Chinese Supreme Court to Rule on Power of Foreign Insolvency Official

Here.

Moses on the Arbitration/Litigation Interface in Europe

Margaret Moses (Loyola University Chicago Law School) has posted Arbitration/Litigation Interface: The European Debate on SSRN.

> *Concerns over the interface between arbitration and litigation have been at the core of a debate in the European Union that has culminated in the issuance of the Recast Brussels Regulation (the "Recast"), effective January 2015. The Recast does not provide a fully transparent and predictable interface between international arbitration and cross-border litigation. Primarily, it does not prevent parallel proceedings, which occur when one party that had agreed to arbitrate nonetheless goes to court, while the other party proceeds with arbitration. These parallel proceedings undermine the effectiveness of arbitration because of the increased cost, inefficiency and delay, as well as the high risk of inconsistent judgments.*
>
> *Because of the global impact of international commercial arbitration, the significance of the European decision echoes beyond its borders. There is a need for a harmonized consensus on preventing parallel proceedings in order to promote predictability and confidence in the arbitration process. This article considers the reasons for the current European approach, the potential*

interpretations of the Recast's explanatory text, the problems it presents as to its expected application, and the interface between the Recast and the New York Convention.

Although anti-suit injunctions could prevent parallel proceedings, the Court of Justice of the European Union has found that anti-suit injunctions are incompatible with the EU Brussels I Regulation (predecessor to the Recast). The Recast's regulatory regime, which governs jurisdiction of courts and recognition and enforcement of judgments in EU Member States, excludes arbitration. However, the exclusion must be viewed through the lens of an extensive explanation set forth in Recital 12 of the Recast. It is unclear how changes in the Recast, as interpreted in accordance with its explanatory Recital 12, may impact the Court's decision.

The article concludes by proposing various means for encouraging flexible solutions to the problem of parallel proceedings and for achieving gradual harmonization.

Luxembourg Code of Private International Law

I am delighted to announce the publication of the second edition of the Luxembourg code of private international law.

The book gathers all applicable legislation in the field of private international law in Luxembourg: international conventions ratified by the Grand Duchy of Luxembourg, European legislation and Luxembourg domestic provisions.

The full table of contents is available here.

Readers wondering how Luxembourg PIL legislation differs from other EU states legislation should know that the Grand Duchy is one of the few European states which ratified the Cape Town Convention (and indeed the only state in the world

which adopted the Luxembourg Protocol) or the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages.

And as if it weren´t enough, buyers will enjoy a free post on this very blog tomorrow!

Conference on the Cultural Dimension of Private International Law

On 13 June 2014, the Swiss Institute of Comparative Law in cooperation with the Universities of Lausanne, Geneva and Urbino will host a conference on the Cultural Dimension of Private International Law in Lausanne. Speakers will address the audience in French, Italian or English.

The conference aims at honouring Tito Ballarino, who dedicated his life to develop the themes of the conference and to facilitate the meeting of Private International Law culture and traditions, in his writing as well as in his academic experiences and exchanges.

The abstract of the conference reads as follows:

> *À l'heure où le législateur européen déconstruit les systèmes nationaux de droit international privé en y superposant un appareil normatif de grande ampleur et complexité technique, l'idée de réfléchir autour des éléments culturels qui sous-tendent le droit international privé peut paraître saugrenue. Et pourtant qui aime la matière ne saurait renoncer à s'interroger sur le sens de la profonde transformation en cours qui engage sûrement l'essence même du droit international privé. Il n'est dès lors pas inutile de recentrer l'attention sur les aspects généraux de la discipline et en repenser la valeur sur fond des grandes questions qui, depuis toujours, agitent la pensée sur le phénomène juridique. Et de fait, la fonction d'intégration sociale que s'assigne le droit – dont le droit*

international privé est un instrument d'autant plus essentiel à mesure qu'avance la dynamique de la mondialisation – déborde le cadre de la culture juridique au sens étroit et s'impose comme fait spirituel et problème moral. De là la convergence, dans le discours traditionnel du droit international privé, d'une multitude de perspectives combinant la théorie générale du droit, la sociologie, l'histoire, la philosophie, la science politique, l'éthique, en un mot, ce qui constitue la "culture". Pourquoi le droit international privé ? Quelle place le moment présent prend-il au sein d'une évolution historique qui s'est toujours efforcée de respecter l'autonomie et l'identité des différentes réalités sociales et cultures juridiques ? Comment la fonction régulatrice de cette branche du droit se concilie-t-elle avec la promotion des droits fondamentaux au rang de critère suprême de justice ? Quel rôle peuvent encore jouer les doctrines qui ont marqué l'histoire de la discipline ?

Il est heureux que l'on puisse se pencher sur ces thèmes à l'occasion des quatre-vingt ans du Professeur Tito Ballarino auquel la rencontre est dédiée en hommage à son exceptionnelle œuvre scientifique constamment vouée à saisir, au-delà des contingences du présent, les lignes les plus significatives de l'évolution culturelle de la société.

The program of the conference is available here.

