Opinion on first Reference for a Preliminary Ruling on Brussels II bis

On 20 September, *Advocate General Kokott* has delivered her opinion on the first reference for a preliminary ruling on the Brussels II *bis* Regulation (Regulation 2201/2003/EC) – *Applicant C*, C-435/06.

The background of the case is as follows: *Applicant C*. has lived with her two minor children and her husband in Sweden. In February 2005, the competent Swedish authority ordered – due to investigations which had been carried out in beforehand – the immediate taking into custody of both children as well as their placement in a foster family outside the home. These protective measures are regarded as public acts in Finland and Sweden. Before the decision of the acting Swedish authority was approved by the *Länsrätt*, *C.* had moved with her children to Finland. After the approval of the decision by the *Länsrätt*, the Swedish police requested administrative assistance from the Finnish police with regard to the enforcement of the Swedish decision. Subsequently, the Finnish police ordered the immediate taking into custody of the children as well as their committal to the Swedish social authorities. After her action against the acts taken by the Finnish authorities at the *Hallinto-oikeus* had failed, the mother, *C.*, appealed to the highest administrative court in Finland, the *Korkein Hallinto-oikeus,* and claimed first to set aside the decision of the *Hallinto-oikeus,* second to revoke the order made by the police and third to bring back the children to Finland. The *Korkein Hallinto-oikeus,* however, had doubts whether the Brussels II *bis* Regulation was applicable. This was decisive since in case of the applicability of the Regulation, Finnish civil – and not administrative – courts would be competent in this case. Further, rules existing within the framework of an cooperation among the administrative authorities in the Nordic States would be superseded by the Regulation. Consequently, the *Korkein Hallinto-oikeus* referred with decision of 13 October 2006 the following questions to the ECJ for a preliminary ruling:

> *a) Does Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000,*

(the Brussels 11a Regulation) [2]apply, in a case such as the present, to the enforcement of a public law decision in connection with child welfare, relating to the immediate taking into custody of a child and his or her placement in a foster family outside the home, taken as a single decision, in its entirety;

(b) or solely to that part of the decision relating to placement outside the home in a foster family, having regard to the provision in Article 1(2)(d) of the regulation;

(c) and, in the latter case, is the Brussels IIa Regulation applicable to a decision on placement contained in one on taking into custody, even if the decision on custody itself, on which the placement decision is dependent, is subject to legislation, based on the mutual recognition and enforcement of judgments and administrative decisions, that has been harmonised in cooperation between the Member States concerned? If the answer to

Question 1(a) is in the affirmative, is it possible, given that the Regulation takes no account of the legislation harmonised by the Nordic Council on the recognition and enforcement of public law decisions on custody, as described above, but solely of a corresponding private law convention, nevertheless to apply this harmonised legislation based on the direct recognition and enforcement of administrative decisions as a form of cooperation between administrative authorities to the taking into custody of a child?

If the answer to Question 1(a) is in the affirmative and that to Question 2 is in the negative, does the Brussels IIa Regulation apply temporally to a case, taking account of Articles 72 and 64(2) of the regulation and the abovementioned harmonised Nordic legislation on public law decisions on custody, if in Sweden the administrative authorities took their decision both on immediate taking into custody and on placement with a family on 23.2.2005 and submitted their decision on immediate custody to the administrative court for confirmation on 25.2.2005, and that court accordingly confirmed the decision on 3.3.2005?

Of particular interest is the **first question** referred to the ECJ: With this question, the Finnish referring court basically aims to know whether a decision ordering the immediate taking into custody of a child and his or her placement

outside the home falls within the scope of application of Brussels II *bis*. To answer this question, the Advocate General examines two questions: First, can the immediate taking into custody of a child and his or her placement outside home be qualified as measures concerning parental responsibility in terms of the Regulation? And secondly, do they constitute civil matters?

