Sciences Po PILAGG Workshop Series, January-February 2012

The list of speakers at the workshop on Private International Law as Global Governance at the Law School of the Paris Institute of Political Science (*Sciences Po*) has been updated and is available on the PILAGG website.

The speakers for January and February will be:

• 20th January: Mads ANDENAS ("*External effects of national ECHR judgments*")
• 25th January (doctoral workshop): Shotaro HAMAMOTO ("*L'arbitrage investisseur-État est-il hostile aux intérêts publics?*")
• 27th January: Ingo VENZKE ("*On words and deeds: How the practice of interpretation develops international norms*")
• 9th February (doctoral workshop): Benoit FRYDMAN ("*Approche pragmatique du droit global*")
• 11th February (doctoral workshop): David KENNEDY ("*The renewal of political economy and global governance*")
• 16th February: Michael WEIBEL ("*Privatizing the adjudication of sovereign defaults*")

PILAGG has also launched a new stream on epistemology and methodology of human-rights in transnational context.

Another Comment on Aguirre Pelz

Dr. Mónica Herranz, full time Professor of Private International Law at the National Distance Education University in Madrid (Spain), has just published a paper on the ECJ ruling *Aguirre Pelz* (C- 491/10 PPUU), under the title "El control por el juez de origen de las decisiones dictadas en aplicación del artículo 42 del R. 2201/2003: el asunto *Aguirre Pelz*", *Revista General de Derecho Europeo*, (25) 2011.

The author analyzes critically the reasoning of the parties in the proceedings, as well as the approach taken by the General Advocate and the solution adopted by the ECJ. Other relevant ECJ rulings in kidnapping cases are discussed. The paper also includes an explanation of the different legal channels for appealing a decision when a fundamental right has been violated (in the State of origin, in the destination State and before the ECHR).

The study shows the need to review the legal solution for intra-community kidnapping cases.

Mónica Herranz: mherranz@der.uned.es

Franzina on Negrepontis v. Greece

Pietro Franzina (University of Ferrara) has published Some Remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad in the last issue of the Italian journal *Diritti umani e diritto internazionale*.

The paper is a note discussing the implications of the recent jugdment of the European Court of Human Rights in *Negrepontis v. Greece* where the court held that Greece had violated Article 8 by denying recognition to an adoption order issued by a Michigan court.

The note is also available on the website of the Italian society for international law.

Sciences Po PILAGG Workshop Series, Spring 2012

The workshop on Private International Law as Global Governance (PILAGG) at the Law School of the Paris Institute of Political Science (*Sciences Po*) will take place on Thursdays or Fridays at 12:30 pm, at the Law School.

The speakers for the Spring 2012 will be:

• 20th January: Mads ANDENAS ("*External effects of national ECHR judgments*")
• 26th January (doctoral workshop): Shotaro HAMAMOTO
• 27th January: Ingo VENZKE ("*On words and deeds*")
• 9th February (doctoral workshop): Benoit FRYDMAN
• 10th and 11th February (Saturday, full-day doctoral workshop): David KENNEDY
• 16th February: Michael WEIBEL
• 8th March: Michael KARAYANNI
• 9th March: George A. BERMANN
• 22nd March: Jeremy HEYMANN
• 23rd March: Alex MILLS
• 12th April (doctoral workshop): Diego P. FERNÁNDEZ ARROYO
• 13th April: Michael HELLNER
• 11th May, Final Meeting (full day, see Program)

Where: unless otherwise announced, Law School, 13 rue de l'Université 75007 Paris, Room J210 (2nd floor).
When: 12:30 to 14:30 pm

More information is available here.

Issue 2011.1 Nederlands Internationaal Privaatrecht

The first issue of 2011 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht*, which was published in April of this year (apologies for the late posting), was a special issue on Human Rights and Private International Law.

It includes the following interesting contributions:

Laurens Kiestra, Article 1 ECHR and private international law, p. 3-7. The conclusion reads:

In this paper, the role of Article 1 ECHR, which defines the scope of the instrument, with regard to private international law has been discussed. When a court of one of the Contracting Parties either applies a foreign law or recognizes a foreign judgment originating from a third State, there is no reason not to apply the ECHR to such cases. Even though such a third State has never signed the ECHR, it would ultimately be the court of one of the Contracting Parties whose application of a foreign law or recognition of a foreign judgment violating one of the rights guaranteed in the ECHR that would breach the ECHR. This follows from the Court's case law concerning the extraterritorial effects of the ECHR which has been confirmed by the little case law that specifically deals with private international law. Even in circumstances in which there is only a negligible connection with the Contracting Party, the situation does not change appreciably. Such situations still come within the jurisdiction of the Contracting Party and the ECHR is thus applicable to such cases. This does not mean that there cannot be any consideration of specific private international law issues, but only that such concerns should be dealt with within the system of the ECHR. Therefore, one could question whether the public policy exception resulting in the non-application of the ECHR, because of the relative character of the exception, is permissible in light of Article 1 ECHR.

