128th Conference of the Private International Law Association of Japan (2015)

The Private International Law Association of Japan will hold its 128th conference on **Saturday, June 6**, and **Sunday, June 7, 2015**, at the Campus of Waseda University, Tokyo. One of the sessions includes a symposium on “Regional Economic Integration and Private International Law”. The conference programme and further information are available here.

Gremlins no more – conflictoflaws.net is back

Apologies for our recent outage, which many of you had noticed – thanks to those who emailed in and pointed out the problems with accessing posts, search, etc. We had gremlins of some variety in the database which powers conflictoflaws.net, and after much prodding and pushing they have cleared off. Everything should now be working normally again (if anyone does spot a fault, please do let me know.)

The Judgments Project Moves On

From 3 to 6 February 2015, the Working Group on the Judgments Project met in The Hague for its fourth meeting under the chairmanship of Mr David Goddard QC. The Working Group was composed of 28 participants from 15 Members. At its

meeting, the Group further developed its proposed provisions for a future Convention on the recognition and enforcement of judgments. The Group prepared a common draft text, which sets out a possible architecture and draft provisions relating to the scope of the Convention, criteria for recognition and enforcement and procedure for recognition and enforcement.

The Working Group envisages that it will be able to bring the draft text to the point where it can recommend to Council, prior to its 2016 session, that the text be submitted to a Special Commission.

Conference Report: "International Civil Procedure and Brussels Ibis" – 50th Anniversary of the T.M.C. Asser Instituut, Den Haag

In 2015, the T.M.C. Asser Institute celebrates its 50th anniversary (http://www.asser.nl/asser-50-years/). On this occasion, its Private International Law Section organized on 19 March 2015 the Symposium "International Civil Procedure and Brussels I bis".

The first panel discussed recent developments on the EU level in the context of the Brussels I bis Regulation. Ian Curry-Sumner, Voorts Juridische Diensten, presented thoughts on a possible future recast of Brussels II bis. The Commission conducted a consultation on the functioning of this Regulation from 15 April 2014 until 18 July 2014 (http://ec.europa.eu/justice/newsroom/civil/opinion/140415_en.htm) and published results (https://ec.europa.eu/eusurvey/publication/BXLIIA) but beyond these steps no further action has been taken so far. According to Article 65 of the Regulation

the Commission should have presented no later than 1 January 2012 its first report on the application of the Regulation, based on information by the Member States, and should have accompanied this Report with proposals for adaption if necessary. Curry-Sumner submitted several of such proposals, e.g. in relation to making more precise the geographical scope of the Regulation or for making the Regulation more coherent with the Hague Convention on Protection of Children in order to reduce complexity in international cases.

Andrea Bonomi, Université de Lausanne, presented procedural issues of the Succession Regulation. He discussed the jurisdictional system of the Regulation as being one of comprehensive scope leaving no room for residual jurisdiction (except for Article 19). Bonomi drew attention to the risk of concurring proceedings under the subsidiary jurisdiction of Article 10, coupled with lis pendens rules in Article 17 that are limited to concurring proceedings before the courts of Member States. Given various „correction mechanisms" for „reuniting" *forum* and *ius* such as e.g. in Article 6 lit. a empowering the court seized to exercise discretion to decline jurisdiction, the question was raised whether the dogma of legal certainty so far excluding *forum non conveniens doctrines* may become or even may have already become obsolete. The author of these lines asked whether the broad definition of „court" in Article 3(2) may possibly include arbitral tribunals since the Succession Regulation does not exclude „arbitration" as opposed to, for example, the Brussels I bis Regulation in its Article 1(2) lit. d. Even if arbitral tribunals are no „courts" in the sense of the Succession Regulation the question of potential effects of the Succession Regulation on arbitration remains. One may hold that the Regulation implicitly establishes a fully mandatory system that excludes the derogation of the jurisdiction of the (Member) state courts, one may also hold that the Regulation leaves the decision about the arbitrability to the applicable national law but requires an arbitral tribunal with a seat in a Member State to apply the choice-of-law rules provided for by the Regulation, one may finally hold that arbitration is not affected in any way by the Regulation despite its silence on this issue.

