Ontario Court Enforces American Judgments Against Iran

Under the *State Immunity Act*, foreign states are generally immune from being sued in Canada. This includes being sued on a foreign judgment. However, in 2012 Canada enacted legislation to give victims of terrorism the ability to sue a foreign state that sponsored the terrorism. It also made it easier for foreign judgments against such a state to be enforced in Canada.

In *Tracy v The Iranian Ministry of Information and Security*, 2016 ONSC 3759 (released June 9, 2016; likely to be posted in the week of June 13, 2016, in CanLII) the Ontario Superior Court of Justice had to consider these legislative reforms and how they applied to a series of American judgments rendered against Iran in favour of American victims of terrorist acts which Iran was found to have sponsored. The court held that Iran was not immune from the enforcement proceedings and that accordingly the American judgments were enforceable against certain assets of Iran in Ontario.

The decision is reasonably detailed. It involves interpretation of the *State Immunity Act* and the *Justice for Victims of Terrorism Act*. It also considers issues relating to the limitation period and the enforcement of punitive damages awards (in this case, in the hundreds of millions of dollars). Not all of the analysis resonates as convincing and there is considerable scope for a possible appeal. For example, Iran's argument that the loss or damage suffered by the victim had to have been, on the language of s 4(1) of the *JVTA*, suffered after January 1, 1985, did not prevent the enforcement of American decisions in respect of acts of terror which happened before that date because, the court held, the victims continued to suffer harm on an ongoing basis. This seems vulnerable to challenge. In addition, the court's reasoning as to why the enormous punitive damages awards were not contrary to public policy is extremely brief.

However, on any appeal, Iran does have a significant procedural problem to overcome. It did not defend the enforcement actions when they were initially brought in Ontario. All of the immunity arguments were canvassed by the court as part of Iran's motion to have the resulting default judgments set aside, on the issue of whether Iran might have a viable defence on the merits. But at no

point did Iran offer any explanation for the initial failure to defend. While not conclusive, this weighs against setting the judgments aside even if Iran can show merit to its position on immunity.

The timing of the court's decision against Iran could pose challenges for the current Canadian government, which is currently working to re-engage with Iran after the previous government cut ties in 2012 (see news story here). In addition, a Montreal-based professor has recently been jailed in Iran and this has caused considerable concern in Canada (see news story here).

Save the date: Conference in Lucerne on the Hague Choice of Law Principles on 8/9 September

The University of Lucerne and the Hague Conference on Private International Law (HCCH) will be co-organizing a conference on the implementation of the Hague Choice of Law Principles ("*Towards a Global Framework for International Commercial Transactions: Implementing the Hague Principles on Choice of Law in International Commercial Contracts*") on 8/9 September 2016. The conference serves to analyze the impact and prospects of the 2015 Principles on Choice of Law in International Commercial Contracts (the Hague Principles) in the context of other relevant legal instruments applicable to international commercial transactions. It brings together distinguished academics, experts, private practitioners and representatives from various international institutions.

Scholars and practitioners in the fields of private international law and commercial law and dispute resolution are encouraged to participate.

Conference Directors: Prof. Dr. Daniel Girsberger, University of Lucerne (Switzerland), Dr. Christophe Bernasconi, Secretary-General (HCCH)

Venue: University of Lucerne, Auditorium 9, Frohburgstrasse 3, CH-6002

Lucerne (Switzerland)

Speakers: Jürgen Basedow, Neil B. Cohen, Andrew Dickinson, Roberto Echandi, José Angelo Estrella Faria, Franco Ferrari, Lauro Da Gama e Souza Jr, Thomas Kadner Graziano, Peter Mankowski, Jan L. Neels, Emily O'Connor, J.A. Moreno Rodríguez, Geneviève Saumier, Linda Silberman, Renaud Sorieul

Participation fee: CHF 250.– (including documentation, catering and dinner on Thursday, 8 September 2016; accommodation not included)

Registration and further information: https://regis.buchertravel.ch/event/HCCH_2016

Contact: Mrs. Lisbeth Meule (lisbeth.meule@unilu.ch)

UNCITRAL – Heading for an International Insolvency Convention?

by Lukas Schmidt, Research Fellow at the Center for Transnational Commercial Dispute Resolution (TCDR) of the EBS Law School, Wiesbaden, Germany.