Michael Stürner, Extraterritorial application of the ECHR via private international law? A comment from a German perspective, p. 8-12. The conclusion reads:

In Article 1 the ECHR binds Contracting States to the observance of its provisions. Authorities of each such State must duly respect and foster Convention rights, implying that the entire legal order of that State must comply with Convention standards. Consequently, the ECHR influences private international law along with other branches of such legal systems. Its rules and provisions must equally avoid contradicting Convention rights. Within such legal orders, the ECHR applies to national and transnational cases alike. As soon as there is jurisdictional competence in the Contracting State's courts, a judge acts as part of the State organs bound by the Convention. The operation of choice-of-law rules as applied by national courts and the ensuing results must be in accordance with Convention standards, just as much as the operation of any other national law of such State. If the consequence of the application of foreign law is a violation of the Convention, the forum judge has to see to it that this violation is avoided or corrected. This can be achieved via the public policy exception which is, in its turn, heavily influenced, inter alia, by ECHR standards. However, such an alteration of the resulting application of foreign law referred to through the rules of private international law does not in itself entail an extraterritorial application of the ECHR. There is, as concluded above, no obligation upon a State under public international law to install or apply choice-of-law rules at all; thus there can be no violation of generally accepted principles of international law through a State's application of a public policy exception emerging from its own legal system, including (in the case of the ECHR) its own obligations assumed under public international law.

Ioanna Thoma, The ECHR and the *ordre public* exception in private international law, p. 13-18. Here is an abstract from the introduction:

The purpose of this paper is to crystallize whether the ECHR claims an autonomous and direct application superseding the theoretical premises and technical construction of the conflicts rule itself or whether there is an intertwining interplay between the Convention's ordre public européen and the ordre public exception clause as understood in private international law. First, some examples from domestic case law will demonstrate the methodological approach taken vis-à-vis the interaction between the ECHR and the exception clause of ordre public). Second, further examples from the case law of the ECHR will highlight the position taken by the ECtHR on this question. On the basis of this bottom up and top-down approach our observations and conclusions will be

presented.

Patrick Kinsch, Choice-of-law rules and the prohibition of discrimination under the ECHR, p. 19-24. The abstract included on SSRN reads:

This article deals with the relevance, or irrelevance, of the principle of non-discrimination to that part of private international law that deals with choice of law. Non-discrimination potentially goes to the very core of conflict of laws rules as they are traditionally conceived – that, at least, is the idea at the basis of several academic schools of thought. The empirical reality of case law (of the European Court of Human Rights, or the equally authoritative pronouncements of national courts on similar provisions in national constitutions) is to a large extent different. And it is possible to adopt a compromise solution: the general principle of equality before the law may be tolerant towards multilateral conflict rules, but the position will be different where specific rules of non-discrimination are at stake, or where the rules of private international law concerned have a substantive content.

Paris, the Jurisdiction of Choice?

On January 17th, the President of the Paris Commercial Court (*Tribunal de commerce*) inaugurated a new international division.

The new division, which is in fact the 3rd division of the court (*3ème Chambre*), is to be staffed with nine judges who speak foreign languages, and will therefore be able to assess evidence written in a foreign language. For now, the languages will be English, German and Spanish, as one juge speaking Spanish and two speaking German are currently on the court.

In an interview to the *Fondation de droit continental* (*Civil law initiative*), the President of the Court explained that the point was to make French justice more competitive and attract international cases. It also made clear that France was following Germany's lead, where several international divisions were established

in 2009 in Hamburg and Cologne.

French Commercial Courts

It should be pointed out to readers unfamiliar with the French legal system that French commercial courts are not staffed with professional judges, but with members of the business community working part-time at the court (and for free). In Paris, however, many of these judges work in the legal department of their company, and are thus fine lawyers.

Also, French commercial courts (and French civil courts generally) virtually never hear witnesses, so the issue of the language in which they may address the court does not arise.

Some issues

So, the new international division will be able to read documents in several foreign languages. However, nothing suggests that parties or lawyers will be able either to speak, or to write pleadings, in any other language than French. Lawyers arguing these cases will still need to file their pleadings in French, and thus to translate them in English beforehand for their clients. Furthermore, the interview of the Court's President seems to suggest that using a foreign language will not be a right for the parties. Quite to the contrary, it seems that it will not be possible if one of the parties disagrees, and demands documents be translated in French.

Will that be enough to attract additional commercial cases to Paris?

I wonder whether introducing class actions in French civil procedure would have been more efficient in this respect.