The first of these questions can be answered easily with regard to the placement of a child in a foster family or in institutional care, since this measure is explicitly mentioned in Art. 1 (2) (d) Brussels II *bis*. In contrast to that, the immediate taking into custody of a child is not referred to in Art. 1 (2) of the Regulation. However, the Advocate General argues – in accordance with several Member States – that the immediate taking into custody of a child and his or her placement in a foster family or in institutional care were connected very strongly (para. 28). As Art. 1 (1) (b) Brussels II *bis* showed, matters of parental responsibility included not only measures regarding the termination or delegation of parental responsibility, but also measures concerning the excercise of parental responsiblity. Even though the parents did not lose their custody as such in case of an immediate taking into custody or in case of the placement of the child outside home, they could not exercise essential parts of it anymore (para. 30). Consequently, also the immediate taking into custody of a child constitutes, according to the Advocate General, a matter of parental responsibility.

Of particular interest are the Advocate General's remarks with regard to the second problem – namely the question whether these kind of measures can be regarded as civil matters. Regarding this question, the Swedish government argued, protective measures, such as the immediate taking into custody and the placement of a child in a foster family, did not constitute "civil matters" since they were ordered by public authorities acting in the exercise of their public powers (para. 34). Thus, the Swedish government applied the principles of delimitation which have been elaborated by the ECJ with regard to the Brussels Convention – most recently in *Lechouritou* – also with regard to Brussels II *bis*. This point of view is not shared by the Advocate General. She argues that the aims and the history of the Brussels Convention – with regard to which the delimitation between public and civil matters has been developed – did not necessarily correspond with those of the Brussels II *bis* Regulation. Consequently, the term of "civil matters" had to be interpreted independently with regard to the Brussels II *bis* Regulation (para. 38). Here the Advocate General argues that the restriction

or termination of parental responsibility (Art. 1 (1) (b) Brussels II *bis*) are usually ordered by public authorities. Further, the measures explictly mentioned in Art. 1 (2) Brussels II *bis* constituted in general public protective measures. This enumeration would not make any sense, if one regarded those measures not as civil matters because a private party (parents) and a public authority are concerned (paras. 40, 41). Further, also recital No. 5 („[…] this Regulation covers all decisions on parental responsibility, including measures for the protection of the child" […]") showed that the term of "civil matters" had to be interpreted in an extensive way (para. 42). This was also the case if the measure in question is regarded as a public matter in one Member State (para. 44). Consequently, the Advocate General regards decisions on the immediate taking into custody of a child and the placement of a child in a foster family as civil matters which concern parental responsibility and fall therefore within the scope of the Brussels II *bis* Regulation (para. 53).

With regard to the **second question** referred to the ECJ, the Advocate General holds that Finland and Sweden are – insofar as Brussels II *bis* is applicable – restrained from applying derogating national rules (para. 60).

The Opinion is not available in English yet, but can be found in several languages, inter alia in Spanish, German, Italian and French on the ECJ's website.

See also our older post regarding the reference for a preliminary ruling which can be found here.

Follow-up Australian Article on Enforcing a Judgment on a Judgment

Further to the post in May this year regarding P St J Smart's article which contended that an Australian court should not enforce a "judgment on a judgment", Ian Molloy has written a follow-up article in the latest *Australian Law*

Journal (2007 vol 81, p 760) highlighting two cases which adopt this view. The cases are the Supreme Court of New South Wales decision in *Taylor v McGiffen* (unreported, Supreme Court of New South Wales, 15 July 1985) and the National Court of Justice of Papua New Guinea decision in *WorkCover Authority (NSW) v Placer (PNG) Exploration Ltd* [2006] PGNC 47. Ian Molloy's article is available on the internet to Lawbook Online subscribers.

Romanian Journal of Private International Law and Comparative Private Law

A new yearbook devoted to private international law has been recently published in Romania: **Revista de Drept International Privat ?i Drept Privat Comparat** (Journal of Private International Law and Private Comparative Law). Published by Sfera Juridica, the journal is edited by *Dan Andrei Popescu* (Babe?-Bolyai University, Cluj-Napoca) and has an editorial advisory board of both Romanian and foreign scholars.

