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

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.

Spanish Homosexual Couple and Surrogate Pregnancy (II)

In a previous post I related how a certificate issued in the U.S.A., establishing the parenthood of a baby born in this country to a surrogate mother, had been denied registration in Spain. The interested parties lodged an application for review before the *Dirección General de los Registros y el Notariado* (DGRN); on February 18, 2009, their appeal has been upheld. This post sums up the arguments on which the Spanish resolution is based.

The DGRN starts selecting the correct methodological approach: the request for registration in Spain of a birth certificate from a foreign authority arouses questions of recognition, and not of conflicts of law; hence art. 81 *Reglamento del Registro Civil* should apply. According with this article, facts can be registered by means of Spanish public documents; public foreign deeds are also accepted, provided they are given force in Spain under the laws or international treaties. A foreign deed has to meet three conditions in order to be suitable for registration in Spain:

.- The deed must be a public one: it has to stem from a public authority and meet the necessary requirements to be considered "full evidence" (i.e., to display privileged evidentiary strength) when used before the courts of the country of origin. Apostille or legalisation are usually called for; so does translation. In the instant case, the Californian certificate of birth and filiation satisfies those conditions.

.- The public authority granting the document has to be equivalent to the Spanish ones; that is, she mut provide with guarantees similar to those required by the Spanish law for entering into public registers. According to the DGRN, the authority responsible for civil registration in California satisfies this requirement.

.- The act contained in the foreign registration certificate must endorse a legality test involving three elements: international jurisdiction of the foreign authority, due process, and compatibility with Spanish ordre public. In the instant case only the third requirement seems questionable. The DGRN devotes the rest of its reasoning to explain why incorporation of the foreign certificate to the

Spanish Registro Civil is not contrary to our public policy; why it “does not alter the smooth and peaceful running of the Spanish society”. To this end the DGRN develops several points that may be summarized as follows:

1) Registering parenthood of two male subjects in the Spanish Registro Civil does not violate public order, since Spanish law admits paternity of two males in cases of adoption, and adopted children and biological children are equal in the eyes of law.
2) Spanish law allows registration of parenthood of female couples; to deny it in the case of a couple composed of two male individuals would be discriminatory.
3) To deny entry into a Spanish public register of facts concerning parenthood, already inscribed in a foreign register, would go against the best interests of the child as conceived in UN Convention on the Rights of the Child. The DGRN also recalls ECJ case law, such as *Garcia Avello* (C- 148/02) and *Grunkin-Paul* (C-353/06), where the ECJ argues in favour of a unique identity of the child. Later on the DGRN would reintroduce the argument of the child’s interest: allowing registration in Spain in the same terms as Californian registration is better than leaving the children without any registration in Spain, and also preferable to having two different entries, one in the U.S. and another one in Spain.
4) In Spanish law, parenthood is not necessarily determined from the genetic linkage of those involved.
5) The interested parties have not acted in fraud of law; they have not tried to change the nationality of children in order to prompt the application of Californian law. The babies, born to a Spanish person, are Spanish.
6) The interested parties have not engaged in forum shopping or any fraudulent attempt to circumvent the application of Spanish mandatory rules. The Californian certificate of registration is not a court decision with res judicata effect. Any party may challenge the content of the birth registration before the courts; if so, the Spanish Courts would establish the paternity of children once and for all.