For the full interview of the Court's President, see after the jump.

Creation of an International Chamber at the Tribunal de Commerce [Commercial

Court] of Paris

On January 17, 2011, the Tribunal de Commerce of Paris will inaugurate an international chamber, an event all the more in the nature of an official endorsement because this chamber, which already exists, remains unknown to the general public. The President of the Tribunal de Commerce of Paris, Christian de Baecque, explains the stakes of this rehabilitation.

What has driven the need for official recognition of the international chamber of the Tribunal de Commerce of Paris?

Some months ago, I learned of a draft law issued by legislators in Germany allowing documents to be examined by a court without their translation being mandatory. I found the idea to be excellent and after some research, I realized that the French Code allows this practice.

Many people share this idea, with the objective of promoting Paris as a judicial location. There is, in effect, a currently ongoing struggle between the Anglo-American law and civil law. And it is up to us, at the Tribunal de Commerce, to ponder specific actions.

Is the international chamber of the Tribunal de Commerce of Paris therefore participating in this promotional effort?

Yes, absolutely. The stakes underlying a general recognition of this chamber is to avoid the outflow of judicial business to foreign courts. All of the chambers of the Tribunal de Commerce in the resolution of disputes are specialized. We thus also had a chamber specialized in international law. It operated when the parties were neither French nor European. But obviously there were few litigated disputes that actually justified the existence of this chamber. The innovation at the level of the Tribunal is to make public the existence of this chamber, and this publicity should put the Tribunal de Commerce of Paris in a strong position to handle international disputes and thus enhance the position of the civil law.

Could you tell us about the composition of this international chamber?

The 3rd Chamber of the Tribunal, which is the international chamber, will be

composed of nine judges having the requisite knowledge of foreign languages, whether English, German or Spanish, so as to be able to accept exhibits that have not been translated into French (to the extent, obviously, that all the parties would be in agreement). This does not exclude the use of foreign languages in any other chamber. The international chamber wishes to serve as a model, it is not intended to be exclusive.

Three languages have been selected, English, German and Spanish. Why not use only English, as is the case in Germany?

In most cases, the judges of the Tribunal de commerce have had the occasion throughout their careers to draft contracts in a foreign language. They have mastered the fine points of the language. Here it is not solely a question a question of translation; the words have an economic meaning and not only a literary one. Also, if that judge has the language skills to grasp the subtleties of a document, it seems logical to provide wider latitude to this mode of operating. Of course, the judgment and the consequences that the judge derives therefrom will be drafted in French.

With the 3rd Chamber, the use of such or another language will depend on of the language skills of the judges. It so happens that next year I will have a judge who speaks Spanish and two German-speaking judges, from whence the decision to hear cases in these two languages.

You are quite willing to state that the object of the process is marketing.

We are in fact going to put in place a mechanism that already exists in a new packaging, and this is being done so as to promote a practice that is unknown to the judges themselves. The latter, just as is the case with the lawyers, often lose a lot of time in translation. Certain cases by-pass the Tribunal de Commerce because of this linguistic obstacle, and I am not referring here to foreign businessmen who, for lack of information as to this mechanism, do not come to attend the hearings. The re-implementation of this international chamber must show that the language is not a barrier for pursuing international dispute resolution in France.

Germany, The Precursor in Hearing Cases in a Foreign Language

In Germany, the Rhine-North-Westphalia and Hamburg Länder, in 2009, took the initiative of putting international chambers in place in the Courts of First Instance of Hamburg and Koln for international commercial cases. Mr. Brauch, Attorney offers some clarification on the current situation and on the differences in relation to the French mechanism.

The establishment of these first international chambers was followed in 2010 by a request to the Bundesrat (the representative council of the Länder in the Federal Republic) to amend the Federal Code on the Organization of the courts so as to introduce this model in the other Länder of the Federal Republic.

In these "pilot" chambers, the proceeding may thus be held entirely (memoranda of the parties, probative evidence, oral argument at the hearing and the decisions of the Court) in English upon the request of both parties.

English is the only language selected for these chambers because, considered to be the language of international trade, it also serves to pacify the struggles with the courts, with those in England for example, so that the case can be conducted in English in accordance with civil law. English is also in many cases the language of neutrality, as in the case of Franco-German transactions.

This mechanism of the international chamber seems go further than that its French counterpart, in the sense that the entire proceeding, from the arguments to the judgment and inclusive of the pleadings, is pursued in the English language. Only the executory portion is translated for the bailiff into German. For these specialized chambers, the Court of Appeals is also considering establishing special chambers dedicated to proceedings held in English.

As soon as the Federal code of procedure is amended, the establishment of these international chambers will extend to other Länder in cities such as Frankfurt, Munich, Stuttgart and Düsseldorf.

