Professor Paul Stephan on Court on Court Encounters

Professor Paul Stephan (the University of Virginia School of Law) recently published "Courts on Courts: Contracting for Engagement and Indifference in International Judicial Encounters" in the Virginia Law Review. This is an important new article on the question of transjudicial communication and global governance, especially as it challenges the predominant scholarly position. From the Introduction:

> *The Article proceeds in five Parts. It first describes the various contexts in which court-on-court encounters take place and the analytic choices that confront the courts. It then reviews work by scholars who believe engagement and dialogue among courts motivated by collective promotion of the global rule of law explain what courts do. Third, it offers, as an alternative model of judicial encounters, a contract theory that emphasizes the choices made by actors within an exchange context. These actors include both private persons (firms as well as individuals and states (which can contract directly with private persons or enter into a kind of contract through international agreements, express and implicit). Fourth, it reviews the evidence of judicial behavior, looking mostly at U.S. practice but also considering other national courts in both common-and civil-law jurisdictions, as well as international tribunals—both permanent and ad hoc. This evidence indicates that contract theory provides a more robust explanation for judicial practice, especially by national courts, than does the dialogue theory described in the second Part. The Article also explains why contract theory provides a normatively more appealing justification for judicial choices than do the rival theories. A conclusion identifies broader implications.*

French Supreme Court Rules on Scope of Rome II Regulation

The French supreme court for private and criminal matters (*Cour de cassation*) ruled on the respective scopes of the 1971 Hague Convention on the law applicable to traffic accidents and the Rome II Regulation in a judgment of 30 April 2014.

In 2010, a traffic accident occurred in Spain involving two cars. The first was registered in France, the second in Spain. The passenger of the French car initiated proceedings in France against the driver of the same car.

The lower courts found that both parties had their habitual residence in France and that French law thus governed as a consequence of Article 4(2) of the Rome II Regulation. In order to avoid applying the 1971 Hague Convention, to which France is a party, the court of appeal ruled that both France and Spain were members of the EU, and that the Rome II Regulation thus prevailed over conventions entered into by the Member States (article 28(2)).

The French Supreme court sets aside the judgment on the ground that Article 28 of the Rome II Regulation expressly provides that international conventions prevail over the Rome II Regulation when they were also ratified by third states. As it is the case for the 1971 Hague Convention, the latter should have been applied.

Under Articles 3 and 4 of the 1971 Hague Convention, when the traffic accident involves cars registered in different states, the law of the place of accident, here Spain, applies.

Second Issue of 2014's ICLQ

The second issue of *International and Comparative Law Quarterly* for 2014 includes one short article on private international law.

Ben Juratowitch (Freshfields Paris), Fora Non Conveniens *for Enforcement of Arbitral Awards Against States*

> *In Figueiredo Ferraz v Peru the US Court of Appeals, Second Circuit, deployed the doctrine of forum non conveniens to decline to enforce an arbitral award against Peru. The award had been rendered in Peru and the successful party in the arbitration sought to enforce it against Peru's assets in New York. This article argues that, contrary to the Second Circuit's approach, when the merits of a dispute are decided in an arbitration seated in one jurisdiction and the arbitral award is then presented to a court in another jurisdiction for enforcement against the award debtor and its assets within the jurisdiction of that court, neither forum non conveniens nor any rule performing the same function should arise.*

Job Opening: American Society of International Law Executive Director

ASIL Executive Director Job Opening

The American Society of International Law is looking for a new Executive Director. The dealine for applicaitons is June 15, 2014. See this page for more information. From the job posting:

The American Society of International Law ("ASIL" or "the Society") seeks an accomplished leader with vision, proficiency in international law, and proven

management abilities to serve as its next Executive Director, starting in the second half of 2014.

…

To receive appropriate consideration, applications should be received by June 15, 2014. All applications will be acknowledged, but only finalists will be contacted further. The identity of applicants will be held on a strictly confidential basis. No phone calls please.

Klerman on Jurisdiction, Choice of Law and Property

Daniel Klerman (University of Southern California Law School) has posted Jurisdiction, Choice of Law and Property on SSRN.

