

Mexico First State to Join Hague Choice of Court Convention of 2005

According to recent news published on the website of the Hague Conference on Private International Law (HCCH), on Wednesday, 26 September 2007, Mexico deposited its instrument of accession to the Hague Convention of 30 June 2005 on Choice of Court Agreements. Pursuant to its Art. 31, one more ratification or accession will suffice to bring the Convention, which is open to all States, into force.

Further information on the Convention (status table, explanatory report and preliminary documents, translations and bibliography) can be found on the related section of the HCCH website.

(Many thanks to Pietro Franzina, University of Ferrara, for the tip-off)

Conference: PIL and Protection of Foreign Investors

University of Montenegro Faculty of Law in Podgorica, with the support of the GTZ organize the Fifth Annual Conference: "Private International Law and Protection of Foreign Investors" (*Međunarodno privatno pravo i zaštita stranih investitora*).

The program includes the following speakers and topics:

Maja Stanivuković: Clause Concerning the Observation of All Commitments which the State Assumes Towards the Foreign Investor (the Umbrella Clause) in Bilateral Investment Protection Treaties (*Klauzula o ispunjenju svih obaveza koje je država preuzela prema stranom ulagaču (kišobran klauzula) u dvostranim*

ugovorima o zaštiti investicija)

Žorž Krivokapić: Some Modern Clauses in Investment Agreements (*Neke moderne klauzule u investicionim ugovorima*)

Uglješa Grušić: Effects of Choice of Court Clauses in European, English and Serbian Law (*Dejstvo prorogacionih sporazuma u evropskom, engleskom i srpskom pravu*)

Mirela Župan: Widening Party Autonomy to Non-State Law (*Širenje stranačke autonomije na izbor ne državnog prava*)

Ivana Kunda: Internationally Mandatory Rules: Defining their Notion in European Private International Law (*Međunarodno prisilna pravila: određenje pojma u europskom ugovornom međunarodnom privatnom pravu*)

Bernadet Bordaš: Certain Issues of Resolving Investment Disputes as an Investor Protection Instrument (*Neka pitanja rešavanja investicionih sporova kao instrumenta zaštite investitora*)

Vesna Lazić: Suitability of the UNCITRAL Arbitration Rules for the Settlement of Investment Disputes

Michael Wietzorek: Arbitration of Investment Disputes

Toni Deskoski: The Importance of the Right to be Heard in International Arbitration Proceedings

Vladimir Savković: Internet Arbitrations as a Model for Resolving Disputes Arising Out of the Electronic Contracts – Pros and Cons (*Internet arbitraže kao model za rešavanje sporova proizašlih iz elektronskih ugovora – pro et contra*)

Christa Jessel Holst: The Directive 2005/56/EC of 26 October 2005 on Cross-Border Mergers of Limited Liability Companies and Its Implementation in Member-States with Restrictions in the Legal Transactions of the Real Properties

Vlada Polović: The Status of Foreign Investors in Domestic Insolvency Proceedings (*Položaj stranih investitora u stečajnom postupku na domaćoj teritoriji*)

Milena Jovanović-Zattila: Investor Protection on the Capital Market (*Zaštita*

investitora na tržištu kapitala)

Davor Babi?: Law Applicable to Takeover of Joint Stock Companies (*Pravo mjerodavno za preuzimanje dioničkih društava*)

Predrag Cvetkovi?: International Legal Regime for Foreign Investments: The Role of the World Trade Organisation (*Međunarodno-pravni režim stranih ulaganja: o ulozi i značaju Svetske trgovinske organizacije*)

Valerija Šaula: On the Occasion of a Decision of the Constitutional Court of Bosnia and Herzegovina – The Issue of Service Being Made Abroad as a Condition for Recognition of a Foreign Judgement (*Povodom jedne odluke Ustavnog suda Bosne i Hercegovine-Problem dostavljanja u inostranstvo kao uslov za priznanje presude stranog suda*)

The conference is to be held from 18 to 20 October 2007 in the Hotel Bellevue Iberostar in Bečići (Montenegro). The proceeds from the conference will be published by the Faculty of Law in Podgorica.

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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) ²apply, 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 exercise of parental responsibility. 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 explicitly 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 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 that "[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 workshop 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.