I absolutely approve of these mechanisms which are especially effective in handling international contracts for financial services or of merger/acquisition, an area in which I am especially involved. In such transactions, all of the

documents are often drafted in English, even if the two parties are neither English nor American, but German and French or other. Il may be, in fact, that these companies are affiliated with American or English groups, and that the representatives of the parent companies are insisting on having the case litigated in an English language proceeding. Until now, it was necessary in such a case to have recourse to international arbitration or to a foreign English-language court. The establishment of such international chambers thus allows for a proceeding to be held before a German State Court. This is a real opening onto the international horizon.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (1/2011)

Recently, the January/February issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

Here is the contents:

- ***Heinz-Peter Mansel/ Karsten Thorn/Rolf Wagner:*** "Europäisches Kollisionsrecht 2010: Verstärkte Zusammenarbeit als Motor der Vereinheitlichung?" – The English abstract reads as follows:

The article gives an overview on the developments in Brussels in the judicial cooperation in civil and commercial matters, covering a period from November 2009 until November 2010. It summarises current projects and new instruments that are currently making their way through the EU legislative process. It also refers to the laws enacted on a national level in Germany which were a consequence of the new European instruments. Furthermore, the article shows areas of law where the EU has made use of its external competence. The article discusses both important decisions and pending cases before the ECJ as

well as important decisions from German courts touching the subject matter of the article. In particular, it critically analyses two decisions from the Court of Appeal of Munich and the Court of Appeal of Berlin. These two courts used the Grunkin Paul case as a starting point to develop their own kind of recognition principle based on art. 21 Treaty on the Functioning of the European Union, thereby, in the author's view, deciding legal questions that would have been better left to the ECJ to decide. In addition, the present article turns to the current projects of the Hague Conference as well.

- ***Theodor Schilling***: "Das Exequatur und die EMRK"- the English abstract reads as follows:

The article raises the question of the requirements the ECHR may pose for the enforcement of foreign judgments. It starts with discussing the human rights protection of creditor and debtor in enforcement proceedings within a single country. It goes on to consider that protection in foreign enforcement proceedings with special emphasis on the role of the exequatur and of possible alternatives to it. The next item is the level of protection granted by human rights law in foreign enforcement proceedings, exemplified by the Stolzenberg-Gambazzi story and a judgment of the German Federal Court. Finally the discussion turns to the abolition of the exequatur by certain EU regulations. The overall result is that the demands of the ECHR concerning the protection of the debtor in foreign enforcement proceedings are not very high but that human rights law is rather accommodating to the more muscular approaches to enforcement.

- ***Matthias Lehmann/André Duczek***: "Zuständigkeit nach Art. 5 Nr. 1 lit. b EuGVVO – besondere Herausforderungen bei Dienstleistungsverträgen" – the English abstract reads as follows:

The subject of this article is the application of Article 5 (1) (b) of the Brussels I Regulation on service contracts. The authors criticise the recent ECJ judgment in Wood Floor Solutions Andreas Domberger GmbH v. Silva Trade SA, case No. C-19/09. They argue that the decision conflicts with the primary goals of the Brussels I Regulation, because (1) the competent court cannot be determined with certainty since the determination would depend on factual circumstances that may occur after the conclusion of the contract; (2) the court at the place

where the main service is rendered is not necessarily close to the dispute between the parties; (3) the determination of the competent court would require a lot of futile time and effort; and (4) if no main service can be found, the service provider would be able to bring the claim at its domicile, contrary to the principle of actor sequitur forum rei. In light of these problems, the authors suggest a different approach: In their view, the court at the place of performance of the service that is the subject of litigation should have jurisdiction. Such interpretation would be in line with the goals of legal certainty and proximity and solve most of the problems that the ECJ judgment has produced. But it would create another difficulty since it allows the provider of services in multiple locations to bring its claim, e. g. for payment, virtually anywhere. This problem, the authors suggest, can be avoided through a contractual stipulation on the place of performance, which is explicitly allowed by Article 5 (1) (b) Brussels I Regulation.

- ***Jörg Pirrung:*** "Gewöhnlicher Aufenthalt des Kindes bei internationalem Wanderleben und Voraussetzungen für die Zulässigkeit einstweiliger Maßnahmen in Sorgerechtssachen nach der EuEheVO" – the English abstract reads as follows:

Judgment and Opinion in case A give rise to the hope that the ECJ will interpret the Brussels IIa regulation 2201/2003 in a way leading to success fthe Brussels I regulation 44/2001, the former Brussels Convention of 1968. In view of the entry into force of the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children for all EU States, envisaged for 2010 (or 2011), the application of regulation 2201/2003 by courts in the EU should be open-minded. In order to avoid, as far as possible, differences in the development of the law concerning international jurisdiction and recognition of decisions in custody cases in the EU on the one hand and in the relations to the contracting states of the Hague Convention on the other hand, the courts in the EU should try to apply the regulation in conformity with the understanding of the international treaty.

