ECJ: Judgment on Brussels II bis (A)

On 2 April 2009, the ECJ has delivered its judgment in case C-523/07 (*A*).

The case, which has been referred to the ECJ by the Finnish *Korkein hallinto-oikeus*, concerns three children who lived originally in Finland with their mother (*A*) and stepfather. In 2001 the family moved to Sweden. In summer 2005 they travelled to Finland – originally with the intention to spend their holidays there. In Finland, the family lived on campsites and with relatives and the children did not go to school there. In November 2005 the children were taken into immediate care and placed into a child care unit. This was unsuccessfully challenged by the mother and the stepfather.

The *Korkein hallinto-oikeus*, which is hearing the appeal, had doubts with regard to the interpretation of the Brussels II *bis* Regulation. Thus, it referred four questions to the ECJ for a preliminary ruling.

With the **first question** referred to the ECJ, the Finnish court basically asks whether Article 1(1) of the Regulation is to be interpreted to the effect that, first, it applies to a single decision ordering a child to be taken into care immediately and placed outside his original home and, second, that decision is covered by the term 'civil matters' for the purposes of that provision, where it was adopted in the context of public law rules relating to child protection. Since the exact question had been dealt with already in case C-435/06 (*C*) – the first judgment on the Brussels II *bis* Regulation (see with regard to this case our previous post which can be found here) – the ECJ referred to its decision in this case and held that

> *Article 1(1) of [the Brussels II bis Regulation] must be interpreted as meaning that a decision ordering that a child be immediately taken into care and placed outside his original home is covered by the term 'civil matters', for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection.*

The **second question** aims at the definition of "habitual residence" in terms of Art. 8 Brussels II *bis* – in particular in a situation in which the child has a

permanent residence in one Member State but is staying in another Member State carrying on a peripatetic life there. With regard to this question the Court held that

> *the concept of 'habitual residence' under Article 8(1) of Regulation No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.*

With its **third question**, the referring court asks first the conditions to which the adoption of a protective measure such as the taking into care of children is subject under Article 20(1) of the Regulation. Secondly, the Finnish court wishes to know whether such a measure may be applied in accordance with national law and whether those provisions are binding. Thirdly, the court asks whether the case has to be transferred to the court of another Member State having jurisdiction after the protective measure is taken. In this respect the ECJ held:

> *A protective measure, such as the taking into care of children, may be decided by a national court under Article 20 of Regulation No 2201/2003 if the following conditions are satisfied:*
>
> *– the measure must be urgent;*
>
> *– it must be taken in respect of persons in the Member State concerned, and*
>
> *– it must be provisional.*
>
> *The taking of the measure and its binding nature are determined in accordance with national law. After the protective measure has been taken, the national court is not required to transfer the case to the court of another Member State having jurisdiction. However, in so far as the protection of the best interests of the child so requires, the national court which has taken provisional or*

> *protective measures must inform, directly or through the central authority designated under Article 53 of Regulation No 2201/2003, the court of another Member State having jurisdiction.*

By means of the **fourth question**, the *Korkein hallinto-oikeus* asks whether a court of a Member State which has no jurisdiction at all must declare that it has no jurisdiction or transfer the case to the court of another Member State. Here, the Court held as follows:

> *Where the court of a Member State does not have jurisdiction at all, it must declare of its own motion that it has no jurisdiction, but is not required to transfer the case to another court. However, in so far as the protection of the best interests of the child so requires, the national court which has declared of its own motion that it has no jurisdiction must inform, directly or through the central authority designated under Article 53 of Regulation No 2201/2003, the court of another Member State having jurisdiction.*

See with regard to this case also our previous posts on the reference as well as Advocate General Kokott's opinion.

Canadian National Class Action Judgment Not Recognized in Quebec

The Supreme Court of Canada has confirmed the decision of the Quebec Court of Appeal in *Canada Post Corp. v. Lepine* (available here). The decision flows from Canada Post's termination, after only a year, of a lifetime internet service it sold to customers. This led to class proceedings in Quebec and Ontario. While aware of the proceedings in Quebec, the parties settled the class proceedings in Ontario

in a judgment that purported to cover residents of Quebec. When the Quebec proceedings continued (due to dissatifaction with what was obtained under the Ontario settlement) the defendant sought to have the Ontario judgment recognized in Quebec.

