The proposed draft text of the Hague Convention on the recognition and enforcement of foreign judgments

On 17 March 2016, the Council on General Affairs and Policy of the Hague Conference on Private International Law decided to set up a Special Commission to prepare a draft Convention on the recognition and enforcement of foreign judgments (the Hague Judgments Convention), while endorsing the recommendation of the Working Group on the Judgments Project that matters relating to direct jurisdiction should be put for consideration to the Experts' Group of the Judgments Project soon after the Special Commission has drawn up a draft Convention.

The Special Commission will meet in the Hague between 1 and 9 June 2016 to discuss the proposed draft text drawn up by the Working Group. The text may be found here, accompanied by an explanatory note prepared by the Permanent Bureau.

As stated in Article 1 of the proposed draft text, the Convention is meant to apply to the recognition and enforcement of judgments "relating to civil and commercial matters", at the exclusion of matters in the field of family law, the law of persons and successions. Insolvency, the carriage of passengers and goods, marine pollution, liability for nuclear damage and defamation are equally featured in the list of excluded matters.

Article 4(1) provides that a judgment given by a court of a Contracting State must be recognised and enforced in another Contracting State in accordance with the Convention. Recognition and enforcement may be refused only on the grounds specified in the Convention itself.

As a rule, a judgment is eligible for recognition and enforcement if one of the bases listed in Article 5 of the proposed draft text is met, ie, if jurisdiction was asserted in the country of origin in conformity with one of the grounds of jurisdiction contemplated by the Convention.

Suitable grounds include the habitual residence of the defendant (to be understood as meaning, pursuant to Article 3(2), the place where the defendant has its statutory seat, or under whose law it was incorporated, or where it has its central administration or principal place of business), and the defendant's consent to the jurisdiction of the seised court as expressed in the course of the proceedings.

According to the proposed draft text, a judgment is also eligible for recognition, *inter alia*: if it ruled on a *contractual obligation* "and was given in the State in which performance of that obligation took place or should take place under the parties' agreement or under the law applicable to the contract, unless the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State"; if it ruled on a *non-contractual obligation* arising from personal injury or damage to tangible property, "and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred"; if the judgment ruled on an *infringement of a patent, trademark, design or other IP right* required to be deposited or registered, "and it was given by a court in the State in which the deposit or registration of the right concerned has taken place"; if the judgment ruled on the *validity or infringement of copyright or related rights* "and the right arose under the law of the State of origin".

By derogation from Article 5, the proposed draft text sets forth in Article 6 some exclusive bases for recognition and enforcement. In particular, a judgment that ruled on the *registration or validity of patents, trademarks, designs, or other similar rights required to be deposited or registered* "shall be recognised and enforced if and only if the State of origin is the State in which deposit or registration has been applied for, has taken place, or is deemed to have been applied for or to have taken place under the terms of an international or regional instrument", while a judgment that ruled on *rights in rem in immovable property or tenancies of immovable property* for a period of more than six months "shall be recognised and enforced if and only if the property is situated in the State of origin".

The grounds on which a judgment eligible for recognition and enforcement may nevertheless be denied recognition or enforcement in a Contracting State are enumerated in Article 7.

Specifically, recognition and enforcement may be denied if the document which instituted the proceedings was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence or "was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents"; if the judgment "was obtained by fraud in connection with a matter of procedure"; if recognition or enforcement would be manifestly incompatible with the public policy of the requested State"; if the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfills the conditions necessary for its recognition in the requested State.

Pursuant to Article 9 of the proposed draft text, recognition or enforcement may also be refused "if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered".

Article 11 lays down the list of documents to be produced by the party seeking recognition or applying for enforcement of a foreign judgment under the Convention, while Article 12 clarifies that the procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless the Convention provides otherwise.