- ***David-Christoph Bittmann:*** "Das Verhältnis der EuVTVO zur EuGVVO" – the English abstract reads as follows:

Today European Civil Procedure Law offers creditors several ways of executing a title in another Member State. Beside the "traditional" way of applying for a declaration of enforceability in the second state – as foreseen by Regulation (EC) 44/2001 – the creditor can make use of some modern legal instruments, which provide simplified procedures for getting a European title enforceable in all Member States. To reach this aim the European legislator especially created the European Payment Order and a Small-Claim-Procedure. Some years before, as a first step towards an original European title, the European Enforcement Order for uncontested claims was established by Regulation (EC) 805/2004. With the rising number of such parallel-regulations concerning cross-border enforcement the question of how to delineate the scope of application of these instruments appeared. A special problem discussed in German literature and jurisprudence was, if it should be possible for a creditor to apply for a declaration of enforceability in the second state according to Regulation (EC) 44/2001 although he already holds a European Enforcement Order issued by the court of the first state. The German Federal Supreme Court (BGH) denied this possibility by stating that the creditor does not have an interest in getting a declaration of enforceability when he can reach his aim of cross-border enforcement by making use of the European Enforcement Order. This article discusses the decision of the Federal Supreme Court.

- ***Hans-Patrick Schroeder:*** "Zur Reichweite des § 110 ZPO im grenzüberschreitenden Konzernverbund" – the English abstract reads as follows:

Under the preconditions of Sec. 110 et seq. German Code of Civil Procedure (Zivilprozessordnung, "ZPO"), a respondent in a civil action may request the court to order the claimant to provide security for costs. The statutory preconditions include that the claimant must have its seat or residence outside of the EU and that the claimant does not have any real property inside the EU which could enable the respondent to enforce a claim for reimbursement of costs. Starting with two recent decisions rendered by German courts, the article explores the scope of application of Sec. 110 et seq. ZPO in the context of international groups of companies. Its first conclusion is that a German company may not be ordered to provide security for costs under any circumstances. This applies even if it is the subsidiary of a holding company

outside of the EU and was created only to bring a claim instead of the holding company in order to circumvent the duty to provide security for costs. Under such circumstances, however, the assignment of the rights claimed might be void if the German company is insufficiently funded and the intent to frustrate the respondent's potential claim for reimbursement of costs is evident. Its second conclusion is that having a subsidiary within the territory of the EU does not exempt a claimant seated outside the EU from the duty to provide security for costs since the respondent cannot enforce a claim for the reimbursement of costs against the subsidiary which is not a party to the dispute. This is the main difference between a legally independent subsidiary and a branch lacking legal independence. Only in the latter case are the assets located at the branch attributable to the claimant. Consequently, they may then enable the respondent to enforce its claim for reimbursement of costs within the territory of the EU.

- ***Nadjma Yassari***: "Die islamische Brautgabe im deutschen Kollisions- und Sachrecht" – the English abstract reads as follows:

This article critically reviews a judgement of the German Federal Supreme Court on the characterisation of the Islamic dower (mahr, s. ada¯q, mehriye) in German private international law. On 9 December 2009, the German Federal Supreme Court (BGH) concluded a long-lasting dispute by deciding that the mahr was to be characterised as an effect of the marriage under Art. 14 EGBGB. The court rejected all other norms of international family law including the characterisation of the mahr under the matrimonial property regime of Art. 15 EGBGB. It mainly held that the mahr did not constitute, amend or replace a matrimonial property regime and that the unchangeable nature of the connection of the matrimonial property regime under Art. 15 EGBGB (Unwandelbarkeit) was too static to accommodate the changes in the lives of people who had immigrated to Germany, acquired German nationality and left behind any relation to the law of their former nationality. This view is contested. Rather it is argued that Art. 15 EGBGB provides for a better characterisation of the mahr. Firstly, the mahr is an important instrument of property transfer in marriage. Secondly, linking the mahr to the matrimonial property regime in terms of characterisation will ensure that both the mahr and the financial equalization of the spouses' property upon divorce are governed by the same law, thus leading to more equitable results. The judgement of the

BGH will lead to an increase of cases in which the mahr will fall under German law. Unfortunately, however, the court provides only for little guidance as to the accommodation of the mahr in German national family law. It declares the agreement on the mahr to be valid, but fails to give details on its relation to the native claims awarded under German law, i.e. post-marital maintenance and the equalisation of the matrimonial accrue. Finally, one also misses conclusive hints on the formal requirement for the validity of the mahr agreement under German law.