Francisco Garcimartín Alférez, Universidad Autónoma de Madrid, reported that the Commission evaluated the Insolvency Regulation positively in principle but identified certain needs for reform (Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1346/2000 on insolvency proceedings, COM(2012) 744 final, p. 2 et seq.). These relate to (1)

the inclusion of pre-insolvency proceedings, (2) the precision of the central connecting factor of the COMI, (3) the better coordination of main and secondary proceedings, (4) the publicity of insolvency proceedings and (5) insolvency of groups of companies. As regards the inclusion of pre-insolvency proceedings, Garcimartín pointed out that under the recast the English scheme of arrangement would still not be covered. He further explained the new system of rebuttable presumptions for establishing the COMI including „suspect periods" of three and six months respectively in which the presumptions do not apply. Article 6 now allows consolidating insolvency and related non-insolvency proceedings. A large part of the new provisions concern duties of cooperation in case of insolvency of groups of companies (Chapter V). Garcimartín expressed scepticism as to the benefit and practical impact of these provisions. The recast of the Insolvency Regulation was adopted by the European Council last week, and the European Parliament will presumably adopt it in May. Most of the provisions will not take effect until 2017.

Finally, Jasnica Garasic, University of Zagreb, explained the system and details of the European Account Preservation Order. Garasic made clear that the EAPO allows creditors to preserve funds in bank accounts under the same conditions in all Member States of the EU (except the UK and Denmark) without changing the national legal systems. Rather, creditors are able to choose the interim protection procedure of the EAPO in cross-border cases.

The second panel focused on the Brussels I bis Regulation and forum selection clauses. Xandra Kramer, Erasmus University Rotterdam, provided for data material on the frequency of the use of forum selection clauses and the various interests and aims involved, e.g. choosing a forum because of an interest in the substantive *lex fori* or avoiding certain fora etc. Kramer also showed for the USA that forum shopping seems to pay off since the success rate of claims after referring the proceedings to another court on the grounds of *forum non conveniens* drops from 58% to 29%. As regards the Hague Forum Selection Convention, it was reported that the deposit of the ratification by the EU is expected for July which means that three months later the Convention will enter into force.

Christian Heinze, University of Hannover, explained the new lis pendens rules in Articles 29 et seq. of the Brussels I bis Regulation. He made clear to what extent the new rules rely on previous concepts or concepts from the Hague Convention

and how far these rules introduce true novelties. In particular, Articles 33 et seq. were scrutinized and compared to traditional *forum non conveniens* notions. Heinze suggested that as opposed to *forum non conveniens* doctrines, Articles 33 et seq., in particular in light of Recital 23 and 24, do not allow to take account of choice of law or substantive law aspects but only of genuinely procedural aspects when it comes to the question whether the second seized Member State court should stay its own proceedings. Heinze also drew attention to the fact that taking account of the prospects of recognition of the future judgment from the earlier third state proceedings inevitably threatens uniformity since recognition of third state judgments is subject to non-unified national law of the Member States – as does the question whether a proceeding is "pending" in the sense of Articles 33 et seq.

Finally, Vesna Lazi?, T.M.C. Asser Instituut, Den Haag, presented on the protection of weaker parties in connection with forum selection and arbitration clauses. Lazi? particularly drew attention to the protection under the Unfair Terms in Consumer Contracts Directive. Indeed, lit. q of Schedule 2 provides that clauses excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract, may be held unfair. Even if "arbitration" is excluded from the scope of the Brussels I bis Regulation this Regulation and its protective provisions for consumers may still serve as a measure for assessing whether the consumer's right to take legal action is unduly hindered.

In the discussion, the author of these lines asked the panel what standard should be applied for assessing whether there is an "agreement" in the sense of Article 31(2). If there is such an agreement in favour of a Member State court, a non-chosen Member State court must stay its own proceedings, as soon as the "chosen" court is seized as well. There were different views on this crucial issue for the functioning of the new *lis pendens* rule. For example, it was held that this was a non-issue since it was proof enough for a high likeliness of an agreement if the defendant in the first proceedings before the non-chosen court starts instituting further proceedings before the chosen court. However, if a party is determined to abuse as aggressively as possible the mechanisms of the *lis*

pendens rule, things might well be different and another type of torpedo may emerge. The majority held that the non-chosen court should at least have the power to review the existence of an agreement to a certain extent. Indeed, Recital 22 Sentence 4, according to which the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute before it, should not be understood as excluding any review.

The third panel dealt with enforcement under the Brussels I bis Regulation. Ilaria Pretelli, Swiss Institute of Comparative Law, Lausanne, discussed the regime for provisional measures, Marta Requejo Isidro, Max Planck Institute for International, European and Regulatory Procedural Law, Luxembourg, reported on enforcement under Brussels I bis and under special European civil procedure Regulations and finally Paul Beaumont analysed the Brussels I bis Regulation in relation to other instruments of unification on the global level, in particular in relation to the Lugano Convention, the Hague Judgments Project and the 1958 New York Convention on the recognition and enforcement of arbitral awards in light of Article 73(2) (Regulation "shall not affect" the 1958 Convention) and Recital 12 (Convention "takes precedence" over Regulation) of the Regulation. In essence, Beaumont suggested a general priority of arbitral awards over judgments about the same issue between the same parties rendered by Member State courts, even if the award comes years later than the judgment. In the discussion it was made the observation that this approach may conflict with *res iudicata* principles and thus may violate the public policy in the sense of Article V(2)(b) New York Convention which would of course be a matter of interpretation of the New York Convention as such.