Post Brexit: The Fate of Commercial Dispute Resolution in London and on the Continent

A joint conference of the Max Planck Institute for Procedural Law (Luxembourg) and the British Institute for International and Comparative Law will be held on

May 26th in London, within the framework of a series of BIICL events on the Brexit.

This particular seminar will look at the potential impact of a Brexit on cross-border commercial dispute resolution and on the role of London as a center for international litigation and arbitration. Speakers will address selected questions such as the legal framework for the transitional period; the validity of choice of court agreements and future frequency of choice of court agreements in favour of English courts; the different approaches in England and under the Brussels I Recast as to parallel proceedings; the cross-border circulation of titles; the Swiss position as to commercial dispute resolution between Member States and third States. A roundtable discussion will place a particular focus on London's future as a centre for commercial dispute resolution post Brexit.

Speakers:

- Burkhard Hess, Max Planck Institute Luxembourg
- Richard Fentiman, University of Cambridge
- Andrew Dickinson, University of Oxford
- Marta Requejo Isidro, Max Planck Institute Luxembourg/University of Santiago de Compostela
- Trevor Hartley, London School of Economics
- Alexander Layton QC, 20 Essex Street
- Tanja Domej, University of Zurich
- Thomas Pfeiffer, University of Heidelberg
- Paul Oberhammer, University of Vienna
- Adam Johnson, Herbert Smith Freehills
- Martin Howe QC, 8 New Square
- Karen Birch, Allen and Overy
- Diana Wallis, President of the European Law Institute and former Vice-President of the European Parliament
- Deba Das, Freshfields Bruckhaus Deringer LLP

Time: 15:30-19:00 (followed by a drinks reception)

Venue: British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square, London WC1B 5JP

The program is available here; for registration click here.

Integration and Dispute Resolution in Small States

The British Institute of International and Comparative Law, the Open University and the Centre for Small States at Queen Mary University of London are organising a conference on "Integration and Dispute Resolution in Small States", hosted by Wilmer Cutler Pickering Hale and Dorr LLP on May 19 and 20, 2016. The aim of this 1½ day conference is to bring together academics, representatives of Small States, as well as lawyers litigating in or for Small States (defined as those States with a population of 1.5m or less), to discuss the particular issues these jurisdictions face in regard to international dispute resolution and regional integration. The conference focusses in particular on the commercial relations between large economies and Small States, the role of Small States as financial centres, as well as B2B, Investor-State and State-to-State dispute resolution involving Small States.

View the full programme and register here.

Speakers and Chairs

Gary Born WilmerHale (Keynote speaker); **Justice Winston Anderson** Caribbean Court of Justice; **Agnieszka Ason** Technische Universität Berlin; **Elizabeth Bakibinga** Commonwealth Secretariat; **Professor George Barker** Australia National University; **Dr David S Berry** University of the West Indies; **James Bridgeman** FCIArb; **N Jansen Calamita** BIICL; **Barbara Dohmann QC** Blackstone Chambers; **Conway Blake** Debevoise & Plimpton LLP; **Professor Sue Farran** University of Northumbria; **Stephen Fietta** Partner at Fietta; **Steven Finizio** WilmerHale; **Jack Graves** Touro College of Law; **Françoise L M Hendy** Barbados High Commission; **Desley Horton** WilmerHale; **Her Excellency Dr Len Ishmael** Ambassador, Embassies of the Eastern Caribbean States; **Michel Kallipetis QC** Independent Mediators Limited and Quadrant Chambers; **Edwini**

Kessie Office of the Chief Trade Advisor; **Alex Layton QC** 20 Essex Street; **Dr Eva Lein** BIICL; **Brian McGarry** Centre for Diplomacy & International Security, London Centre of International Law Practice; **Professor Baldur Þórhallsson** University of Iceland, Small States Studies; **Lauge Poulsen** University College London; **Jan Yves Remy** Sidley Austin; **Dominic Roughton** Herbert Smith Freehills LLP; **Professor Francesco Schurr** University of Liechtenstein; **Geoff Sharp** Clifton Chambers; **Mele Tupou** Ministry of Justice; **UNCITRAL**; **Professor Robert G Volterra**; **Professor Gordon Walker** Hamad Bin Khalifa University; **Tony Willis** Brick Court Chambers

The event is convened by:

Dr Petra Butler, Centre for Small States, Queen Mary University of London; **Dr Eva Lein**, British Institute of International and Comparative Law; **Rhonson Salim**, Open University.