- ***Dieter Henrich*** on a decision of the Higher Regional Court Stuttgart on the voidability of marriage: "Rechtsprechungsübersicht zu OLG Stuttgart, Beschluss v. 30.8.2010 – 17 UF 195/10"
- ***Peter Mankowski***: "Zur Abgrenzung des Individual- vom Kollektivarbeitsrecht im europäischen internationalen Zivilverfahrensrecht" – the English abstract reads as follows:

Arts. 18–21 Brussels I Regulation establish a protective regime for labour suits. But this covers only individual law suits by individual employees or employers. It does not encompass actions by trade unions, employer's organisations, works councils or other institutional bodies. Yet the borderline between the two areas can be a slippery slope and can require quite some thought on which side of the line a case falls if for instance a local Works Councils sues substantially on an individual employee's behalf. Formal characterisation of the plaintiff body and concrete mode of claims pursued have to be reconciled.

- ***Oriola Uka/Michael Wietzorek***: "Anerkennung einer deutschen Ehescheidung durch das Appellationsgericht Tirana" – the English abstract reads as follows:

So far, it was disputed whether there is factual reciprocity as required by § 328 Sec. 1 Nr. 5 German Civil Procedure Code and § 109 Sec. 4 Family Procedure Law with regards to Albania, partially due to the circumstance that German literature was unaware of any decision of an Albanian court that recognised a German decision. Based on the decision of the Court of Appeals of Tirana dated 12 April 2010, which recognised a decision of the First Instance Court of Nuremberg regarding a divorce, and on the autonomous Albanian regulations regarding the recognition and enforcement of foreign court decisions, the

present essay argues that German courts should assume that Albanian courts are generally willing and ready to recognise German decisions in Albania.

- ***Erik Jayme*** on the conference of the European Group for Private International Law in Copenhagen: "Tagung der Europäischen Gruppe für Internationales Privatrecht (GEDIP) in Kopenhagen"

Jurisdiction of the Amsterdam Court of Appeal in the Converium Settlement Case

[Guest post written by Thijs Bosters LL.M., a PhD Researcher (Private International Law and Collective redress) at Tilburg University.]

After the *Morrison v. NAB* decision of last June, the question was raised how and where an f-cubed case should be filed in the future. It has been proposed that, for example, the Canadian class action or the Dutch collective settlement procedure could serve as alternatives in cross-border securities mass disputes. What makes the Dutch collective settlement procedure such an interesting alternative is that a settlement can be declared binding by the Amsterdam Court of Appeal on all persons to which it applies according to its terms. In this way, all plaintiffs can be covered and a mass dispute can be resolved through a single action (for more information on the Collective Settlement Act (*Wet collectieve afwikkeling massaschade*), see the The Global Class Actions Exchange report of Stanford Law School). With the 2009 Shell collective settlement, the Dutch Act proved that it can be instrumental in the resolution of cross-border securities mass disputes. The *Shell* case, however, was only a partially f-cubed case, as quite many of the investors involved were Dutch.

Converium

On 12 November 2010, the Amsterdam Court of Appeal assumed preliminary jurisdiction in the "full f-cubed" *Converium* case (the Dutch text can be found here). This case revolves around the Swiss reinsurance company Converium Holding AG (currently known as SCOR Holding AG). In late 2001, Zürich Financial Services Ltd, of which Converium was a full subsidiary, sold its shares through an initial public offering. The shares were listed on the SWX Swiss Exchange in Switzerland and as American Depositary Shares (ADSs) on the New York Stock Exchange. Between 7 January 2002 and 2 September 2004, Converium made several announcements which led people to believe that Converium had deliberately underestimated the insurance risks when floating its reinsurance unit. The existing reserve deficiency forced Converium to announce that it would take a charge of between $ 400 and $ 500 million to increase its reserve. This, combined with the downgrade of the company's credit rating by Standard & Poor's in response to the reserve increase, caused a massive drop of the share value.

In October 2004, the first of several securities class action complaints was filed against Converium, ZFS, and certain of Converium's officers and directors. Eventually, the filed class actions were consolidated before the United States District Court for the Southern District of New York. This court, however, excluded from the class action all non-U.S. persons who had purchased Converium shares on any non-U.S. exchange, leaving them empty-handed. Because of the positive way the Shell case was being resolved in the Netherlands, Converium and ZFS agreed that a settlement would be sought for these non-U.S. purchasers through the Dutch collective settlement system.

Converium, ZFS, the special Converium Securities Compensation Foundation (which represents the group of individual purchasers that were excluded from the U.S. class), and the Dutch Investors Association agreed on a settlement on 8 July 2010. These parties subsequently filed an application with the Amsterdam Court of Appeal to declare the settlement binding. Because there were only approximately 200 known Dutch individual purchasers (out of a total of 12,000), who formed the most important link to use the Dutch system, the Court first wanted to decide whether this link was enough to assume jurisdiction over the case.

