Jurisdiction to Prevent the End of the World

Which court has jurisdiction to prevent the end of the world? Any, one would think: after all, the end of the world is likely to have serious consequences pretty much everywhere.

Is that why an American retired radiation safety officer and a Spanish science writer decided to initiate proceedings in Hawaï to stop the running of the new Large Hadron Collider, a giant particle accelerator operating on the Swiss-French border near Geneva? The plaintiffs fear that the Collider might create a black hole which would spell the end of the Earth. No doubt, that would have an impact even in Hawaï.

The defendants were the European Center for Nuclear Research (CERN), the U.S. Department of Energy, the U.S. National Science Foundation and the U.S. Fermi National Accelerator Laboratory (Fermilab). In an interview to the *New York Times*, one of the plaintiffs revealed that his strategy focused on American parties. He did not know whether CERN would show up, but he had added it as a party to save expenses. In any case, part of the project was funded by the Department of Energy and the National Science Foundation, and the magnets of the Collider are supplied and maintained by Fermilab.

The complaint argued that the defendants had failed to comply with American legislation, namely the National Environmental Policy Act (NEPA), and also with the European precautionary principle.

As the *New York Times* reported, on September 26, 2008, the Hawaï District Court declined jurisdiction.

The order of the Court, which can be found here, is disappointing from a conflict's perspective. This is because Judge Gillmor was able to dismiss the action solely on domestic grounds. In other words, she held that the court lacked jurisdiction within the American legal system, as a federal court, which is not to say that an American state court would have lacked jurisdiction.

American federal courts are courts of limited jurisdiction. This means that this is

for plaintiffs to demonstrate that the court has subject matter jurisdiction. Here, the plaintiffs solely argued that the court had federal question jurisdiction, i.e. that this was an action "arising under" U.S. federal law. The federal law that they put forward was NEPA. However, NEPA requires that there be a "major federal action significantly affecting the quality of the human environment" (42 USC §4332 (c)). The court finds that there was no such major federal action in that case. As a consequence, it rules that there is no federal question, and that it lacks jurisdiction on this ground as a U.S. federal court.

The court further rules that no other ground for subject matter jurisdiction were put forward by the plaintiffs and that they had the burden of doing so. Thus, there might have been other grounds to found the subject matter jurisdiction of the court. For instance, neither federal party jurisdiction, nor diversity jurisdiction are discussed.

Finally, the court rules that it does not need to address the issue of whether the plaintiffs had standing, given that their allegation of an injury was arguably "conjectural and hypothetical".

Meanwhile, a suit was also filed before the European Court of Human Rights (see the report of the *Telegraph* here). I don't know whether this action is more likely to be successful, but Strasbourg is certainly closer to Geneva than Honolulu.

Conference on Judicial Cooperation in South-Eastern Europe

The final program for the international conference titled **?Regional Cooperation in the Field of Civil Proceedings with an International Element**? was distributed this week. This is actually the sixth regional conference where academics and practitioners exchange their views and comments on different topics of conflict of laws and related areas. Commencing in 2002 in Niš (Serbia),

these conferences continued in the following years in Maribor (Slovenia), Belgrade (Serbia), Zagreb (Croatia) and Be?i?i (Montenegro). This year the Faculty of Law of the Univeristy of Banja Luka (Bosnia and Hercegovina) is hosting the conference from 16 to 18 October 2008. The conference is to be held in the hotel Bosna.

The topics to be presented and discussed are divided into four sections as follows:

Comparative Legislation and Practice in the European Union Member States

Christa Jessel-Holst (Max Planck Institute for Foreign and Private International Law, Hamburg), *Regional Cooperation in the Field of Civil Proceedings with an International Element – the Case of South East Europe*

Bea Verschraegen (University of Vienna), *Critical Appraisal of Brussels II a Regulation*

Vesna Lazi? (Utrecht University and T.M.C. Asser Institute), *Improving Service of Judicial and Extrajudicial Documents in European Union: the Regulation (EC) No. 1393/2007 of 13 November 2007*

Comparative Legislation and Practice in the Countries of the Region

Bernadet Bordaš (University of Novi Sad), *Regional Cooperation for the Improvement of the National Courts Proceedings – Selected Practical Examples*

Suzana Kralji? (University of Maribor), *Problems of International Adoption in Slovenia*

Ivana Kunda (University of Rijeka), *Regional Cooperation in the Field of Civil Proceedings with a Cross-Border Element: Practice of the Croatian Courts in Applying the Hague and Bilateral Conventions*