Recognition of foreign judgments in Quebec is governed by Art 3155 of the Civil Code, and so this case is very centrally concerned both with civil law (rather than common law) and with interpreting the specific provisions of the Code. Art 3155 provides several bases for refusing to recognize a foreign judgment (see para. 22).

The first issue is whether the Ontario court had jurisdiction to grant the judgment. The Supreme Court of Canada devotes the most attention to this issue because it raises an interesting question within Quebec's law on recognition. Quebec uses the "mirror principle" for assessing jurisdiction, and so would consider whether the foreign court had taken jurisdiction in accord with Quebec's own approach to taking jurisdiction. That approach includes the doctrine of forum non conveniens. So this raised the issue of whether the Quebec court could hold that, because Ontario did not stay the proceedings at least as they concerned residents of Quebec, it did not have jurisdiction in the sense contemplated by the Code (para. 27). The Supreme Court of Canada rejects this approach: forum non conveniens issues are not to be considered in assessing the foreign court's jurisdiction (paras. 34-37). The Ontario court had jurisdiction.

The second issue is whether the Ontario judgment contravened fundamental principles of procedure. Here the court holds that the class proceeding notices provided to residents of Quebec under the Ontario judgment were deficient. On the facts, this is an understandable conclusion: there is no question that the notices could have been clearer, especially as concerned the relation between the Ontario and Quebec proceedings (para. 45). This conclusion, in itself, is sufficient to resolve the case.

Third, Art 3155 provides a defence to recognition where essentially the same proceeding as that giving rise to the judgment is pending before the Quebec courts. Canada Post had advanced its argument based on a somewhat technical distinction between a proceeding seeking certification for a class action and the subsequently-certified action (para. 53) but the court rejected this distinction (para. 54). This aspect of the decision, interpreting Art 3155(4), could prove very

important to the future of so-called national class actions in Canada, since it would then seem that as long as proceedings had started in Quebec, a decision from another province purporting to cover Quebec residents in the same class action would not be recognized in Quebec. This gives residents of Quebec a protection residents of the other provinces do not have.

This is a welcome decision on the first issue, an understandable decision on the second issue, and a decision that requires more consideration on the third issue.

PIL conference at the University of Johannesburg

Comparative private international law conference; University of Johannesburg; 8-11 September 2009

Key-note speakers:
(1) Prof Dr C F Forsyth (University of Cambridge):
Reconciling classic private international law with fidelity to constitutional values

(2) Prof Dr M Martinek (University of Saarland):
The Rome I and Rome II regulations in European private international law –
a critical analysis

34 participants from 17 countries:

Cameroon (1); Canada (1); China (4); Croatia (1); Czech Republic (1); Germany (2); Israel (1); Italy (1); Japan (1); Mauritius (1); the Netherlands (2); Poland (1); Portugal (1); South Africa (7); Spain (4); United Kingdom (4); United States of America (1)

Sections on:

Private international law of obligations
Private international family law

Commercial private international law
Procedural private international law
Arbitration and private international law
Miscellaneous topics of private international law

Further information: http://www.uj.ac.za/law. Conference organiser: Prof Jan L Neels (jlneels@uj.ac.za). The provisional programme will be available shortly.

Forum Non Conveniens and Treaty Rights: King v. Cessna

On Monday, the Eleventh Circuit rendered an interesting opinion in the case of *King v. Cessna Aircraft* . The case concerned several interesting points on the doctrine of*forum non conveniens*, the most interesting of which is the competing rights guaranteed to foreign plaintiffs under bilateral treaties.

As a bit of background, the case arose out of wrongful death actions by one American, and numerous European plaintiffs, against Cessna Aircraft arising from a plane crash in Italy. Because, under *Piper*, foreign plaintiffs deserve less deference in their choice of forum, the district court dismissed the claims of all the European plaintiffs on the basis of forum non conveniens but stayed the action concerning the American plaintiff pending resolution of the foreign claims in Italy. The question presented is whether bilateral FCN treaties between the United States and Denmark, Finland, Italy, Norway, and Romania–all of which guarantee the foreign nationals "no less favorable" access to U.S. courts–should impact the private interest analysis under *forum non conveniens*. Here is how the Eleventh Circuit ruled on the question:

> *In the forum non conveniens analysis, "[a] foreign plaintiff's choice of forum . . . is a weaker presumption that receives less deference. The European Plaintiffs point out a majority of them are from countries having bilateral treaties with the United States that accord them "no less favorable" access to U.S. courts to redress injuries caused by American actors. Thus, they argue, the district court*

> *erred in giving their choice less deference. We disagree. . . . Even assuming that, by treaty, plaintiffs were entitled to access American courts on the same terms as American citizens …, our case law does not support plaintiffs' assertion that such a treaty would require that their choice of forum be afforded the same deference afforded to a U.S. citizen bringing suit in his or her home forum. Such a proposition impermissibly conflates citizenship and convenience. . . . A court considering a motion for dismissal on the grounds of forum non conveniens does not assign "talismanic significance to the citizenship or residence of the parties," . . . and there is no inflexible rule that protects U.S. citizen or resident plaintiffs from having their causes dismissed for forum non conveniens. . . . [A]ppellants cannot successfully lay claim to the deference owed an American citizen or resident suing in her home forum. Plaintiffs are only entitled, at best, to the lesser deference afforded a U.S. citizen living abroad who sues in a U.S. forum. This analysis makes clear that although citizenship often acts as a proxy for convenience in the forum non conveniens analysis, the appropriate inquiry is indeed convenience. In this case, then, the lesser deference given by the district court to the European Plaintiffs' choice of forum was consistent with the treaty obligations of the United States. Just as it would be less reasonable to presume an American citizen living abroad would choose an American forum for convenience, so too can we presume a foreign plaintiff does not choose to litigate in the United States for convenience.*

Roger Alford at Opinio Juris sums up that, "based on this logic, foreign plaintiffs stand in the shoes of ex pat Americans living abroad." If that is right, then, "one should find case law in which Americans living abroad enjoy this lesser presumption." He correctly notes, however, that there is "no such case law and the court provides none." And, the more fundamental problem with the opinion is that all the convenience factors they discuss on the defendant side are identical as between the European and American plaintiffs. The location of much of the evidence is in Italy, including evidence from Italian witnesses, that is true for *both* the American and European plaintiffs. Unless the claims of the Americans and the Europeans are different, and require differing use of the evidence (which is not the case here), then shouldn't the convenience factors that the court touts so headily apply evenly to both sets of plaintiffs? I'm not suggesting that *forum non* dismissal was an inappropriate decision in the balance of factors–indeed, the

place of the tort, the applicable law and the evidence is all in Italy–but I would think that the American plaintiffs should be equally vulnerable to dismissal on that grounds as well.

ECJ Judgment in Gambazzi

The European Court of Justice (ECJ) has delivered today its judgment in *Gambazzi v. Daimler Chrysler Canada, Inc. and CIBC Mellon Trust Company*.

The case, previously known as *Stolzenberg*, had been already litigated in numerous jurisdictions (see our previous posts here and here). The defendants had sued Gambazzi in London and obtained there a *Mareva* injunction. As Gambazzi failed to comply with it, he was sanctioned by the English court and debarred from defending in the main proceedings. As a consequence, the defendants entered into a default judgment against him. They then sought enforcement of the said default jugdment throughout Europe, including in Italy. The Court of Appeal of Milan referred the case to the ECJ, and asked:

> *On the basis of the public policy clause in Article 27(1) of the Brussels Convention, may the court of the State requested to enforce a judgment take account of the fact that the court of the State which handed down that judgment denied the unsuccessful party which had entered an appearance the opportunity to present any form of defence following the issue of a debarring order as described [in the grounds of the present Order]? Or does the interpretation of that provision in conjunction with the principles to be inferred from Article 26 et seq. of the Convention, concerning the mutual recognition and enforcement of judgments within the Community, preclude the national court from finding that civil proceedings in which a party has been prevented from exercising the rights of the defence, on grounds of a debarring order made by the court because of that party's failure to comply with a court injunction, are contrary to public policy within the meaning of Article 27(1)?*

Following closely the conclusions of Advocate General Kokott, the ECJ ruled this

morning that it could only give guidelines to national courts so that they would make a decision themselves. It held:

> ***the court of the State in which enforcement is sought may take into account, with regard to the public policy clause referred to in [Article 27(1)], the fact that the court of the State of origin ruled on the applicant's claims without hearing the defendant, who entered appearance before it but who was excluded from the proceedings by order on the ground that he had not complied with the obligations imposed by an order made earlier in the same proceedings, if, following a comprehensive assessment of the proceedings and in the light of all the circumstances, it appears to it that that exclusion measure constituted a manifest and disproportionate infringement of the defendant's right to be heard.***

Clearly, this is a bit disappointing. We will have to wait longer before getting a chance to know whether nuclear weapons of English civil procedure are compatible with human rights in general, and Article 6 of the European Convention on Human Rights (ECHR) in particular.

The ECJ addressed two issues in its judgment.

First, it made it clear that English default judgments are judgments within the meaning of Article 25 of the Brussels Convention. It held that they meet the *Denilauler* test of being adversarial. This is good to know, but I am not sure this was the most interesting issue. Advocate General Kokott had also focused on whether English default judgments meet the *Solokleinmotoren* test, and this was much more questionable. AG Kokott had concluded that they did meet that test, but the Court is silent in this respect.

Second, the Court discussed whether the English default judgment was contrary to public policy. It only addressed the issue referred to it by the Milan Court, i.e. whether rendering a 'default' judgment as a consequence of debarment from defending was a violation of the right to a fair trial. Along the lines of AG Kokott's conclusions, the ECJ only gave guidelines to national courts which will have to appreciate whether, in the light of all circumstances, there was such violation. In particular, the Court insisted that they should assess whether debarment was a proportionate sanction.

> *33 With regard to the sanction adopted in the main proceedings, the exclusion of Mr Gambazzi from any participation in the proceedings, that is, as the Advocate General stated in point 67 of her Opinion, the most serious restriction possible on the rights of the defence. Consequently, such a restriction must satisfy very exacting requirements if it is not to be regarded as a manifest and disproportionate infringement of those rights.*
>
> *34 It is for the national court to assess, in the light of the specific circumstances of these proceedings, if that is the case.*

The ECJ does not discuss whether the lack of reasons of English default judgments is contrary to Article 6 ECHR. It does not discuss either whether being prevented from accessing to one's evidence because it is withheld by one's lawyer is contrary to the right to a fair trial. As we had previously reported, other courts in Europe had found that these were violations of their public policy.

BIICL Fellowship in Private International Law

The British Institute of International and Comparative Law is seeking to appoint a Senior Research Fellow in International Private Law.

The advertisement can be found here and a full job description can be found here. The post is a research post, with no teaching duties. The fellow will be appointed for five years and be expected to lead the Institute research and events programme in international private law.

The closing date for applications was March 16. This looks like a (bad) joke, but if you are interested, it might be that your application could still be considered.

Yearbook of Private International Law, vol. X (2008)

I am grateful to Gian Paolo Romano, Production Editor of the Yearbook of Private International Law, for providing this presentation of the new volume of the YPIL.

Volume X (2008) of the Yearbook of Private International Law, edited by *Prof. Andrea Bonomi* and *Prof. Paul Volken*, and published by Sellier European Law Publishers in association with the Swiss Institute of Comparative Law (ISDC) of Lausanne, was put on the market last week.

Volume X, which celebrates the tenth anniversary of the Yearbook, is made up of 35 contributions on the most various subjects authored by scholars and practioners of almost all continents. Its 743 pages make him one of the most considerable collections of PIL essays in English language of recent years. The volume may be ordered via the publisher's website, where the table of contents and an extract are available for download.

The **Doctrine** section includes three contributions concerning the European judicial area: a first on the revised Lugano Convention on jurisdiction and the recognition and enforcement of judgments of 30 October 2007, a second on the European jurisdiction rules applicable to commercial agents and a third on the recent decision of the European Court of Justice in *Grunkin-Paul*, a seminal case that opens new perspectives for the application of the recognition principle as opposed to classical conflict rules in the field of international family law. Other original contributions concern damages for breach of choice-of-forum agreements, accidental discrimination in conflict of laws and the recent Spanish regulation of arbitration agreements.

Two **Special sections** of this volume are devoted, respectively, to the EC Regulation on the law applicable to contractual obligations (Rome I) and to the new Hague Convention and Protocol on maintenance obligations.