Jurisdiction Amsterdam Court of Appeal

The Court first examined whether it could assume jurisdiction to effectuate the settlement and subsequently whether it was also competent to bind all the purchasers named in the settlement. This would prevent plaintiffs from filing a claim for damages in the future.

As the settlement only takes effect if it is made binding, it is not possible to directly use Article 5(1) Brussels I/Lugano to determine which court has jurisdiction because the place of performance, the main requirement of this provision, is unknown. However, in *Effer v. Kantner*, the court also based its jurisdiction on Article 5(1) Brussels I/Lugano in a dispute concerning a contract which had not been concluded yet, so the place of performance was unknown as well. Because the Converium settlement is aimed at a certain performance that will take place in the Netherlands, namely, payment of damages by the Dutch special compensation foundation, the Dutch Court of Appeal can assume jurisdiction.

To prevent parallel and irreconcilable litigation, the Amsterdam Court of Appeal based its jurisdiction to declare the settlement binding on Article 6(1) Brussels I/Lugano. The Court stated that the claims of the various purchasers are so closely connected that it is expedient to hear and decide on them together. As the Court already had jurisdiction over the Dutch purchasers, Article 6(1) Brussels I/Lugano makes it possible to assume jurisdiction in the combined case.

Although the majority of the purchasers are domiciled in one of the Brussels I Regulation/Lugano Convention member states, there are also purchasers that are not. In these cases, the Dutch Code of Civil Procedure decides whether a Dutch court has jurisdiction. According to this Code, a court can assume jurisdiction over cases in which one or more purchasers are domiciled in the Netherlands. In the *Converium* case, the Compensation Foundation and the Investors Association are domiciled in the Netherlands. Moreover, because the settlement will be executed in the Netherlands, there is a sufficient connection with the Dutch jurisdiction for the Amsterdam Court of Appeal to also assume jurisdiction for those cases which involve non-Brussels I/Lugano purchasers.

Based on the above-mentioned provisions, the Amsterdam Court of Appeal may assume jurisdiction in the *Converium* case. Article 6 ECHR and the principle of

audi alteram partem, however, prevent the Court from making a final decision on its competence. As not all the purchasers have been summoned yet, the Court will be forced to stay the proceedings (Article 26(2) Brussels I/Lugano) till they have been given proper notice. Until then, the ruling will be provisional. During the fairness hearing, which still has to be scheduled but will probably take place in the second half of 2011, the purchasers may still advance a different view on the jurisdiction issue.

Rome II and Defamation: Diana Wallis and the Working Paper

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The Rome II Regulation on the law applicable to non-contractual obligations ((Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 1997 L 199, p. 40.)) was left incomplete; there was a failure to arrive at a consensus over the appropriate conflict rule to deal with what in the proposal was termed obligations arising out of violations of privacy and rights relating to the personality. This part of this proposal was therefore withdrawn by the Commission at a late stage with the commitment in the review clause to requisition a comprehensive study in this area of conflicts. All the documents prepared in the codecision procedure are available from the Legislative Observatory on the website of the European Parliament.

The study promised by the Commission, the 'Mainstrat Study' ((Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, personality, JLS/2007/C4/028, Final Report.)), has now been on the table for some time.

In the European Parliament we have begun to look at the issue again using our

power under Article 252 TFEU to ask the Commission to exercise its right of initiative. We held a hearing earlier this year and I have now produced a Working Document. The debate now takes place against a patchwork of new elements. There is a rising clamour of dissatisfaction with so-called 'libel tourism' in the English courts which is criticised by media in the UK and beyond; it is not clear that national regulation alone will solve this problem. The media itself now seems more anxious for a European level solution, of course preferably one that recognises the country of editorial control. Yet this country of origin type approach was precisely what prompted the earlier withdrawal and it has now encountered severe difficulties in relation to the European Data Protection Directive.

On the other side of the balance some sort of horizontal approach might now be made easier given that the European Union has through the Lisbon Treaty committed itself to acceding to the ECHR and therefore it could be argued that all jurisdictions should approach the balancing of rights that is necessary in these cases from the same base line. This might produce a common point of departure. Then there is the Icelandic Modern Media Initiative, which is trumpeted by some as having the possibility, given Iceland's bid for EU membership, to bring a US type First Amendment right into the EU. On top of all this of course the Internet continues to develop and the possibilities for ordinary people, perhaps especially vulnerable young people to end up with a real cross-border or worldwide violation of their personality rights is all too real. Interestingly, there is a developing movement on the web in which the excesses of the certain sectors of the press are coming under attack. The question does not reduce simply to the freedom of the press versus rich litigants who would silence debate. It is a constitutional issue and the balance struck by the different national constitutions in this field differs from country to country. This is the fascinating backdrop against which we take up our discussions. The Working Document is very much a consideration of the current status. Your comments and views to feed in to our deliberations would be hugely welcomed. **Download the Working Document**.

