von Hein*, Something Old and Something Borrowed, but Nothing New? Rome II and the European Choice-Of-Law Evolution;
- *Dennis Solomon*, The Private International Law Of Contracts In Europe: Advances And Retreats;
- *Symeon C. Symeonides*, The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons (available on SSRN: see our dedicated post here);
- *Larry Catá Backer*, The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law (available on SSRN);
- *Jens Dammann*, Adjudicative Jurisdiction and the Market for Corporate

Charters;
- *Onnig H. Dombalagian*, Choice Of Law and Capital Markets Regulation (available on SSRN);
- *Katharina Boele-Woelki*, The Legal Recognition of Same-Sex Relationships within the European Union;
- *Horatia Muir Watt*, European Federalism and the "New Unilateralism";
- *Linda J. Silberman*, Rethinking Rules of Conflict of Laws in Marriage and Divorce in the United States: What Can We Learn from Europe?;
- *Richard Fentiman*, Choice of Law in Europe: Uniformity and Integration;
- *William A. Reppy, Jr.*, Eclecticism in Methods for Resolving Tort and Contract Conflict Of Laws: the United States and the European Union;
- *Jürgen Basedow*, Federal Choice of Law in Europe and the United States – A Comparative Account of Interstate Conflicts;
- *Erin Ann O'Hara – Larry E. Ribstein*, Rules and Institutions in Developing a Law Market: Views from the United States and Europe (available on SSRN);
- *William M. Richman*, A New Breed of Smart Empirically Derived Conflicts Rules: Better Law Than "Better Law" in the Post-Tort Reform Era: Reviewing Symeon C. Symeonides, The American Choice-Of-Law Revolution: Past, Present And Future (2006).

Information on subscribing to the *Tulane Law Review* can be found here.

For those who could not attend the event, **the webcast of the conference is available for viewing on the Duke University's website**, in five parts (RealMedia format):

1. **Welcome and Opening Remarks** (*Dean David F. Levi*, *Ralf Michaels*, and *Haller Jackson*) and **Panel 1: Contract and Tort Law**. Moderated by *Paul Haagen*. Panelists include *Jan von Hein*, *Symeon Symeonides*, *Dennis Solomon*, and *Patrick Borchers*.
2. **Panel 2: Corporate Law**. Moderated by *Jim Cox*. Panelists include *Larry Cata Backer*, *Jens Dammann*, and *Onnig Dombalagian*.
3. **Panel 3: Family Law.** Moderated by *Kathy Bradley*. Panelists include *Marta Pertegas*, *Katharina Boele-Woelki*, and *Linda Silberman*.
4. **Panel 4: Methods and Approaches**. Panelists include *Richard Fentiman*, *Ralf Michaels*, and *William Reppy, Jr.*
5. **Panel 5: Internal and External Conflicts, Federalism, and Market**

Regulation. Panelists include *Jürgen Basedow, Mathias W. Reimann, Erin O'Hara,* and *Larry Ribstein*.

(Many thanks to Martin George.)