Faculty Position at the University of Windsor (Canada)

The Faculty of Law at the University of Windsor is seeking an outstanding individual or individuals for appointment to the Paul Martin Professorship in International Affairs and Law.

The appointment is intended for established scholars, eminent jurists and distinguished public servants and statespersons who are pursuing research in any area of international or transnational law (which we define widely to encompass

public and private international law, comparative law, and law and globalization). Appropriate academic or professional qualifications and experience will be required.

The commencement date, duration, and other terms of the appointment will be negotiated according to the availability of the successful candidate(s). The appointment may extend over one or more academic terms.

JOB DESCRIPTION: The Paul Martin Professor will have the opportunity to engage in scholarly work and will be expected to teach a course (possibly on an intensive basis). The successful candidate will contribute to the intellectual life of the Faculty, will regularly engage with students and faculty at Windsor Law and the wider University, and will participate in the activities of the Faculty's Transnational Law and Justice Network (TLJN). We would welcome, as well, outreach projects which engage stakeholders and the public in the candidate's chosen field. Remuneration is negotiable and will be commensurate with the experience and expertise of the candidate. Research support will be available.

APPLICATION PROCEDURE: Those interested in applying for the Paul Martin Professorship should send a curriculum vitae and a cover letter indicating scholarly/teaching interests and a proposed project to be undertaken during the course of the appointment to Dean Camille Cameron, Chair, Appointments Committee, Windsor Law School, c/o adawson@uwindsor.ca, by June 9th, 2014.

"The University of Windsor is committed to equity in its academic policies, practices, and programs; supports diversity in its teaching, learning, and work environments; and ensures that applications from members of traditionally marginalized groups are seriously considered under its employment equity policy. Those who would contribute to the further diversification of the University's professional staff include, but are not limited to, women, Aboriginal peoples, persons with disabilities, members of visible minorities, and members of sexual minority groups. The University of Windsor invites you to apply to its welcoming community and to self-identify as a member of one of these groups. International candidates are encouraged to apply; however, Canadians and permanent residents will be given priority."

Bismuth on International Public Policy for Sovereign Debt Contracts

Regis Bismuth (university of Poitiers) has posted The Path Towards an International Public Policy for Sovereign Debt Contracts on SSRN.

> *Recent times have been rich in events highlighting the shortcomings of mechanisms for dealing with sovereign debt crises, especially when they involve private creditors. Both the Greek financial debacle and the spate of litigation arising from Argentina's 2001 default have exposed the obstacles to both the successful implementation of restructuring plans and the attempts to block the legal actions brought by private creditors not willing to participate in the restructuring of sovereign debt. Given this seeming disarray and the impediments to the establishment of sovereign insolvency proceedings, the loan contract emerged as one of the most suitable instrument to ensure an orderly resolution of sovereign insolvency issues. In this context, it seems reasonable to examine the possible emergence of an "international public policy" for sovereign debt, the cornerstone of which would be the loan contract concluded between the State and its creditors.*

Call for Papers for the Third Annual ASIL-ESIL-MPIL Workshop

on Transnational Legal Theory

See here for a call for papers for the Third Annual ASIL-ESIL-MPIL Workshop on International Legal Theory being held September 8, 2014 at the Vienna University of Economics and Business. Abstract submissions should be sent to asil.esil.mpil@gmail.com by June 22, 2014. Short papers (5000 words max.) must be delivered by August 25, 2014.

Questions regarding the workshop may be directed to:

Evan Criddle ejcriddle@wm.edu
Jörg Kammerhofer joerg.kammerhofer@jura.uni-freiburg.de
Alexandra Kemmerer kemmerer@mpil.de

UK Supreme Court Rules on Law Governing Damages

On 2 April 2014, the Supreme Court of the United Kingdom delivered its judgment in C0x v Ergo Versicherung AG.

In this pre-Rome II case, the issue before the court was whether issues of damages were substantive or procedural in character for choice of law purposes.

The court issued the following press summary.

BACKGROUND TO THE APPEALS

These proceedings arise out of a fatal accident in Germany. On 21 May 2004 Major Cox, an officer serving with H.M. Forces in Germany, was riding his bicycle on the verge of a road near his base when a car left the road and hit him, causing injuries from which he died. The driver was Mr Kretschmer, a German national resident and domiciled in Germany. He was insured by the respondent, a German

insurance company, under a contract governed by German law. The appellant, Major Cox's widow, was living with him in Germany at the time of the accident. After the accident, she returned to England where she has at all relevant times been domiciled. She has since entered into a new relationship and has had two children with her new partner.

Liability is not in dispute, but there are a number of issues relating to damages. Their resolution depends on whether they are governed by German or English law, and, if by English law, whether by the provisions of the Fatal Accidents Act 1976 ("the 1976 Act") or on some other basis. The question which law applies was ordered to be tried as a preliminary issue.

There are two relevant respects in which an award under English Law, specifically the 1976 Act, may differ from an award under the relevant German Law, "the BGB". First, damages awarded to a widow under the BGB will take account of any legal right to maintenance by virtue of a subsequent remarriage or a subsequent non-marital relationship following the birth of a child. Section 3(3) of the 1976 Act expressly excludes remarriage or the prospect of remarriage as a relevant consideration in English law. Secondly, Section 844 of the BGB confers no right to a solatium for bereavement. Under section 823 of the BGB the widow may in principle be entitled to compensation for her own pain and suffering, but this would require proof of suffering going beyond normal grief and amounting to a psychological disturbance comparable to physical injury.