UNCITRAL Working Group V (Insolvency Law) has issued a report on the work of its forty-ninth session, which took place in New York from 2 – 6 May 2016. The Working Group continued its deliberations on the cross-border insolvency of multinational enterprise groups, the recognition and enforcement of insolvency-derived judgments and the obligations of directors of enterprise group companies in the period approaching insolvency. Furthermore the report communicates that a meeting of an open-ended informal group established to consider the feasibility of developing a convention on international insolvency issues has taken place. This is rather exciting, as the development of an international insolvency convention by UNCITRAL would constitute the next big step in international

insolvency law leaving behind the defiencies of soft law. The report is available at: http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html.

Reminder: ILA 77th Biennial International Conference 2016

The International Law Association (ILA) invites you to join the ILA 77th Biennial International Conference 2016 which will take place from **7 to 11 August 2016** at the Sandton Convention Centre in Johannesburg, South Africa.

The main theme of the conference will be **'International Law and State Practice: Is there a North – South Divide?'**

The keynote address at the opening session will be given by **Judge Navi Pillay**, the former UN High Commissioner for Human Rights. Programme details as well as further information on the illustrious panel of renowned speakers from across the globe are available at the conference website.

The regular registration closes **30 June 2016**. If you have not yet registered you can do so by clicking here.

The ILA looks forward to seeing you in Johannesburg!

Job Opening: Research Fellow (Wissenschaftliche/r

Mitarbeiter/in) in Private International Law / Transnational Commercial Law at the EBS Law School, Wiesbaden (Germany)

The EBS Law School in Wiesbaden, Germany, is looking for a highly skilled and motivated research fellow on a part-time basis (50%).

The position will entail research within the team of the Chair for Civil Law, Civil Procedure and Private International Law (Prof. Dr. Matthias Weller, Mag.rer.publ.) and within the EBS Research Center for Transnational Commercial Dispute Resolution (TCDR) on a number of new and ongoing projects focusing on Private International Law, Transnational Commercial Law and International Civil Litigation.

The position includes teaching and programme management for the "EBS Law Term" on Transnational Commercial Law, an intense academic programme in English from September to December each year for incoming international students from all over the world, mainly from the partner law faculties of the EBS Law School. For further information on this programme: http://www.ebs.edu/lawterm.

Requirements:

- a university law degree (e.g. JD, preferably the German "Erste Juristische Prüfung")
- qualifications or at least substantial interest in Private International Law and Transnational Commercial Law
- excellent English language skills

The position is limited to two years but can be prolonged. The work location is Wiesbaden, a city close to Frankfurt, Germany. The work involves 19,75 hours per week (50%). The payment is subject to negotiations with the University,

depending on the level of qualifications, but will not be lower than the average payment for research fellows (*Wissenschaftliche Mitarbeiter*) there. The faculty offers to obtain a doctoral degree on the basis of a thesis (*Dissertation*) if the faculty's requirements for admission are met.

How to Apply:

Please send your application with reference to **"ZRV_WiMi_Law Term"** via email to antonella.nolten@ebs.edu. The application should include a cover letter, a CV containing, if applicable, list of publications and/or teaching evaluations and electronic copies of all relevant certificates. Please do not hesitate to contact Antonella Nolten in case of further questions.

We are looking forward to hearing from you!

German Federal Court of Justice (Bundesgerichtshof) rules on the validity of arbitration agreements (Claudia Pechstein)

by Lukas Schmidt, Research Fellow at the Center for Transnational Commercial Dispute Resolution (TCDR) of the EBS Law School, Wiesbaden, Germany.