Issue 2010/1 Nederlands Internationaal Privaatrecht

The first issue of 2010 of the Dutch PIL journal *Nederlands Internationaal Privaatrecht* includes the following contributions:

Xandra Kramer – Editorial (Lissabon, Stockholm, Boek 10 BW en andere IPR-beloften voor 2010), p. 1-2

J-G Knot – Europees internationaal erfrecht op komst: het voorstel voor een Europese Erfrechtverordening nader belicht (on the Proposal for a European Regulation on Succession and Wills), p. 3-13; here is the English abstract:

> *On 14 October 2009 the European Commission published a proposal for a regulation on succession. This new instrument will harmonise all private international law rules regarding succession, viz. jurisdiction, applicable law and recognition and enforcement, on a European Union level. Furthermore, the Regulation creates a European Certificate of Succession. The rules of this Regulation will, after its entry into force, replace the current Dutch private international rules on succession. The Regulation grants general jurisdiction to the courts (a term which entails judicial as well as non-judicial authorities, such as notaries) of the Member State in which the deceased had his or her last habitual residence. Under certain circumstances it is possible to refer to courts of a Member State whose law has been chosen and who are better placed to hear the case. Courts may also have jurisdiction based on the fact that property of the deceased is located in that Member State, if the last habitual residence of the deceased was not in a Member State. The law applicable to the whole of the succession is that of the Member State of the last habitual residence of the deceased. A testator can also expressly choose the application of the law of his or her nationality to the succession of the estate. In this article the rules of the proposal are examined extensively. Differences between the proposal and the existing Dutch rules on private international law of succession are commented upon. One of the biggest changes will be that the different approach with regard to the devolution and the administration of estates in private international law, as currently employed in the Netherlands, will disappear under the European Regulation. The conclusion reads that, notwithstanding the*

fact that the proposal still needs several improvements, the introduction of a European Succession Regulation will in my opinion contribute to an easier and more effective administration of cross-border successions within Europe.

S.F.G. Rammeloo – Op de valreep… Eenvormige interpretatie door Hof van Justitie EG van artikel 4 EVO (case note on ICF/MIC, ECJ C-133/08), p. 20-26); here is the English abstract:

On 6 October 2009, the ECJ gave an interpretative ruling in case C-133/08 on Article 4 of the EC Convention on the Law Applicable to Contractual Obligations (Rome, 1980). The questions in the preliminary proceedings relate to the applicable law to a charter-party contract cum annexis in the absence of choice by the parties ('objective proper law test'), the seperability of the contract, and the connecting criteria of Article 4, subsection 4 in conjunction with subsections 1, 2 and 5. The main proceedings and the essential observations of the ECJ judgment are followed by a critical analysis as well as some considerations on its potential effects on the interpretation of Article 4 (objective proper law test) and Article 5 (contract on the carriage of goods) of EC Regulation 593/2008 which on 27 December 2009 replaced the 1980 Convention.

L.R. Kiestra – De betekenis van het EVRM voor de internationale gerechtelijke vaststelling van het vaderschap (case note on three Dutch judgments concerning 8 ECHR and the judicial establishment of paternity), p. 27-30; here is the English abstract:

This case note discusses three Dutch cases concerning the meaning of Article 8 ECHR for the judicial establishment of paternity ('gerechtelijke vaststelling van het vaderschap'). All three cases concerned a mother who wanted to establish the paternity of a man over her child(ren). In all three cases a foreign law was applicable to the situation, according to the relevant Dutch choice of law rules ('Wet conflictenrecht afstamming'). Under the applicable foreign laws in the three cases, it was not possible to judicially establish paternity over the child(ren). The Dutch judge had to decide whether this would result in a violation of the ECHR and consequently whether the applicable law had to be set aside on the basis of the public policy exception. In two of the three cases, the judge came to the

conclusion that the normally applicable foreign law had to be set aside, while in one of the cases the judge decided that this was not
necessary. This case note discusses the different outcomes in these three cases and examines a number of issues related to the possible impact of the ECHR on private international law. These include whether or not the ECHR can in fact be at all applicable to such private international law matters and the relationship between the public policy exception and the ECHR.

Richard Fentiman – Book presentation: 'International Commercial Litigation', Oxford University Press 2010, p. 31-32.

Trevor Hartley – Book presentation: 'International Commercial Litigation: Text, Cases and Materials on Private International Law', Cambridge University Press 2009, p. 32-33.