The first issue (2006) contains a large number of articles and comments, dealing with private international law, comparative law and arbitration. While all the articles are published in Romanian, a translation is provided for most of them (in English, French or German). Here's a short extract of the table of contents (only translated titles are listed: for the full TOC, and the original Romanian titles, please refer to this .pdf file – hosted by the Àrea de Dret Internacional Privat blog):

> *Viviana Onaca, Entraide judiciaire en matière civile et commerciale – le présent et les perspectives;*
>
> *Christian von Bar, Ein Raum der Sicherheit, der Freiheit und des Rechts – auch des Privatrechts?;*

Private International Law

Maurice N. Andem, Jurisdictional Problems in Private International Law: A Brief Survey of International Co-operation in Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters;

Bertrand Ancel, Horatia Muir Watt, L'intérêt supérieur de l'enfant dans le concert des juridictions : le Règlement Bruxelles II bis;

Andrea Bonomi, The Role of Internationally Mandatory Rules in an European Private International Law System;

Bernard Dutoit, Le droit des contrats face à la globalisation des relations humaines;

Marc Fallon, Lignes de force de l'interaction du droit international privé et du droit de l'Union européenne;

David Hayton, Trusts in EU Private International Law;

Alina Oprea, La Convention européenne des droits de l'homme et l'application des normes étrangères en droit international privé;

International Arbitration

Caixia Yang, Évolution de l'arbitrage commercial international en droit chinois et situation actuelle;

Comparative Private Law

Abbas Karimi, Les modifications du code français de la consommation par la transposition de la directive européenne 93-13 du 5 avril 1993;

Laura Tofana, Mircea Dan Bocsan, Aperçu sur le cadre juridique de l'adoption internationale en Roumanie – une analyse critique de la loi no.273/2004;

Paul Vasilescu, Entre la réforme et les reliques civiles – l'insolite d'un vendeur impayé;

Book Reviews

Stéphanie Francq, L'applicabilité du droit communautaire dérivé au regard des

méthodes du droit international privé (Alina Oprea);

Bernard Dutoit, Le droit international privé ou le respect de l'altérité (Alina Oprea);

***In Memoriam Gerhard Kegel (1912 – 2006)**, Heinz-Peter Mansel.*

(Many thanks to Raluca Ionescu – Universidad Autónoma de Barcelona and Àrea de Dret Internacional Privat blog – for the tip-off)

CLIP Launched its Website

The European Max-Planck-Group for Conflict of Laws in Intellectual Property, known also as CLIP, has just recently made its website accessible to the public. Under the http://www.cl-ip.eu one may now find the references to the documents they produced and the two pdf. files previously posted here, list of the members with links to their biographical data, events announcements, intranet page accessible only by the members, and links to two parallel projects of the *Université Libre de Bruxelles* and the American Law Institute.

The novelty on this website concerns the announced conference "Intellectual Property and Private International Law" to be held on 4 and 5 April 2008 at University of Bayreuth (Germany). The program is not available yet but this blog will try to keep its readers informed of the news in this field.

Questions and comments on CLIP and their project are to be addressed to:

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“Ut Res Magis Valeat Quam Pereat” as a “Dispositive” Choice of Law Factor: A Recent Decision from the Second Circuit

A divided panel of the Second Circuit held last week that federal common law, and not Brazilian law, would be applied to a contract for the shipment of goods, notwithstanding the fact that the contract was negotiated, executed, and performed in Brazil, by a Brazilian company and a corporation that regularly conducts business in Brazil, concerning goods that were at all times located in Brazil. Dispositive of the choice of law inquiry was the fact that federal common law would enforce the contract provisions, while Brazilian law would not.