Claudia Pechstein, an internationally successful ice speed skater, claims damages against the International Skating Union (ISU) because of a two-year-suspension for doping. The essential question was whether an arbitration agreement signed by *Pechstein* is effective. This agreement includes amongst other things the exclusive jurisdiction of the Court of Arbitration for Sport (CAS) in Lausanne. Pechstein claimed that the arbitration agreement was invalid under § 19 GWB (German Antitrust Legislation) because the ISU (nationally and

internationally only the ISU organizes competitions in ice speed skating) has abused its dominant position. *Pechstein* had to sign the arbitration agreement to be admitted to the competition. She claimed that the list of arbitrators of the CAS, from which the parties must each select an arbitrator, has not been prepared impartially because the sports federations and Olympic committees have a clear predominance in creating the list.

However, the German Federal Court of Justice (Bundesgerichtshof) does not agree with these propositions. The Court, by its decision of 7 June 2016, docket no. KZR 6/15, ruled that the action is inadmissible because of the arbitration agreement. The Court held that the ISU is indeed dominant in the organization of international speed skating competitions, but has shown no abusive conduct because the associations and the athletes do not confront each other as guided by fundamentally conflicting interests. There was no structural imbalance in the composition of the tribunal ruling on *Pechstein's* suspension. Furthermore, in the Court's view, *Pechstein* has signed the agreement voluntarily, even if she otherwise could not have participated in the contest. A consideration of the mutual interests in the light of § 19 GWB justifies the application of the arbitration clause. However *Pechstein* is entitled to invoke the internationally competent Swiss courts following the arbitral procedure.

2nd Liechtenstein Conference on Private International Law on 30 June 2016

Despite the fact that thousands of legal persons and personal relations are subject to Liechtenstein Private International Law, Liechtenstein law has retained some unique features. Whether the unique features should be maintained, or provide the reasoning for a reform agenda, will be discussed at the 2nd Liechtenstein

Conference on 30 June 2016 organised by the Propter Homines Chair for Banking and Securities Law at the University of Liechtenstein.

The presentations will deal with Liechtenstein international company, foundation and trust law, conflicts of law relating to banks, prospectus liability and collectus investment schemes, as well as matters of succession and the potential of Liechtenstein as an arbitration venue. All presentations will be held in German.

Please find further information here.

In case of interests please contact: nadja.dobler@uni.li

Out now: Furrer/Markus/Pretelli (eds.), The Challenges of European Civil Procedural Law for Lugano and Third States (2016)

The new 2007 Lugano Convention, establishing parallelism with the Brussels I Regulation (Reg. 44/2001), had just entered into force in Switzerland in 2010 when it faced a new challenge in the form of the Recast Regulation (Reg. 1215/2012). Therefore, in 2014, CIVPRO (University of Bern), CCR (University of Luzern) and the Swiss Institute for Comparative Law (Lausanne) invited professors, researchers, civil officers and practitioners from all over Europe to discuss the future of European civil procedure with a special focus on Lugano and third states. Alexander Markus (Bern), Andreas Furrer (Luzern) and Ilaria Pretelli (Lausanne) have now published the (English/German) volume containing the keynote speeches and the subsequent contributions to this conference as well as the reports on the discussion in the various panels. This book presents and analyzes the past, the present and the alternative conceivable futures of the Lugano model of a “parallel” convention. For further information, click here.

Reminder – Call for Papers – Young PIL Scholars' Conference

This post has kindly been provided by Dr. Susanne Gössl, LL.M.

"This post is meant to remind that the deadline for applications for the Young PIL Scholars' Conference in Bonn, Germany, in April 2017 is approaching.

We accept applications of junior researchers to present a paper until 30 June 2016. The topic is "Politics and Private International Law (?)". We envisage presentations of half an hour each in German language with subsequent discussion on the respective subject. The presented papers will be published in a conference transcript by Mohr Siebeck.