- In addition to several contributions of general nature, the **special section**

on Rome I includes detailed analyses of the impact that the Regulation will have on the connection of specific categories of contracts (contracts relating to intellectual and industrial property rights, distribution and franchise contracts, financial market and insurance contracts), as well as some remarks from a Japanese perspective.

- The **special section on maintenance obligations** includes insider commentaries on the two instruments adopted by the Hague Conference on 23 November 2007: the Convention on the International Recovery of Child Support and other Forms of Family Maintenance and the Protocol, which includes rules on the law applicable to maintenance obligations and aims to replace the 1973 Hague Applicable Law Convention.

The **National Reports** section includes the second part of a detailed study on private international law before African courts, a critical analysis of the new Spanish adoption system and of the conflict of laws issues raised by the Panamanian business company, two articles on arbitration (in Israel and Romania), and several contributions concerning recent developments in Eastern European countries (Macedonia, Estonia, Lithuania and Belarus). Africa is also at the centre of the report on UNCITRAL activities for international trade law reform in that continent.

The section on **Court Decisions** includes – together with commentaries on the *Weiss und Partner* and the *Sundelind López* decisions of the ECJ – detailed analyses of a recent interesting ruling of the French *Cour de cassation* on overriding mandatory provisions and of two Croatian judgments on copyright infringements.

The **Forum Section** is devoted to the recognition of trusts and their use in estate planning, the juridicity of the *lex mercatoria* and the use of nationality as a connecting factor for the capacity to negotiate.

Here is the full list of the contributions:

Doctrine

- *Fausto Pocar*, The New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters;

- *Peter Mankowski*, Commercial Agents under European Jurisdiction Rules. The Brussels I Regulation Plus the Procedural Consequences of *Ingmar*;
- *Koji Takahashi*, Damages for Breach of a Choice-of-court Agreement;
- *Carlos Esplugues Mota*, Arbitration Agreements in International Arbitration. The New Spanish Regulation;
- *Gerhard Dannemann*, Accidental Discrimination in the Conflict of Laws: Applying, Considering, and Adjusting Rules from Different Jurisdiction;
- *Matthias Lehmann*, What's in a Name? *Grunkin-Paul* and Beyond;

Rome I Regulation – Selected Topics

- *Andrea Bonomi*, The Rome I Regulation on the Law Applicable to Contractual Obligations – Some General Remarks;
- *Eva Lein*, The New Rome I / Rome II / Brussels I Synergy;
- *Pedro A. De Miguel Asensio*, Applicable Law in the Absence of Choice to Contracts Relating to Intellectual or Industrial Property Right;
- *Marie-Elodie Ancel*, The Rome I Regulation and Distribution Contracts;
- *Laura García Gutiérrez*, Franchise Contracts and the Rome I Regulation on the Law Applicable to International Contracts;
- *Francisco J. Garcímartin Alférez*, New Issues in the Rome I Regulation: The Special Provisions on Financial Market Contracts;
- *Helmut Heiss*, Insurance Contracts in Rome I: Another Recent Failure of the European Legislature;
- *Andrea Bonomi*, Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts;
- *Yasuhiro Okuda*, A Short Look at Rome I on Contract Conflicts from a Japanese Perspective;

New Hague Maintenance Convention and Protocol

- *William Duncan*, The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance. Comments on its Objectives and Some of its Special Features;
- *Andrea Bonomi*, The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations;
- *Philippe Lortie,* The Development of Medium and Technology Neutral International Treaties in Support of Post-Convention Information

Technology Systems – The Example of the 2007 Hague Convention and Protocol;

National Reports

- *Richard Frimpong Oppong*, A Decade of Private International Law in African Courts 1997-2007 (Part II);
- *Santiago Álvarez González*, The New International Adoption System in Spain;
- *Daphna Kapeliuk*, International Commercial Arbitration. The Israeli Perspective;
- *Toni Deskoski*, The New Macedonian Private International Law Act of 2007;
- *Karin Sein*, The Development of Private International Law in Estonia;
- *Radu Bogdan Bobei*, Current Status of International Arbitration in Romania;
- *Marijus Krasnickas*, Recognition and Enforcement of Foreign Judicial Decisions in the Republic of Lithuania;
- *Daria Solenik*, Attempting a 'Judicial Restatement' of Private International Law in Belarus;
- *Gilberto Boutin*, The Panamanian Business Company and the Conflict of Laws;

