Study on the Application of Brussels I in the Member States Completed

The Study on the Application of the Brussels I Regulation in the Member States which has been carried out by the Institute for Private International Law at the University of Heidelberg under the direction of *Prof. Dr. Burkhard Hess, Prof. Dr. Thomas Pfeiffer* (both Heidelberg) and *Prof. Dr. Peter Schlosser* (Munich) on behalf of the European Commission has been completed now.

The aim of the study has been to prepare a report of the Commission according to Art. 73 Brussels I. For this purpose, for the first time since the entry into force of the Brussels I Regulation, statistical, empirical and legal data on the application of the Regulation has been collected in all former 25 Member States (with the exception of Denmark). The comprehensive survey has been executed with the assistance of national reporters from the respective Member States by means of numerous personal interviews with lawyers, judges and other legal practitioners, written consultations as well as an extensive evaluation of case law on the basis of questionnaires elaborated by the general reporters.

Based on the information submitted by the national reporters, a report has been drawn up by the general reporters which gives an overview of the experiences made with the Regulation in the Member States, examines problems and contains several suggestions for future amendments of the Regulation.

This general report has now been published on the website of the European Commission. The individual national reports will be publicly available in the near future as well.

See regarding the study also our previous post which can be found here.

Swedish Supreme Court on Jurisdiction and Trademark Infringements

The Swedish Supreme Court (Högsta Domstolen) recently rendered a decision on rejection to refer a case to the ECJ for a preliminary ruling on the proper interpretation of Article 5.3 of the Council Regulation no 44/2001 of 22 December 2000 (hereinafter "the Brussels I Regulation"). The decision rendered 27 April 2007 with case no. Ö 210-07 can be retrieved here.

Parties, facts, conclusions, legal basis for appeal, contentions before the court

The plaintiff, Aredal Foam Systems HB, a company domiciled in Sweden, served the defendant, MSR Dosiertechnik GmbH, a company domiciled in Germany, with a subpoena in a Swedish court of First Instance (tingsrätten), asking that Court to force the defendant to discontinue infringing the plaintiff´s trademark "FireDos" in Sweden, Spain, Great Britain, the Benelux-countries and France, where the plaintiff had the exclusive right to that trademark, and furthermore, to recompense the economic loss occurred in those States. The judgment of the First Instance was appealed to the Swedish Court of Second Instance (Svea Hovrätt), who attributed adjudicatory authority to Swedish courts, but only to the extent the defendant had infringed the plaintiff´s Swedish trademark. The judgement of the Court of Second Instance prompted the plaintiff to appeal to the Swedish Supreme Court (Högsta Domstolen). Before the Swedish Supreme Court, the plaintiff´s object of action was to ask that Court, first, to refer the case to a new trial before the Court of First Instance based on the contention that Swedish courts were competent to adjudicate claims of the plaintiff relating to infringement and economic loss in all the said States, second, to refer the case to the ECJ for a preliminary ruling on the proper interpretation of Article 5.3 of the Brussels I Regulation, and, third, to render a decision that the defendant pay the plaintiff´s procedural costs before the Swedish Supreme Court. This case note will solely venture into the question of adjudicatory authority.

Ratio decidendi of the Swedish Supreme Court

First, the Swedish Supreme Court identified the legal basis for conferring, delimiting and thus both attribute and exclude adjudicatory authority to Swedish courts. Since the defendant was domiciled in an EU State, the legal basis for determining the attribution of jurisdiction to Swedish courts was the Brussels I Regulation.

Second, the Swedish Supreme Court identified the relevant provisions for the case, which were the main rule of jurisdiction in Article 2 and the exception to the main rule contained in Article 5.3 of the Brussels I Regulation.