Toni Deskoski (University "Ss Cyril and Methodius" in Skopje), *International Legal Aid According to Bilateral Agreements Concluded by the Republic of Macedonia*

Vladimir ?olovi? (University Megatrend, Belgrade), *Regulating International Legal Aid in Insolvency Proceedings with an International Element*

Valerija Šaula (University of Banja Luka), *Regional Cooperation in the Field of Civil Proceedings with International Element in the Legislation and Practice of the Republic of Srpska*

Practical Problems

Nikola Sladoje, Assistant Minster of Justice of Bosnia and Herzegovina, *Practical*

Problems in Requesting and Providing International Legal Aid – Bosnia and Herzegovina Experience
Mirko Živkovi? (University in Niš), *Municipal Civil Registers and Social Work Centres in Serbia – Some Issues of Private International Law*
Jasmina Alihodži? (University in Tuzla), *Presumed Reciprocity Principle in the Function of Efficient Implementation of International Legal Aid in the Region Countries*

Other Issues and Problems
Maja Stanivukovi? (University in Novi Sad), *Default Interest Rate Applicable to Foreign Currency in Contractual Claims Governed by the Serbian Law*
Ana Kneževi?-Bojovi? (Union University in Belgrade), *Insolvency Proceedings with an International Element*
Michael Wietzorek (Friedrich-Alexander University, Erlangen-Nürnberg), *Particularities of United States of America Procedural Law from a German Perspective*
Predrag Cvetkovi? (University in Niš), *Relationship between the Communitarian and the Law of the World Trade Organization (WTO): Basic Considerations*

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Incorporation of 2000 Hague Convention in English Law

I reported earlier on the entry into force of the 2000 Hague Convention on the International Protection of Adults.

An interesting issue is the application of the Convention in England and Wales. The United Kingdom ratified the Convention, but only for Scotland. However, in the English *Mental Capacity Act* 2005, it is provided that the Convention applies in England and Wales.

Richard Frimston was able to clarify the situation in the following comment:

> *The Ministry of Justice have clarified the position. The United Kingdom has under Article 55 declared that its ratification only extends to Scotland. This is so notwithstanding the fact that section 63 of the Mental Capacity Act 2005 (the Act) specifically states that Schedule 3 of the Act gives effect in England and Wales to Convention XXXV (in so far as the Act does not otherwise do so), and makes related provision as to the private international law of England and Wales.*
>
> *SI 2007/1897 makes it clear that both section 63 and Schedule 3 have taken effect from 1 October 2007 save that by paragraph 35 of the Schedule to the Act, paragraphs 8 [jurisdiction in relation to non residents], 9 [jurisdiction in relation to convention countries], 19(2) and 19(5) [protective measures made by convention countries], Part 5 [co-operation with convention countries], and paragraph 30 [Article 38 certificates given by convention countries] only come into force, when Convention XXXV itself enters into force under Article 57.*
>
> *However this does not mean that England & Wales has ratified. The existing declaration under Article 55 still operates and although Convention XXXV is effective in England & Wales, England & Wales has not yet actually ratified the Convention.*
>
> *Paragraphs 8, 9, 19(2) and 19(5), Part 5, and paragraph 30 however are not limited to coming into force solely when England & Wales ratifies, but only when Convention XXXV itself enters into force. Therefore these provisions will also come into force in England & Wales on January 1 2009. Convention XXXV therefore will have full effect in England & Wales from January 1 2009, but for the purposes of the law in Scotland, France or Germany, England & Wales has not ratified.*
>
> *The UK Ministry of Justice has made it clear that "England & Wales is committed to extending Convention XXXV as soon as possible. The work for this is under way".*
>
> *Schedule 3 does of course now set out the private international law in England & Wales and therefore in addition to setting out the rules for jurisdiction and recognition in England & Wales Schedule 3 also sets out the applicable law and therefore the rules as to which lasting powers are or are not valid. A lasting*

> *power validly made in South Australia by a person habitually resident in South Australia is now valid whenever the power was made. An English Enduring Power of Attorney made by a person habitually resident in a state where such powers are not valid, may now be invalid, even if made at a time when Schedule 3 to the Act did not apply.*
>
> *The difficulty that Schedule 3 extends Convention XXXV to the applicable law issues of Lasting Powers not only of adults subject to incapacity but also to all Lasting Powers, including those of persons not subject to incapacity remains. Other ratifying states will not recognise this extension of the Convention.*

What is remarkable about the *Mental Capacity Act* is that it makes applicable in a domestic legal order an international treaty which is not applicable from an international perspective. Thus, in effect, the domestic law incorporates the international convention in the domestic legal order. In this case, as the UK is working on extending the application of the Convention to England and Wales, it seems close to an early entry into force.