It will be no surprise for those who know about the excellence of the Asser Instituut to be informed that the Symposium provided for first-class analysis and discussion of most central and current trends and developments in International Civil Procedure of European provenance. The large audience of the Symposium was perfectly right not only in congratulating the Institute to its 50th birthday but also the organisers of the birthday party.

Fritz Sturm 13 June 1929 – 14 March 2015

We just received the sad news that Professor Dr. Dr. h.c. Fritz Sturm passed away on 14 March 2015. Fritz Sturm was professor emeritus at the University of Lausanne, Switzerland, and an internationally renowned expert on private international law, comparative law and Roman law. His main fields of research were international family law and the general principles of private international law. A German by birth, Sturm obtained his legal education mainly in Lausanne and Munich. After starting his academic career in Lausanne, he accepted calls to Mainz (1966) and Marburg (1971). In 1977, he returned to Lausanne, were he stayed until his retirement in 1999. On this occasion, Sturm was honoured with an impressive two-volume Festschrift (1802 pages). Sturm was a member of the German Council for Private International Law, a select group of law professors advising the German Federal Ministry of Justice and for Consumer Protection, for 41 years. Many of his contributions had a decisive influence on the course of German legislation. Even in his eighties, he attended the Council's meetings in Würzburg regularly and frequently enriched the debate with his sharp and witty remarks. He was a very prolific author who always remained open to new developments in the field of private international law, which is best evidenced by his regularly updated introduction to private international law in Staudinger's commentary on the German Civil Code (last edition 2012), a monument of a life-long comparative research. Fritz Sturm's death is a big loss not only for German and Swiss, but for European private international law as well.

TDM Call for papers: Special Issue on Latin America

Since the beginning of the 21st century, Latin America has sought the proper response to international disputes. That effort has been complicated by the

opportunities and realities of globalization and its relation to its effects on local economies and government policy. While new export markets have driven growth in certain sectors, the desire to utilize local resources for internal development has presented significant challenges, both economic and political. We invite submissions for a TDM Special Issue on Latin America that seeks to address these issues, both from a theoretical and practical perspective. The topics to be discussed include the following: * Disputes Involving States and State Parties; * Control of Local Laws and Courts over International Transactions; * Changes in Dispute Resolution Methods; * Implications of Investment by "Multi-Latinas" and Access to Changing Markets; * Regional and National Disputes.

Proposals for papers (e.g. abstracts) should be submitted to the editors Dr. Ignacio Torterola (Brown Rudnick LLP) and Quinn Smith (Gomm & Smith). Intended publication date is the final quarter of 2015.

Good news: Greeks and Germans talking to each other about European economic law

Klaus J. Hopt, Director emeritus at the Max-Planck-Institute for Comparative and Private International Law, Hamburg, and *Dimitris Tzouganatos*, Professor of Law at the National University of Athens, have edited a conference volume (in German) on "The New Challenges Facing European Economic Law. With Contributions from Germany and Greece" (Mohr Siebeck, Tübingen, 2014). The book, which is based on a symposium that took place near Athens in July 2013, deals with the "new" European economic and business law acts and proposals following the financial crisis, plus the problems of transformation and practical consequences for member states, taking as examples Germany and Greece. Particular attention is paid to European and international banking, company and capital market law, as well as consumer law, international procedural law – Brussels I*bis* and the European Account Preservation Order – and antitrust.

Further information is available here.

A Court's Inherent Jurisdiction to Sit Outside its Home Territory

Another step in the evolution of the common law on this issue has been taken by the Court of Appeal for Ontario in *Parsons v Ontario*, 2015 ONCA 158 (available here). The court disagrees in some respects with the earlier decision, on the same issue, of the British Columbia Court of Appeal in *Endean v British Columbia*, 2014 BCCA 61 (available here) (discussed by me over a year ago here). It may be that in light of this conflict the Supreme Court of Canada will end up hearing appeals of either or both decisions.