New publication on Kiobel and human rights litigation

Maria Chiara Marullo and Francisco Javier Zamora Cabot have published a paper on "TRANSNATIONAL HUMAN RIGHTS LITIGATIONS. KIOBEL'S TOUCH AND CONCERN: A TEST UNDER CONSTRUCTION."

The abstract reads:

In recent years the international debate on Transnational Human Rights Litigation has mainly focused, although not exclusively, on the role of the Alien Tort Claims Act as a way of redress for serious Human Rights violations. This Act has given the possibility of granting a restorative response to victims, in a Country, such as the United States of America, that assumes the defense of an interest of the International Community as a whole: to guarantee the access to justice to the aforesaid victims. The purpose of this article is to analyze the recent and restrictive position on this Act of the Supreme Court of the United States, in

the Kiobel case, and especially when, as a means of modulating the limitative doctrine affirmed there, the Touch and Concern test was introduced. It has generated from its very inception a strong discussion amongst international legal scholars and also great repercussions concerning the practice of the U.S. District and Circuit Courts.

The publication can be downloaded here or through SSRN.

Conference on the Hague Principles on Choice of Law, Lucerne 8-9 September 2016

The Permanent Bureau of the Hague Conference on Private International Law and the University of Lucerne are organising a conference "*Towards a Global Framework for International Commercial Transactions: Implementing the Hague Principles on Choice of Law in International Commercial Contracts*" in Lucerne on 8-9 September 2016.

The purpose of this conference is to present the impact and prospects of the Hague Principles of 2015 in the context of other instruments applicable to international commercial transactions.

For the programme and registration information see the conference's website.

Van Den Eeckhout on the

Proposed Revision of the Posting Directive

by Veerle Van den Eeckhout

On the blog section of the Dutch journal Nederlands Juristenblad, a blog of Veerle Van Den Eeckhout on the Proposal for a revision of the Posting Directive has been published, see here.

The blog is entitled “Modellering van internationaal privaatrecht – Een enkele ipr-technische aantekening bij het voorstel tot wijziging van de Detacheringsrichtlijn” (in English: “Modelling Private International Law. A single PIL-technical note on the proposed revision of the Posting Directive”). It is written in Dutch.

The blog focuses on a single technical PIL-aspect of the proposed revision of the Posting Directive; at the end, however, the issue is placed in a broader context of ongoing dynamics and debates in private international law – see also already on this the blog “The impact and potential of a curious and unique discipline. About PIL, Shell Nigeria, European and global competition and social justice”, published also on the blog section of the NJB-site, see here , available in English on https://conflictoflaws.de/2015/on-pil-international-labour-law-and-corporate-social-responsibility/.

Cross-border Bank Resolution and Private International Law

The following information have kindly been provided by Prof. Dr. Matthias Lehmann, University of Bonn.

Bank resolution is key to avoiding a repetition of the global financial crisis in which failing financial institutions had to be bailed out with taxpayers’ money. It permits recapitalizing banks or alternatively winding them down in an orderly

fashion without creating systemic risk. Resolution measures, however, suffer from a structural weakness. They are taken by nation-states with territorially limited powers, yet they target entities or groups with global activities and assets in many countries. Under traditional rules of private international law, these activities and assets are governed by the law of other states which is beyond the remit of the state undertaking the resolution.