News from UNCITRAL

- *Luca G. Castellani*, International Trade Law Reform in Africa;

Court Decisions

- *Pietro Franzina*, Translation Requirements under the EC Service Regulation: The *Weiss und Partner* Decision of the ECJ;
- *Marta Requejo Isidro*, Regulation (EC) 2201/03 and its Personal Scope: ECJ, November 29, 2007, Case C-68/07, *Sundelind López*;
- *Paola Piroddi*, The French Plumber, Subcontracting, and the Internal Market;
- *Ivana Kunda*, Two Recent Croatian Decisions on Copyright Infringement: Conflict of Laws and More;

Forum

- *Julien Perrin*, The Recognition of Trusts and Their Use in Estate Planning under Continental Laws;
- *Thomas Schultz*, Some Critical Comments on the Juridicity of *Lex Mercatoria*;
- *Benedetta Ubertazzi*, The Inapplicability of the Connecting Factor of Nationality to the Negotiating Capacity in International Commerce.

(See also our previous posts on the 2006 and 2007 volumes of the YPIL)

European Parliament: Resolution on Cooperation in the Taking of Evidence in Civil or Commercial Matters

The **European Parliament's Resolution** of 10 March 2009 on **cooperation between the courts of the Member States in the taking of evidence** in civil or commercial matters (2008/2180(INI)) has been published (see the Parliament's website).
The resolution constitutes the Parliament's response to the Commission's report on the application of the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (COM(2007)0769).

The Comission's report on the application of Regulation (EC) No. 1206/2001 had been prepared on the basis of Art. 23 Regulation (EC) No. 1206/2001 stating that no later than 1 January 2007, and every five years later, the Commission shall present a report on the application of the Regulation.
In its report, the Commission

- *encourages all further efforts – in particular beyond the dissemination*

of the practice guide – to enhance the level of familiarity with the Regulation among legal practitioners in the European Union

- *is of the view that measures should be taken by Member States to ensure that the 90 day time frame for the execution of requests is complied with*
- *is of the view that the modern communications technology, in particular videoconferencing which is an important means to simplify and accelerate the taking of evidence, is by far not used yet to its possible extent, and encourages Member States to take measures to introduce the necessary means in their courts and tribunals to perform videoconferences in the context of the taking of evidence. The importance of the further promotion of E-Justice has also been stressed by the Council (at its meeting of 12 and 13 June 2007) and by the European Council (at its meeting of 21 and 22 June 2007)*

In the **Parliament's resolution**, the delayed submission of the Commission's report on 5 December 2007 is the first but not the only point of criticism brought forward by the Parliament. The resolution rather points out several issues which are regarded as problematic with regard to the functioning of the Regulation:
The Parliament

1. Condemns the late submission of the above-mentioned Commission report, which, according to Article 23 of Regulation (EC) No 1206/2001, should have been submitted by 1 January 2007 but in fact was not submitted until 5 December 2007;

2. Concurs with the Commission that greater efforts should be made by Member States to bring the Regulation sufficiently to the attention of judges and practitioners in the Member States in order to encourage direct court-to-court contacts, since the direct taking of evidence provided for in Article 17 of the Regulation has shown its potential to simplify and accelerate the taking of evidence, without causing any particular problems;

3. Considers that it is essential to bear in mind that the central bodies provided for in the Regulation still have an important role to play in overseeing the work of the courts which have responsibility for dealing with requests under the Regulation and in resolving problems when they arise; points out that the

European Judicial Network can help to solve problems which have not been resolved by the central bodies and that recourse to those bodies could be reduced if requesting courts were made more aware of the Regulation; takes the view that the assistance provided by the central bodies may be critical for small local courts faced with a problem relating to the taking of evidence in a cross-border context for the first time;

4. Advocates the extensive use of information technology and video-conferencing, coupled with a secure system for sending and receiving e-mails, which should become in due course the ordinary means of transmitting requests for the taking of evidence; notes that, in their responses to a questionnaire sent out by the Hague Conference, some Member States mention problems in connection with the compatibility of video links, and considers that this should be taken up under the European e-Justice strategy;