People infected with the Hepatitis C virus by the Canadian blood supply between 1986 and 1990 initiated class actions in each of Ontario, Quebec and British Columbia. These actions were settled under an agreement which provided for ongoing administration of the compensation process by a designated judge in each of the three provinces. In 2012 the issue arose as to whether the period for advancing a claim to compensation could be extended. Rather than having three separate motions in each of the provinces before each judge to address that issue, counsel for the class proposed a single hearing before the three judges, to take place in Alberta where all of them would happen to be on other judicial business. In the face of objections to that process, motions were brought in each province to determine whether such an approach was possible. The initial decision in each province was that a court could sit outside its home province. The Quebec decision was not appealed but the other two were.

The Court of Appeal for Ontario has now released its decision on the appeal, and the three judges are quite divided. They divide even over a preliminary issue, namely whether the order made below is "final" or "interlocutory" for purposes of the appeal route. If it is the former, the appeal is properly brought to the Court of Appeal, but not if it is the latter (in which case the appeal would be to the

Divisional Court). The judges split 2-1 in deciding the order is final.

Turning to the merits, the judges remain divided. Justice LaForme upholds the order below. He concludes the court has the inherent jurisdiction to sit outside Ontario and that it can do so without violating the open court principle, even in the absence of a video link to an Ontario courtroom (for spectators and perhaps some lawyers). Justice Lauwers agrees that the court has the inherent jurisdiction to sit outside Ontario, but that doing so without a video link back to Ontario would be a violation of the open court principle. He reverses the order below, but only to the extent that he insists on such a link. Justice Juriansz agrees with the result reached by Justice Lauwers but his reasoning is quite different. He relies on Ontario's Rules of Civil Procedure which allow for a motion to be heard by video-conference. In his view, the proposed hearing outside of Ontario falls within these rules if there is a video link back to an Ontario courtroom. No resort to inherent jurisdiction is required and the open court principle is not impaired.

I remain somewhat skeptical that the court has the jurisdiction to sit outside the province. I would rather see such a process addressed by statute rather than through invocation of the court's inherent powers. I am also concerned that Justice Juriansz's approach is something of a fiction, using the video-conference rules to in essence pretend that the hearing is actually being held in the courtroom to which the video feed is transmitted. I consider such a video link essential, but for me it goes to the question of the open court principle and not to jurisdiction.

A side note: this is my first post in many months. My sense, and that of many of my colleagues in Canada, is that we have had a dearth of interesting developments in private international law over the past year.

Symeon C. Symeonides, The Choice-of-Law Revolution Fifty Years after Currie: An End and a Beginning

Dean Symeon C. Symeonides (Willamette University – College of Law) has posted a new article to SSRN. It is to be published in the University of Illinois Law Review, Vol. 2015, No. 2, 2015. Here is the abstract:

This Article is part of a symposium marking the fiftieth anniversary from the passing of Brainerd Currie (1913-1965), the protagonist of the American choice-of-law revolution that began in the 1960s.

The Article consists of four parts. Part I discusses what was wrong and what is right with the key component of Currie's "governmental interest analysis" — his concept of "governmental" or state interests. It contends that, when properly conceived, state interests can provide a rational basis for usefully classifying conflicts into three categories and sensibly resolving conflicts falling within two of those categories ("false" and "true" conflicts).

Parts II-IV discuss the revolution's past, present, and future. Part II chronicles the revolution in tort and contract conflicts by tracing the gradual abandonment of the lex loci delicti and lex loci contractus rules in the majority of states of the United States. Part III summarizes the methodological changes produced by the revolution and the substantive results reached by the courts that joined it. Part IV builds the case for an exit strategy that will turn the revolution's numerical victory into a substantive success by using the vehicle provided by the process of drafting the Third Conflicts Restatement.

Sandra Wandt on Party Autonomy in European Private International Law

Sandra Wandt has published an interesting doctoral thesis (in German) on „Party Autonomy in European Private International Law – A Study on the Main Codifications regarding Coherence, Completeness and Regulatory Efficiency“ (*Rechtswahlregelungen im europäischen Kollisionsrecht – Eine Untersuchung der Hauptkodifikationen auf Kohärenz, Vollständigkeit und rechtstechnische Effizienz*; PL Academic Research, Frankfurt/Main 2014). The thesis was accepted *summa cum laude* by the law faculty of the Ludwig-Maximilians-University in Munich under the supervision of Professor Dr. Abbo Junker. In her thesis, Wandt provides for an exhaustive analysis of the various rules on party autonomy found in the current EU Regulations on PIL, i.e Rome I, II, III and the Succession Regulation as well as in the Hague Maintenance Protocol and the proposal on marital property. She deals in particular with inconsistencies concerning the admissibility of a free choice of law, the requirements for a valid agreement on the chosen law and the limits imposed on the parties‘ choice. The book is a valuable contribution to the ongoing debate about achieving a more coherent codification of pervasive issues in European private international law. For those who are interested in further details, the introductory chapter is available here.