> *Jurisdiction and choice of law in property disputes has been remarkably stable. The situs rule, which requires adjudication where the property is located and application of that state's law, remains the norm in most of the world. This article is the first to apply modern economic analysis to choice of law and jurisdiction in property disputes. It largely confirms the wisdom of the situs rule, but suggests some situations where other rules may be superior. For example, in disputes about stolen art, the state where the work was last undisputedly owned may be both the most efficient forum and the best source of applicable law.*

The paper is forthcoming in Yun-chien Chang (ed.), *Law and Economics of Possession* (Cambridge University Press).

Conflict of Laws in Israel and Palestinian Territories

Michael Karayanni (Hebrew University of Jerusalem) will shortly publish Conflicts in a Conflict – A Conflict of Laws Case Study on Israel and the Palestinian Territories.

> ***Conflicts in a Conflict*** *outlines and analyzes the legal doctrines instructing the Israeli courts in private and civil disputes involving the Occupied Palestinian Territories of the West Bank and the Gaza Strip, since 1967 until the present day. In doing so, author, Michael Karayanni sheds light on a whole sphere of legal designs and norms that have not received any thorough scholarly attention, as most of the writings thus far have been on issues pertaining to international law, human rights, history, and politics. For the most part, Israeli courts turned to conflict of laws, or private international law to address private disputes implicating the Palestinian Territories. After making a thorough investigation into the jurisdictional designs of the West Bank and the Gaza Strip, both before and after the Oslo Peace Accords,* ***Conflicts in a Conflict*** *comes to focus on traditional topics such as adjudicative jurisdiction, choice of law, and recognitions and enforcement of judgments. Related issues such as the foreign sovereign immunity claim of the Palestinian Authority before Israeli courts as well as the extent to which Palestinian plaintiffs were granted access to justice rights, are also outlined and analyzed.*
>
> *This book's compelling thesis is the existence of a close relationship between conflict of laws doctrines as they developed over the years and Israeli policies generally in respect of the Palestinian Territories. This study of the conflict of laws in a war setting and conflict of laws in a jurisdictionally ambiguous location, will greatly serve scholars and practitioners in similarly troubled and complex legal situations elsewhere.*

Summer School in International Commercial Contracts in Italy

The School of Law of the University of Verona, Italy, in cooperation with the Center for International Legal Education (CILE) of the University of Pittsburgh, USA, will host a Summer School program in International Commercial Contracts, which will take place on June 3-6, 2014 at the School of law of the University of Verona.

> *The Summer School aims at providing participants with an in-depth understanding of drafting, managing and litigating international contracts. The course will deal with the different sources of law applicable to international contracts, relevant model contract clauses and selected types of contracts of particular relevance in international practice.*
>
> *Target group and prerequisites for admission: The School is addressed to legal professionals and other business operators involved in international contract practice, but also open to 2nd-level degree and PhD students. A very good level of English is a fundamental prerequisite for admission.*

Programme

The Law & Economics of International Contracts / International Sales Law
C. Gillette, NYU Law School

The Law Applicable to International Contracts / Case-Law on International Sales
F. Ferrari, University of Verona, NYU Law School

Transaction Planning Using Rules of Jurisdiction
R. Brand, University of Pittsburg School of Law

Negotiating and Drafting International Contracts
M. Torsello, University of Verona

International Commercial Arbitration
C. Giovannucci Orlandi, University of Bologna

For further information, please contact segreteria.master@ateneo.univr.it, cile@law.pitt.edu, or the Director of the course, Prof. Marco Torsello, at: marco.torsello@univr.it.

Deadline for registration: May 15, 2014. Registration fees: € 730,00.

Devaux on French Choice of Law Rules on Marriage

Angelique Devaux has posted The New French Marriage in an International and Comparative Law Perspectives on SSRN.