In other instances, however, states have incorporated international conventions that they had ratified for cases beyond their scope. This was the case of Italy which decided to incorporate the Brussels Convention into Italian law to replace its common law of jurisdiction in civil and commercial matters (see art. 3 of the 1995 Italian law of international private law).

Is that acceptable for the contracting states of the relevant Convention? For the organisation which supervised the negotiation of the relevant convention such as the Hague Conference?

Spanish PIL periodicals: la Revista

Española de Derecho Internacional

The Revista Española de Derecho Internacional (REDI) is one of the main Spanish magazines concerning Private and Public International Law. Dating back to 1948, 57 volumes (two issues per volume; half-yearly periodicity) have already been published. Since 1997 the magazine belongs to the Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales (AEPDIRI), and is co-edited by the Asociación and the Boletín Oficial del Estado (BOE).

Aiming to keep the members of the scientific community informed about what is happening in International Law in Spain and its environment, the magazine is opened to contributions from Spanish and foreing authors (though preference is given to the Latin-American Community and European authors). The unique determinant criteria are the interest and current importance of the subject, a suitable development and the scientific quality of the proposed contribution. The language of publication is normally Spanish.

Works are published either as Estudios or Notas. Both are doctrinal studies; they both require to be favourably reported by some member of the editorial board, or by some specialist by request of this organ. The difference between Estudios and Notas lies in the number of pages (up to 40 for Estudios, no more than 18 for Notas) and the depth of the approach (usually the departure point of a Nota is a recently passed resolution, or new legislation presenting special interest). Together with them each REDI issue contains four fixed sections dealing with jurisprudence (case law), practice, news (about congresses, seminars, meetings, etc, concerning Public and Private International Law worldwide), and a selection of the latest Spanish and foreing bibliography on Private and Public International Law. The "jurisprudence" section deserves a special mention: it contains the most important resolutions on Public and Private International Law passed either by Spanish or International Courts (the European Court of Justice, the European Court of Human Rights) in the months preceding the publication of each REDI issue. The most significant paragraphs of each resolution are reproduced, accompanied by a short doctrinal comment.

These are the contents of the future REDI issue (2008-1), expected soon:

I. ESTUDIOS

(CIADI), por P. J. Pascual Vives

- 4. Los métodos alternos de solución de controversias comerciales entre los Estados miembros del Sistema de la Integración Centroamericana (SICA), por O. Mejía Herrera
- 5. ¿Un nuevo escenario en las relaciones Unión Europea-Federación Rusa?, por A. Blanc Altemir
- 6. La Alianza de Civilizaciones aún respira: la Declaración de Buenos Aires entre América del Sur y los Países Árabes, de 21 de febrero de 2008, por C. Díaz-Silveira Santos
- 7. La evaluación entre iguales: ¿un método efectivo?, por C. Gutiérrez Espada y Mª. J. Cervell Hortal
- Derecho Internacional Privado (Private International Law)
- Consejo sobre los asuntos generales y la Política de la Conferencia de La Haya de Derecho Internacional Privado (1-3 de abril de 2008), por A. Borrás

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Petschen

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- LÓPEZ MARTÍN, A.G., La navegación por los estrechos. Geoestrategia y Derecho, por J. Ferrer Lloret
- LUENGO HERNÁNDEZ DE MADRID, G. E., El Derecho de las subvenciones en la OMC, por L. N. González Alonso
- MARTÍN-ORTEGA, O., Empresas Multinacionales y Derechos Humanos en Derecho Internacional, por J. Bonet
- Quiñones Escámez, A.:Uniones conyugales o de pareja: formación, reconocimiento y eficacia internacional. Actos públicos y hechos (o actos jurídicos) en el Derecho internacional privado, por S. Álvarez González
- SEGURA SERRANO, A., El Derecho Internacional Humanitario y las Operaciones de Mantenimiento de la Paz de las Naciones Unidas, por F. Jiménez García
- TORROJA MATEU, H., El derecho del Estado a ejercer la protección diplomática, por E. Crespo
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- Vítolo, Daniel R., Embid Irujo, José Miguel, El Derecho de sociedades en un marco supranacional: Unión Europea y MERCOSUR: III congreso Argentino-Español de Derecho Mercantil, por V. Andreeva Andreeva

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Conference: “La matière civile et commerciale, socle d’un code

européen de droit international privé?" (Toulouse, 17 October 2008)

An interesting conference will be hosted in **Toulouse, on 17 October 2008**, by the *Institut de Recherche en droit européen, international et comparé* (IRDEIC) of the University of Social Sciences of Toulouse: **"La matière civile et commerciale, socle d'un code européen de droit international privé?"** (The civil and commercial matters, core of a European Code of Private International Law?).