In *Eli Lilly Do Brasil, Ltda. v. Federal Express Corp.*, No. 06-cv-0530 (2d Cir., Sept. 11, 2007), Eli Lilly sued Federal Express in New York for the the value of pharmaceuticals that were stolen in transit between plaintiff’s factory in Brazil to Japan. Defendant raised a limitation on liability contained in the waybill for shipment. On cross motions for summary judgment, Defendant sought to enforce the limitation on liability under federal common law, and Plaintiff sought to apply Brazilian law, asserting that it would invalidate the clause without proof of Defendant’s gross negligence. The District Court applied federal common law, and granted Defendant’s motion.

The Second Circuit reviewed the choice of law decision *de novo* and, like the court below, “consult[ed] the Restatement (Second) of Conflict Laws” for guidance. Under the Section 6 factors, made relevant through section 188, the balance clearly tilted in favor of Brazil. However:

> *“[the] recognition that Brazil’s interest . . . is greater than the United States’ cannot be the end of our inquiry or determinative of its conclusion. . . . Which state is most interested under § 188 is a different question from which state has*

> *the more significant relationship with the parties and the contract for purposes of [the final choice of law]. . . . In this case, even taking account of Brazil's superior § 188 contacts, two of the § 6 factors emerge as determinative of United States venue: (1) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue in dispute, . . . and (2) protection of the parties' justified expectations. Once Lilly-for whatever reason-asked a United States court to consider its contract, it invited application of the well-settled 'presumption in favor of applying that law tending toward the validation of the alleged contract.' . . . This presumption is consistent with the general rule of contract construction that 'presumes the legality and enforceability of contracts.' The paramount importance of enforcing freely undertaken contractual obligations, especially in commercial litigation involving sophisticated parties, was obvious to the District Court and is obvious to us. The Restatement expressly provides that the justified expectation of enforceability generally predominates over other factors tending to point to the application of a foreign law inconsistent with such expectation."*

Under Federal common law, unlike Brazilian law, the limitation on the waybill is valid. The Second Circuit upheld the application of the former, and affirmed the decision below.

Judge Meskill filed a dissent. He generally opined tha "[t]he presumption in favor of applying the law that tends to validate a contract is [only] important where the alternative is no contract at all." Because there was no allegation that the entire waybill would be "completely invalidated" under Brazilian law, Judge Meskill would have vacated the summary judgment and remanded for a decision under Brazilian law. He also acknowledged that "while the federal common law's presumption in favor of applying the law that tends to validate contracts might mean that the United States has a *general* interest in validating contracts, the United States still does not have a 'significant' or 'close' relationship with *this* contract." Indeed, the United States' interest in enforcing contracts arises in any choice of law contract case filed in its courts. Therefore, under § 197 of the Restatement, "Brazil remains as the default jurisdiction whose laws govern this contract of transportation regardless of whether the liability limitation is valid under Brazilian law."

A link to the decision can be found here.

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Workshop: Conflict of Laws and Laws of Conflict in Europe and Beyond – Patterns of Supranational and Transnational Juridification

The one-day workshop titled “Conflict of Laws and Laws of Conflict in Europe and Beyond – Patterns of Supranational and Transnational Juridification” is hosted by the Law Department of the European University Institute and organized by Dr. Rainer Nickel of the University of Frankfurt am Main. It receives support under the FP 6, and makes part of the RECON project which seeks to clarify whether democracy is possible under conditions of pluralism, diversity and complex

multilevel governance.

Although, in a view of the topics, this worshop is not a typical conflict of laws event, it might be of interest for the users of this blog too. The workshop website is accessible here and the program containing the list of speakers and topics as well as members of the discussion panel and some other participants is available here.

The workshop is scheduled for 21 September 2007 and will take place in a beautiful venue in of the Florence European University Institute, Conference Room, Villa La Fonte, San Domenico di Fiesole. The registration is possible with Marlies Becker (marlies.becker@eui.eu).