Matthias Lehmann (University of Bonn) addresses this problem in a recent paper titled “Bail-in and Private International Law: How to Make Bank Resolution Measures Effective Across Borders”. He illustrates the conflict between resolution and private international law by using the example of the European Union, where the limitations of cross-border issues are most acutely felt. He explains the techniques and mechanisms provided in the Bank Recovery and Resolution Directive (BRRD) and the Single Resolution Mechanism (SRM) Regulation to make resolution measures effective in intra-Eurozone cases, in intra-EU conflicts with non-Euro Member States and in relation to conflicts with third countries. Besides this, he also throws light on the divergences and flaws in the BRRD’s transposition into national law. In this context, he discusses two recent cases, *Goldman Sachs International v Novo Banco SA* [2015] EWHC 2371 (Comm), and *BayernLB v Hypo Alpe Adria (HETA case)* Regional Court, Munich I, judgment of 8 May 2015, that have dealt with the recognition of foreign resolution acts. A brief overview of third-country regimes furthermore highlights the problems in obtaining recognition of EU resolution measures abroad.

Munich's Institute of Comparative Law celebrates its 100th Anniversary: Conference on 'Sales Law and Conflict of Laws from Ernst Rabel until Today', 16-17 June 2016, LMU Munich

The following announcement has been kindly provided by Professor Dr. Stephan Lorenz, LMU Munich.

It was in 1916 that Ernst Rabel founded the 'Institute of Comparative Law' at Munich University – the first of its kind in Germany. The 100th Anniversary of the Institute, which still persists as a department of the Institute of International Law at Ludwig-Maximilians-University Munich, gives reason to review the influence of Ernst Rabel on both, sales law and conflict of laws and to take a current view on recent developments in these fields. As is well-known, Rabel's work on sales law was highly influential for the development of the Hague Uniform Sales Law of 1964, the precursor of the CISG of 1980. The latter had a formative impact on EU consumer sales law and subsequently on the proposal for a Common European Sales Law (CESL). But also the current contractual conflict of laws of the EU as the Rome I-Regulation would not exist in its current form without the fundamental contributions of Ernst Rabel. The presentations of the conference cover the entire range of these topics from the beginnings of comparative law and its early years until its most recent developments:

- Dean's Greeting, *Prof. Dr. Martin Franzen*
- Introductory Speech, *Prof. Dr. Peter Kindler*
- The History of the Institute of Comparative Law, *Prof. Dr. Dagmar Coester-Waltjen, München/Göttingen*
- Welcome and Introduction, *Prof. Dr. Dr. h.c. mult. Hans Jürgen Sonnenberger, München*
- Ernst Rabel – The Munich Years, *Archivdirektor a.D. Hans-Joachim*

Hecker, Stadtarchiv München

- Karl Neumeyer as a Pioneer of Comparative Law in the field of Public Law, *Prof. Dr. Peter Huber, Judge at the Federal Constitutional Court (Bundesverfassungsgericht), München*
- Rabel's Influence on the CISG and the Development of European Sales Law, *Prof. Dr. Ulrich Magnus, Hamburg*
- The Distinction between Digital and Analogous Goods – How fit for the Future are the Commission's Proposals for a Law of Contracts in the Digital Interior Market?, *Univ.-Prof. Dr. Christiane Wendehorst, LL.M. (Cambridge), Wien*
- International Contract Law and CISG, *Prof. Dr. Andreas Spickhoff, München*
- Transaction-like Party Autonomy, *Prof. Dr. Marc-Philippe Weller, Heidelberg*
- Conclusions, *Prof. Dr. Stephan Lorenz, München*

Participation in the Conference requires prior registration here.

Call for Papers–International Law Weekend in NY

The American Branch of the International Law Association has issued a call for papers. See here for more details.

Private International Law

Newsletter

From the Private International Law Interest Group of the American Society of International Law:

We are pleased to present the second issue of “Commentaries on Private International Law,” the newsletter of the American Society of International Law Private International Law Interest Group.

You may find it here and here.