Third, the Swedish Supreme Court identified the legal question in issue. With reference to the wording of the Brussels I Regulation Article 5.3, the Swedish Supreme Court stated that the plaintiff can sue the defendant "at the place where the harmful event occurred or may occur". That wording was according to the Swedish Supreme Court, with reference to the case law of the ECJ, to be understood as meaning the place giving rise to the damage as well as the place where the damage occurred, where upon the place where the damage occurred does not encompass the place where the plaintiff alleges to have suffered an economic loss as a consequence of a direct damage initially suffered and occurred in another Member State. Therefore, the Swedish Supreme Court reasoned, the legal question in issue was where the place of the event initially causing tortious, delictual or quasi-delictual liability to incurr directly produced its harmful effects upon the person who is the victim of that event.

Fourth, in answering that question, the Swedish Supreme Court stated, with reference to legal theory, when a trademark is infringed, the direct damage occurs (beyond doubt) in the State where the trademark is registered or incorporated (lex loci protectionis). Against this background, and with the legal relationship not involving claims that MSR in Sweden had acted so that the foreign trademarks of Aredal had been infringed, the Swedish Supreme Court concluded it could not attribute and extend the adjudicatory authority of Swedish courts more than the Swedish Court of Second Instance could ground Swedish jurisdiction in accordance with the Brussels I Regulation Article 5.3. By consequence, the Swedish Supreme Court established there was no legal ground to send the case to the ECJ for a preliminary ruling on the proper interpretation of the Brussels I Regulation Article 5.3.

Christian Schulze, ‘The 2005 Hague Convention on Choice of Court Agreements’, (2007) 19 SA Merc LJ 140-150

The article discusses the 2005 Hague Convention’s rules on jurisdiction (of the chosen and not-chosen courts) and the recognition and enforcement of resulting judgments. It then goes on to examine the role of the new convention in comparison to other conventions and to the Brussels I Regulation. Reference is made to the different objectives of these international instruments and to the more limited scope of the Hague Convention. The article also discusses jurisdiction agreements in general, pointing out that they are common in international commercial contracts and may be regarded as a prudent step for parties to take. The author describes the distinction between exclusive and non-exclusive choice of court agreements. He concludes by stating that this convention makes litigation a more viable alternative to arbitration since it ensures the enforcement of choice of court agreements in the same fashion as the New York Convention (1958) does for arbitration agreements. He then expresses the hope that the new convention would draw as much interest as the New York Convention.

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" (*Me?unarodno privatno pravo i zaštita stranih investitora*).

The program includes the following speakers and topics:

Maja Stanivukovi?: 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 ulaga?u (kišobran klauzula) u dvostranim ugovorima o zaštiti investicija*)

?or?e Krivokapi?: Some Modern Clauses in Investment Agreements (*Neke moderne klauzule u investicionim ugovorima*)

Uglješa Gruši?: 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 strana?ke autonomije na izbor ne državnog prava*)

Ivana Kunda: Internationally Mandatory Rules: Defining their Notion in European Private International Law (*Me?unarodno prisilna pravila: odre?enje pojma u europskom ugovornom me?unarodnom 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 Lazi?: 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 Savkovi?: Internet Arbitrations as a Model for Resolving Disputes Arising Out of the Electronic Contracts – Pros and Cons (*Internet arbitraže kao model za rješavanje 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 ?olovi?: The Status of Foreign Investors in Domestic Insolvency Proceedings (*Položaj stranih investitora u ste?ajnom postupku na doma?oj teritoriji*)

Milena Jovanovi?-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 dioni?kih društava*)

Predrag Cvetkovi?: International Legal Regime for Foreign Investments: The Role of the World Trade Organisation (*Me?unarodno-pravni režim stranih ulaganja: o ulozi i zna?aju 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 Be?i?i (Montenegro). The proceeds from the conference will be published by the Faculty of Law in Podgorica.

The contact person is:
Professor Dr. Maja Kosti?-Mandi?
Faculty of Law
Ul. 13. jula br. 2
81 000 Podgorica
Montenegro
tel: +381 81 481 110
e-mail: majak@cg.yu

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:

Professor Dr. Annette Kur
Max Planck Institute for Intellectual Property,
Competition and Tax Law
Marstallplatz 1
80539 Munich/Germany
Phone: + 49 (89) 24 24 6 404
Fax: + 49 (89) 24 24 6 501
Email: annette.kur@ip.mpg.de

"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.