The Cost of Transnational Accidents: Evolving Conflict Rules on Torts

Antonio Nicita (Professor of Economic Policy at University of Siena) and *Matteo Winkler* (LLM, Yale Law School; Ph.D., Bocconi University) have written an interesting paper on the economic analysis of the conflict of laws rules concerning transnational accidents, in particular domestic and supranational rules on tort liability. A preliminary version of the paper ("**The Cost of Transnational Accidents: Evolving Conflict Rules on Torts**") was presented on September 13th at the annual conference of the European Association of Law & Economics (EALE), held in Copenhagen.

An abstract has been kindly provided by the authors:

> *The paper is divided into two parts. In the first part, the authors show the main conflict rules concerning torts at the domestic level: loci commissi delicti (place of accident), lex loci laesionis (place of injury), forum shopping and forum non conveniens, parties' freedom of choice (before and after the accident), victim's*

freedom of choice. Then, the authors describe the problems pertaining to each of these rules. In the second part, they analyse two cases, Bhopal and Amoco Cadiz, and conclude that when State courts are called to settle disputes concerning transnational accidents, they tend to protect their own community from the accident's consequences, if negative, or alternatively, to discharge the accident's negative externalities to other States' community. Both approaches raise problems from the standpoint of externalities regulation: they lead either to underregulation or overregulation.

In particular, Nicita and Winkler maintain that when, like in Bhopal, State courts strictly enforce the lex loci rule, they might both favor the flux of investment towards developing countries – although the damages in favor of these countries' victims are likely to be undercompensated, or protect the delocalized activities of multinational enterprises, while when courts refer to the lex loci laesionis rule, they are likely to regulate the transnational activity and therefore to increase the costs of compliance borne by multinational enterprises.

As a third case study, finally, the authors examine the EC Regulation on the law applicable to torts, Rome II. According to this Regulation, they point out that there are some underlying policies, that attempt to supersede the policies enforcement by State courts.

The paper is available on the EALE Conference's website, and will be revised by the authors according to the observations coming from the conference's public.

On the economic analysis of conflict of laws, see also some of our previous posts at the following links: 1, 2, 3, 4, 5, 6, 7.

Rome I: EP Rapporteur's

Compromise Amendments and Council's Working Text

In the first meeting held by the **European Parliament's JURI Committee** after the summer break (10/11 September), the Rapporteur for Rome I, *Cristian Dumitrescu*, presented a **new set of 43 compromise amendments** to the initial Commission's Proposal, to be discussed within the Committee in order to adopt a final text of the Report for the Parliament's plenary session. While taking into account the previous works of the JURI Committee on Rome I (see our post here), the Rapporteur drafted these new amendments in view of the final text of the Rome II Regulation and the current discussion on Rome I in the Council (see below). As he states in the justification to amendment n. 2,

> *[t]he proposed compromise amendments set out in this paper have several aims. First, they are intended to bring the Regulation more closely into line with Rome II as adopted. Secondly, they seek to introduce changes already accepted in the Council working group and hence aim at reaching an agreement with the Council. Thirdly, they propose solutions in areas where the Council has not yet been able to reach agreement. Fourthly, they are designed to facilitate ecommerce by positing solutions lying outside the area of private international law to difficulties which conflict-of-laws rules cannot resolve in themselves. Lastly, the amendments are intended to bring into the public domain, and hence make available for public debate in a democratic assembly, technical changes discussed so far only within the Council. The rapporteur has presented them in order to foster debate within the Committee and negotiations with the Council.*

As regards the conflict rules, see compromise amendments n. 21 (Art. 3), n. 22 (Art. 4), n. 23 (**new Art. 4a on contracts of carriage**), n. 26 (a new, complex **Art. 5a dealing with insurance contracts**) and n. 27 (Art. 6 on individual employment contracts). **Art. 7 on contracts concluded by an agent is deleted** (see amendment n. 28).