Please send an exposé of maximum 1,000 words to nachwuchs-ipr(at)institut-familienrecht.de. The exposé shall be in German language and composed anonymously that is without any reference to the authorship. The author including his/her position or other affiliation shall be identifiable from a separate file.

Additional information can be found at https://www.jura.uni-bonn.de/en/institut-fuer-deutsches-europaeisches-und-internationales-familienrecht/pil-conference/call-for-papers/

If you have any further questions, please contact Dr. Susanne Gössl, LL.M. (sgoessl(at)uni-bonn.de)."

Geo-blocking and the conflict of laws: ships that pass in the night?

On 25 May 2016, the European Commission presented its long-awaited proposal for a regulation on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market (COM[2016] 289 final).

In the Commission's words, "[t]he general objective of this proposal is to give customers better access to goods and services in the Single Market by preventing direct and indirect discrimination by traders artificially segmenting the market based on customers' residence. Customers experience such differences in treatment when purchasing online, but also when travelling to other Member States to buy goods or services. Despite the implementation of the non-discrimination principle in Article 20(2) of Directive 2006/123/EC 3 ("Services Directive"), customers still face refusals to sell and different conditions, when buying goods or services across borders. This is mainly due to uncertainty over what constitutes objective criteria that justify differences in the way traders treat customers. In order to remedy this problem, traders and customers should have more clarity about the situations in which differences in treatment based on residence are not justifiable. This proposal prohibits the blocking of access to websites and other online interfaces and the rerouting of customers from one country version to another. It furthermore prohibits discrimination against customers in four specific cases of the sale of goods and services and does not allow the circumventing of such a ban on discrimination in passive sales agreements. Both consumers and businesses as end users of goods or services are affected by such practices and should therefore benefit from the rules set out in this proposal. Transactions where goods or services are purchased by a business for resale should, however, be excluded in order to allow traders to set up their distribution systems in compliance with European competition law."

From a conflicts perspective, the question that is most interesting is how the prevention of geo-blocking and similar techniques will relate to the "directed-activity"-criterion that the European legislature has used both in the Rome I Regulation (Article 6(1)(b)) and in the Brussels I (recast) Regulation (Article 17(1)(c)). In a series of cases starting with the *Alpenhof* decision of 2011

(ECLI:EU:C:2010:740) the CJEU has developed a formula for determining the direction of a trader's activity by focusing on its subjective intention to deliver goods or services to consumers in a certain country, i.e. that it "should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them." If standard techniques of geo-blocking or the use of different sets of general conditions of access to their goods or services are now banned as discriminatory, how will this affect the test developed by the CJEU; in other word, is it reasonable to infer that a trader has actually been "minded to conclude a contract" and consented to being sued in the state of the consumer's domicile if the trader has no legal option *not* to offer goods or services to the customer? The drafters have noticed this obvious problem and inserted a pertinent clause into Article 1 no. 5 of the proposal, which reads:

"This Regulation shall not affect acts of Union law concerning judicial cooperation in civil matters. Compliance with this Regulation shall not be construed as implying that a trader directs his or her activities to the Member State where the consumer has the habitual residence or domicile within the meaning of point (b) of Article 6(1) of Regulation (EC) No 593/2008 and point (c) of Article 17(1) of Regulation (EU) 1215/2012."

In light of the highly controversial experience with similar reservations – it suffices to think of Article 1(4) of the E-Commerce Directive (2000/31/EC) or Recital 10 of the recently withdrawn CESL proposal (COM[2011]635 final) –, I have doubts whether the separation between the two areas of law will work as smoothly as the Commission seems to imagine: if a trader is legally *coerced* to serve consumers in a certain state, any test aimed at determining his or her "state of mind" to do so necessarily becomes moot – which, on the other hand, may be a good opportunity for the CJEU to rethink its frequently criticized approach. Considering the (non-)treatment of Recitals 24 and 25 of the Rome I Regulation in *Emrek* (ECLI:EU:C:2013:666), however, I am inclined not too expect much deference from the Court to interpretative guidance provided by the European legislators…