5. Considers that the fact that in many Member States facilities for video-conferencing are not yet available, together with the Commission's finding that modern means of communication are "still used rather rarely", confirms the wisdom of the plans for the European e-Justice strategy recently recommended by Parliament's Legal Affairs Committee; urges Member States to put more resources into installing modern communications facilities in the courts and training judges to use them, and calls on the Commission to produce specific proposals aimed at improving the current state of affairs; takes the view that the appropriate degree of EU assistance and financial support should be provided as soon as possible;

6. Takes the view that efforts should be made in the context of the e-Justice strategy to assist courts in meeting the translation and interpreting demands posed by the taking of evidence across borders in an enlarged European Union;

7. Notes with considerable concern the Commission's finding that the 90-day time-limit for complying with requests for the taking of evidence, as laid down in Article 10(1) of the Regulation, is exceeded in a "significant number of cases" and that "in some cases even more than 6 months are required"; calls on the Commission to submit specific proposals as quickly as possible on measures to remedy this problem, one option to consider being a complaints body or contact point within the European Judicial Network;

8. Criticises the fact that, by concluding that the taking of evidence has been improved in every respect as a result of Regulation (EC) No 1206/2001, the Commission report presents an inaccurate picture of the situation; calls on the Commission, therefore, to provide practical support, inter alia in the context of the e-Justice strategy, and to make greater efforts to realise the true potential of the Regulation for improving the operation of civil justice for citizens, businesses, practitioners and judges;

9. Instructs its President to forward this resolution to the Council, the Commission and the governments and parliaments of the Member States.

Many thanks to Prof. Burkhard Hess (University of Heidelberg) for the tip-off.

Swiss Institute of Comparative Law: First Book on the Rome I Regulation in French

The contributions presented at the **20th Journée de droit international privé**, jointly organised in March 2008 in Lausanne by the Swiss Institute of Comparative Law (ISDC) and the Centre de droit comparé, européen et international (CDCEI) of the Law Faculty of University of Lausanne and dedicated to the Rome I Regulation, have been published by Schulthess under the editorship of *Eleanor Cashin Ritaine* and *Andrea Bonomi*: **"Le nouveau règlement européen 'Rome I' relatif à la loi applicable aux obligations contractuelles"**.

Here's the table of contents (available as a .pdf file):

Avant-propos (*Andrea Bonomi / Eleanor Cashin Ritaine*);

Première partie: Panorama introductif et principes généraux

- Le Règlement Rome I: la communautarisation et la modernisation de la

Convention de Rome (*Michael Wilderspin*);
- La nouvelle synergie Rome I / Rome II / Bruxelles I (*Eva Lein*);
- The New Rome I Regulation on the Law Applicable to Contractual Obligations: Relationships with International Conventions of UNCITRAL, the Hague Conference and UNIDROIT (*Caroline Nicholas*);
- Choice of the Applicable Law (*Stefan Leible*);
- La loi applicable à défaut de choix (*Bertrand Ancel*);

Deuxième partie: Quelques contrats particuliers et mécanismes spécifiques

- Insurance Contracts in "Rome I": Another Recent Failure of the European Legislature (*Helmut Heiss*);
- Consumer Contracts under Article 6 of the Rome I Regulation (*Peter Mankowski*);
- New Issues in the Rome I Regulation: the Special Provisions on Financial Market Contracts (*Francisco J. Garcimartín Alférez*);
- Les règles applicables aux transferts internationaux de créance à l'aune du nouveau Règlement Rome I et du droit conventionnel (*Eleanor Cashin Ritaine*);
- Le régime des règles impératives et des lois de police dans le Règlement «Rome I» sur la loi applicable aux contrats (*Andrea Bonomi*).

Title: **Le nouveau règlement européen "Rome I" relatif à la loi applicable aux obligations contractuelles. Actes de la 20e Journée de droit international privé du 14 mars 2008 à Lausanne**, edited by *Andrea Bonomi* and *Eleanor Cashin Ritaine*, Schulthess (Série des publications de l'ISDC, vol. 62), Zürich, 2009, 251 pages.

ISBN/ISSN: 978-3-7255-5799-8. Price: CHF 75,00. Available at *Schultess.*

(Many thanks to Prof. Andrea Bonomi)

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.*
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> *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.