Consumer contracts (Art. 5) are dealt with in the new package only as regards the scope of the exclusions (Art. 5(3): see amendments nn. 24 and 25), but the

whole provision was redrafted by the Rapporteur in a separate compromise amendment presented in June (compromise amendment n. 1: see our post here). However, the Rapporteur remains quite sceptical as regards the effectiveness of the protection afforded by a conflict rule, and he states in new Recital 10a (compromise amendment n. 14) that

> *[w]ith […] reference to consumer contracts, recourse to the courts must be regarded as the last resort. Legal proceedings, especially where foreign law has to be applied, are expensive and slow. The introduction of a mechanism to deal with small claims in cross-border cases is a step forward. However, the protection afforded to consumers by conflict-of-laws provisions is largely illusory in view of the small value of most consumer claims and the cost and time consumed by bringing court proceedings. It is therefore considered that, particularly as regards electronic commerce, the conflicts rule should be backed up by easier and more widespread availability of appropriate online alternative dispute resolution (ADR) systems. The Member States are encouraged to promote such systems, in particular mediation complying with Directive …/…, and to cooperate with the Commission in promoting them.*

As it was the case for Rome II, some controversial issues have been moved by the Rapporteur in the Recitals accompanying the Regulation: see for instance compromise amendments nn. 5 and 6 (new Recitals 7a and 7b) on the choice of non-State bodies of law as the applicable law, and compromise amendment n. 19 (Recital n. 15) on the relationship between the Regulation and Community law.

On the Council's side, a complete text of the Rome I Regulation has been recently made publicly available in the Register (doc. n. 11150/07 of 25 June 2007). It was drafted in June by the outcoming German Presidency and the Portuguese Presidency on the basis of the meetings of the Committee on Civil Law Matters during the first semester 2007 and the comments made by delegations.

It contains the text of the compromise package agreed by the Council in April 2007 (doc. n. 8022/07 ADD 1 REV 1: see our post here) and a proposed wording for the provisions that were left over. The latter include Art. 4a on contracts of carriage – three options are proposed as regards carriage of passengers -, Art. 5 on consumer contracts, Art. 5a dealing with insurance contracts, Art. 8 on

overriding mandatory provisions, Art. 13 on voluntary assignment and contractual subrogation.

For better readability, the compromise package is presented in italics; a number of footnotes completes the text, highlighting doubts raised by the delegations and provisions which need further discussion or clarification.

The adoption of the Report on the Rome I Proposal is expected in the EP's JURI Committee in one of the forthcoming meetings. According to current forecasts (subject to frequent changes: please refer to the Rome I OEIL page), the vote at first reading in the Parliament's plenary session is scheduled on 28 November 2007; a political agreement on common position is expected in the Council in the last JHA session under the Portuguese Presidency, on 6 December 2007.

Conference: Community Trademarks and Designs – Significant Recent Developments

From the conference website: The seminar will focus on significant developments since 2005, when the last ERA seminar was held at the Office for Harmonisation in the Internal Market (OHIM).

In the field of designs, the Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs enabling the international registration of community designs and to which the European Union has just acceded will be presented and its consequences discussed. Concerning spare parts, progress on discussions relating to the proposal for a Directive amending Directive 98/71/EC on the legal protection of designs (COM(2004)582) will be analysed.

Concerning trademarks, the seminar will focus on conflicts of laws, in particular within the framework of the Internet. The implications of the Rome II proposal on

the law applicable to non-contractual obligations will form an integral part of the discussions.

At a jurisprudential level, the most significant community case law on invalidity decisions concerning trademarks and designs will be presented.

The last part of the seminar will be dedicated to the mechanisms aiming to reinforce intellectual property rights. The conference will provide an overview of the transposition of the Enforcement Directive 2004/48/EC. The implications of the proposed directive on criminal measures aimed at ensuring the enforcement of intellectual property rights (COM(2005)276 final) will also be discussed. Experts from OHIM, academics and practitioners will be invited to give their point of view.

Target audience: Lawyers in private practice and in-house counsel, civil servants of national and European authorities responsible for trademarks and designs, judges, academics

This conference to be held in Alicante, 22-23 November 2007, is organised by ERA. The conference programme can be downloaded from the conference website.