The symposium will focus on the three cornerstones of the EC Private International Law in civil and commercial matters, namely the Rome I, Rome II and Brussels I regulations, evaluating their consistency under the point of view of basic principles, structure and solutions. The underlying question is whether these pieces of European legislation can be constructed as the hard core of a European PIL code, with its own general theory and specific principles and methods, which could be extended to other fields of the conflict of laws, towards the establishment of the area of freedom, security and justice envisaged by the EC Treaty.

A more detailed presentation (in French) of the colloquium, and the complete programme are available on the conference's webpage. Here's an excerpt:

Ouverture du colloque: *H. Roussillon*, Président de l'Université des Sciences Sociale de Toulouse I; *B. Beignier*, Doyen de la faculté de droit de l'Université de Toulouse I.

Président de séances: *M. Bogdan* (Université de Lund)

- 9:00 – *M. Fallon* (Université Catholique de Louvain): "Les éléments d'un code européen de droit international privé".
- 9:20 – *C. Hahn* (DG JLS, Commission européenne): "Les objectifs visés et les fondements de la compétence dans les textes de référence".
- 9:40 – *S. Francq* (Université Catholique de Louvain): "Les champs d'application (matériel et spatial) dans les textes de référence".

- 10:00 – Débats
- 11:00 – *F. Pocar* (Université de Milan): “Le choix des sous catégories et des éléments de rattachement dans les textes de référence”.
- 11:20 – *H. Muir Watt* (Université Paris I): “L’autonomie de la volonté dans les textes de référence”.
- 11:40 – *S. Poillot Peruzzetto* (Université de Toulouse I): “L’ordre public et les lois de police dans les textes de référence”.
- 12:00 – Débats

Présidente de séances: *H. Gaudemet-Tallon* (Université de Paris II)

- 14:00 – *C. Kessedjian* (Université Paris II): “La relation des textes de référence avec le droit primaire”.
- 14:20 – *M. Wilderspin* (Commission européenne): “La relation des textes de références avec le droit dérivé (et principalement les directives service et commerce électronique”.
- 14:40 – *A. Borrás* (Université de Barcelone): “La relation des textes de référence avec les textes internationaux”.
- 15:00 – Débats
- 16:00 – *J.S. Bergé* (Université de Paris Ouest Nanterre La Défense): “Les textes de référence et la dynamique interprétative de la Cour de justice”.
- 16:20 – *L. Idot* (Université de Paris II): “Le cas du droit de la concurrence dans les textes de référence”.
- 16:40 – Débats
- 17:00 – Synthèse: *P. Lagarde* (Université de Paris I).

No participation fee is required. Participants should register before 30 September (see the conference’s leaflet).

(Many thanks to Federico Garau, Conflictus Legum blog)

Second Issue of 2008's Revue Critique de Droit Int'l Privé

The second issue of the French *Revue Critique de Droit International Privé* was released some time ago. It contains one article and several case commentaries. A table of contents can be found here.

The title of the article is the Forum of Necessity (*Le for de nécessité : tableau comparatif et évolutif*). It discusses this head of jurisdiction which seems peculiar to the civil law of conflicts in respect of Belgian, Swiss, French and Dutch international private law. The authors are Valentin Rétornaz, a research assistant at Neuchatel university (Switzerland), and Bart Volders, a member of the Brussels bar and an adjunct professor to the university of Anvers, Belgium. The English abstract reads:

> *This study contains a comparative analysis of the institution known as the « forum of necessity ». Familiar to many legal systems and given pride of place in several codes of private international law, it allows a court normally without jurisdiction over a case, to decide it nevertheless in order to avoid a denial of justice. The principle behind it is an elementary principle of justice according to which no cause of action should be refused access to a court. The simplicity of such an objective may be deceptive insofar as the means to achieve it are concerned. The « forum of necessity » may indeed be difficult to manage in concrete circumstances, as the cases examined here well show. This study first attempts to draw from the main legal texts and academic writings its general characteristics and the conditions under which it allows a court to exercise jurisdiction. Then, cases and specific commentaries are examined in order to formulate some general principles.*

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.