English rules of private international law distinguish between questions of procedure, governed by the law of the forum i.e. in this case England, and questions of substance, governed by the local laws, in this case Germany. The issue in the present case is whether Mrs Cox is entitled to rely on the provisions of sections 3 and 4 of the 1976 Act. They provide for a measure of damages substantially more favourable to her than the corresponding provisions of German law, mainly because of the more favourable rule concerning the exclusion of her current partner's payments of maintenance. This issue depends on whether the damages rules in sections 1A and 3 of the 1976 Act fall to be applied (i) on ordinary principles of private international law as procedural rules of the forum, or (ii) as rules applicable irrespective of the ordinary principles of private international law.

The Court of Appeal held that English law should adopt the German damages

rules as its own and apply them not directly but by analogy.

JUDGMENT

The Supreme Court unanimously dismisses the appeal and finds that the German damages rules apply. Lord Sumption writes the leading judgment and Lord Mance writes a concurring judgment [37].

REASONS FOR THE JUDGMENT

- The Court finds that the relevant sections of the 1976 Act do not apply as they do not lay down general rules of English law, but only rules applicable to actions under the Act itself. An action to enforce a liability whose applicable substantive law is German law is not an action under section 1 of the 1976 Act to which the damages provisions of the Act can apply [20].
- As the particular rules of assessment in the 1976 Act do not apply, then the answer must be sought in the rules of assessment which apply generally in English law in the absence of any statute displacing them. The relevant English law principle of assessment, which applies in the absence of any statute to the contrary, is that Mrs Cox must be put in the same financial position, neither better nor worse, as she would have been in if her husband had not been fatally injured. It follows that, in principle, credit must be given for maintenance from her subsequent partner during the period since the birth of their child [21].
- A further issue concerns Mrs Cox's receipt of maintenance from her current partner during the period before they had a child, when he was under no legal obligation to maintain her either in German or in English law [22]. The findings at first instance about the relevant German law indicate that it is not just the maintenance that the appellant would have received from Major Cox that must have been received by virtue of a legal obligation, but also the maintenance from her current partner for which she can be required to give credit. Lord Sumption notes that the classification of a damages rule regulating the receipts for which credit must be given in an award of damages is a difficult question which admits of no universal answer but that, in the present case, the rule in question is one of substance, rather than procedure [22] (Lord Mance [39]).

- Lord Sumption rejects the argument that the 1976 Act should be applied notwithstanding the ordinary rules of private international law. As a matter of construction the Act does not have extraterritorial effect [32 – 34]. Nor do the principles enacted in the 1976 Act represent 'mandatory rules' of English law, applicable irrespective of ordinary rules of private international law [35].
- Lord Mance explains that it makes no difference to the outcome of the appeal whether or not the dependency claims under the 1976 Act and German law are categorised as broadly similar or whether the relevant provisions of the 1976 Act are treated as substantive or procedural [47]. Assuming that the dependency claims are categorised as broadly similar, the provisions of ss. 3 and 4 of the 1976 Act are, if substantive, irrelevant to a tort subject to German substantive law. If on the other hand, the provisions of ss. 3 and 4 were to be treated as procedural, their application could have no effect on the outcome. There is no basis on which an English procedural provision can expand a defendant's liability under the substantive principles of the relevant governing law [48].

Castermans and de Graaf on Competition in European Insolvency Law

Alex Castermans and Ruben de Graaf (Leiden Law School) have posted The General Concept of Concurrence Applied to European Insolvency Law on SSRN.

> *In the current multilevel legal order, private relationships are governed by rules rooted in different international, European and national regimes. Where these rules lead to conflicts, important questions arise. May they be applied simultaneously, or should one of the regimes be excluded in favor of the other? And if the latter is the case, who should make that choice: the claimant or the court?*

To solve these questions, a method of interpretation is needed, crafted with private relationships in mind. This contribution seeks to uncover such a method within the area of European insolvency law, where issues of concurrence arise as the result of the division of companies and as a result of private international law.

Note: The contribution has been published in the Liber Amicorum for Prof. Bob Wessels (international insolvency law, Leiden Law School).

Munagorri on Hierarchy of Norms and PIL

Rafael Munagorri (university of Nantes) has posted Droit international privé et hiérarchie des normes: Observations sur une rencontre (Private Law and Hierarchy of Norms: Some Remarks on Their Relations) on SSRN.

Traditional methods to solve conflicts of laws and conflict of jurisdictions have been shaped without the idea of the hierarchy of norms. Moreover, some specialists of international private law consider that the very idea of hierarchy of norms is inappropriate within their field. This opinion reflects an ideological point of view. Hierarchy of norms is interesting in order to understand historical, theoretical and epistemological dimensions of international private law.

The paper was published in the Journal for Constitutional Theory and Philosophy of Law in 2013.