> *"Drinking, eating, sleeping together is marriage it seems to me" already wrote Antoine Loysel, Jurisconsult, into Institutes Coutumières at the beginning of the 16th century.*
>
> *After several failed attempts and the creation of a civil partnership designed as a semi-loophole to a heated debate and timely subject, it took France more than twelve years after the Netherlands to finally join the family of countries authorizing marriage of homosexual couples.*
>
> *Equality is the key word of the French reform: Equality in duties and rights that allows an identical access for legal protection to marriage like for opposite-sex couples, inspired from The Declaration of Human and Civic Rights of 26 August 1789 .*
>
> *To perfect the equality to an international level, the Act of 17 May 2013 included language which states that marriages performed in a foreign jurisdiction satisfy the legal requirements of marriages in France. The new bill also confirms France's traditional choice of law rule according to which the law of the nationality of each spouse applies to the substantive validity of marriage. In order to be effective, the statute adopts a new conflict of law rule providing that same-sex marriage would still be allowed when the national law, or the law*

of the residence, or the law of the domicile of one of the spouses allows it. Intended to translate an extensive and cosmopolitan access to same-sex marriage, the new rules of conflict of laws suffer in reality from imperfection and do not provide an equal access to marriage for all, in particular due to historical international conventions that superseded the law.

The difficulties for both gay and lesbian spouses occupy an even more prominent place in today's globalized world where more and more couples live outside their country of origin. As soon as cross-border elements come, the new definition of French marriage faces a multitude of challenges related to immigration, benefits, adoption, international wealth management, matrimonial property regime, divorce, and succession.

What are the surrounding practical consequences when same-sex married couples decide to move abroad, and how to solve or to anticipate all the dormant problems?

In this paper, I am examining some of the potential issues related to same-sex marriage and conflict of laws in a comparative law perspective, and I suggest a new approach to deal with these coming questions in accordance with the international and European tools that may serve individuals from countries that already have opened marriage to same-sex couples, and those who want to join the international family.

Issue 2013.4 Nederlands Internationaal Privaatrecht

The fourth issue of 2013 of the Dutch journal on Private International Law *Nederlands Internationaal Privaatrecht* includes two contributions on the Commission Recommendation on Collective Redress and an article on the obligations of parties with regard to pleading and contesting jurisdiction under

the Brussels I Regulation in the Netherlands.

Astrid Stadler, 'The Commission's Recommendation on common principles of collective redress and private international law issues', p. 483-488. The abstract reads:

For its new policy on collective redress the European Commission has chosen the form of a mere 'Recommendation' instead of a binding directive or regulation with respect to the violation of (consumer) rights granted under EU law. The Recommendation provides some basic principles on collective redress instruments which should be taken into account by the Member States when implementing injunctive or compensatory collective redress mechanisms. There is, however, no obligation for the Member States to implement such procedural tools. Despite the attempt at establishing common principles, the European legislature thus seems to accept a heterogeneous landscape of collective redress in Europe and has missed the opportunity to provide rules on international jurisdiction, recognition and the applicable law particularly designed for cross-border mass litigation. As a consequence forum shopping becomes even more important for plaintiffs in mass damage cases.

Mick Baart, 'Implications of Commission Recommendation 2013/39 on common principles for collective redress. Can safeguards limit the potential for abuse without compromising the realization of policy goals?', p. 489-498. The abstract reads:

The recent publication of Recommendation 2013/39 seeks to establish a common European approach to collective redress. In response to concerns that collective procedures may introduce opportunities for abuse, the European Commission included a number of procedural safeguards. However, can these safeguards limit the potential for abuse without hindering the achievement of policy goals? This article evaluates this question from the perspective of group formation since opt-out procedures have traditionally been perceived as an important factor in abusive practices. The Recommendation accordingly considers the use of opt-in procedures to be an essential safeguard against abuse. Nonetheless, the rejection of opt-out procedures appears to entail an inherent paradox as it reduces the potential for abuse but simultaneously presents significant obstacles to the effectiveness of collective procedures. Moreover, it could have unintended consequences for questions of private international law as Member States that

actively use opt-out mechanisms are not obliged to comply with a non-binding Recommendation.

Jacques de Heer, 'De stelplicht van eiser en gedaagde in geschillen voor de Nederlandse rechter over internationale bevoegdheid op grond van de EEX-Verordening', p. 499-507. The English abstract reads:

In cross-border contentious proceedings, the plaintiff only has a conditional obligation to show that the court in which proceedings are brought has jurisdiction. This condition follows from Article 24 of the Brussels I Regulation, which deals with jurisdiction through submission to the forum. When the defendant wishes to contest the jurisdiction of the court, he is under no immediate obligation to argue why this is so. However, if the factual arguments put forward by the plaintiff to found the jurisdiction of (for example) the Dutch court remain uncontested, this court has to consider these facts when deciding on its jurisdiction. In so deciding, the court is not bound by the jurisdictional rules of the Brussels I Regulation as mentioned by the defendant. When the defendant only raises a defence of concurrent proceedings in another Member State, he is obliged to immediately state the relevant facts.

ICC Conference on Jurisdiction Clauses

The Institute of World Business Law at the International Chamber of Commerce will host a conference on May 23rd on Jurisdictional Choices in Times of Trouble.

The following topics will be addressed:

Morning 09.30-13.00
Session I – Asymmetrical choices

The validity of unilateral optional clauses

- Overview of the jurisdictions which uphold unilateral option clauses and
- those that consider them void The resulting legal uncertainty
- Study of the causes, implications and solutions
- Is the situation the same if the option reserves the right to resolve disputes via recourse to an arbitral tribunal rather than courts?

Pr. Marie-Elodie Ancel, University Paris-Est Créteil Val de Marne
Dr. Anton Asoskov, Lomonosov Moscow State University
Pr. Alain Rau, University of Texas
Dr. Maxi Scherer, Queen Mary, University of London

Moderated by: Dr. Georges Affaki, Chairman of the Legal Committee of the ICC Banking Commission

Questions – Discussion

The limits to the parties' free choice of jurisdiction

- The requirement of an objective link between the choice of jurisdiction and the connection of the contract to a specific country
- Other formal requirements for the validity of jurisdictional choices (incorporation by reference, etc)
- News on the doctrine of forum non conveniens
- Debate on The Hague Convention on exclusive choice of court agreements: less favourable than the Brussels 1 bis Regulation but tendancy to favourize relations with third parties

Marie Berard, Clifford Chance LLP, United Kingdom
Pr. Diego Fernández Arroyo, Sciences Po Law School
Khawar Qureshi QC, McNair Chambers

Moderated by: Dr. Horacio Grigera Naón, Independent Arbitrator, United States

Questions – Discussion

Disparities in the choice of arbitrators

Pr. Eric Loquin, University of Burgundy
Paolo-Michele Patocchi, Patocchi & Marzolini, Switzerland

Moderated by: Pr. Pierre Mayer, Dechert LLP Paris

Questions – Discussion

Afternoon 14.30-17.45

Session II – The influence of national laws on jurisdictional choices

Applicable law

- Sulamerica and Arsanovia–is there a contrast between these two English cases and national laws opting for a substantive approach (rather than a conflict of law approach) to determine the validity of the arbitration clause?
- Debate on Article 25 of the Brussels 1 bis Regulation on the validity of the jurisdiction clause in substance (cf recital 20): as in Sulamerica, the DIP of the chosen court is applied, not the law governing the contract.

Dr. Georges Affaki
Pr. Julian D.M. Lew QC, Queen Mary, University of London; 20 Essex Street Chambers
Pr. François-Xavier Train, University Paris 10
Pr. Laurence Usunier,University Paris 13

Moderated by: Dr. Horacio Grigera Naón

Questions – Discussion

The law applicable to the arbitrability of the dispute

Pr. Carlos Alberto Carmona, Marques Rosado Toledo Cesar & Carmona – Advogados, Brazil
Pr. Hans van Houtte, President, Iran-United States Claims Tribunal

Moderated by*:* Yves Derains, Derains & Gharavi, France

Questions – Discussion

Choice of a tribunal and lis pendens

- The conflict between the EU Brussels Regulation 1 bis and other legislations – which solutions?

- What are the consequences of the ratification of The Hague Convention on the choice of court?

Pr. Arnaud Nuyts, University of Brussels (ULB)
Pr. Gilles Cuniberti, University of Luxembourg
Pr. Horatia Muir-Watt, Sciences Po Law School

Moderated by: Dr. Horacio Grigera Naón

Questions – Discussion

Conclusions: Georges Affaki and Horacio Grigera Naón

Closing remarks: Yves Derains