ELI UNIDROIT Launch Pilot Studies in Civil Procedure Project

The European Law Institute has announced that its joint project with UNIDROIT on civil procedure will move on as follows.

Background

In 2004, the ALI (American Law Institute) and UNIDROIT adopted and jointly publishedPrinciples of Transnational Civil Procedure. The aim of the work was to reduce uncertainty for parties litigating in unfamiliar surroundings and promote fairness in judicial proceedings through the development of a model universal civil procedural code. The Principles, developed from a universal perspective, were accompanied by a set of Rules of Transnational Civil Procedure, which were not formally adopted by either UNIDROIT or the ALI, but constituted the Reporters' model implementation of the Principles, providing greater detail and illustrating how they might be developed. The Rules were to be considered either for adoption or for further adaptation in various legal systems, and along with the Principles can be considered as a 'model for reform in domestic legislation'.

ELI-UNIDROIT cooperation

ELI and UNIDROIT cooperation aims at adapting the ALI-UNIDROIT Principles from a European perspective in order to develop European Rules of Civil Procedure. This work will take as its starting point the 2004 Principles and aim to develop them in the light of: i) the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union; ii) the wider acquis of binding EU law; iii) the common traditions in the European countries; iv) the Storme Commission's work; and v) other pertinent European sources.

At the first stage of the project, three working groups consisting of academics, judges and practitioners will be established. These working groups should conduct pilot studies to test the viability of the methodological approach and overall project design, whilst the ultimate outcome remains to cover, as a minimum, the full range of issues addressed in the 2004 ALI-UNIDROIT Principles.

The pilot projects will cover the following topics:

i. Service and due notice of proceedings
ii. Provisional and protective measures
iii. Access to information and evidence

On 28 February 2014 the ELI Council appointed the following persons as co-reporters for the above mentioned topics: Neil Andrews, Gilles Cuniberti, Fernando Gascon Inchausti, Astrid Stadler and Eva Storskrubb.

Issue 2014.1 Nederlands Internationaal Privaatrecht

The first issue of 2014 of the Dutch journal on Private International Law *Nederlands Internationaal Privaatrecht* includes an analysis of the Brussels I Recast and the influence on Dutch legal practice, an article on Child abduction and the ECHR, and two case notes; one on the Impacto Azul case and one on the Povse case.

- Marek Zilinsky, 'De herschikte EEX-Verordening: een overzicht en de gevolgen voor de Nederlandse rechtspraktijk', p. 3-11. The English abstract reads:

From 10 January 2015 onwards the Brussels I Recast (Regulation No. 1215/2012) shall apply. Under the new regulation which replaces the Brussels I Regulation (Regulation No. 44/2001), the exequatur is abolished and some changes are also made to provisions on jurisdiction and lis pendens. This article gives an overview of the changes effected by the Brussels I Recast compared to the proposed changes in the Proposal for a new Brussels I Regulation (COM(2010) 748 final). The consequences of the new regulation for Dutch practice are also dealt with briefly.

- Paul Vlaardingerbroek, 'Internationale kinderontvoering en het EHRM', p. 12-19. The English abstract reads:

With the Neulinger/Shuruk decision in 2009, the European Court of Human Rights caused a great deal of misunderstanding and confusion among judges and academics, because in

this case the ECHR seemed to protect the abductors of children and to allow them to benefit from their misconduct. After the Neulinger case some further ECHR decisions followed that seemed to compete with the fundamental purposes of the Hague Convention on child abduction, but in this paper I will try to show that in more recent cases the European Court has mitigated the hard consequences of the Neulinger/Shuruk decision and has given a new direction in how to proceed and decide when the two conventions seem to compete.

- Stephan Rammeloo, 'Multinationaal concern – Aansprakelijkheid van moedervennootschap voor schulden van dochtervennootschap: nationaal IPR ('*scope rule*') getoetst aan Europees recht (artikel 49 VWEU)', p. 20-26. Case notes European Court of Justice 20-06-2013, Case C-186/12 (*Impacto Azul*), The English abstract reads:

In June 2013 the CJEU delivered a preliminary ruling under Article 49 TfEU with regard to the exclusion, under national law, of an EU Member State from the joint and several liability of parent companies vis-à-vis the creditors of their subsidiaries in a crossborder context. Article 49 TfEU does not prohibit any such exclusion resulting from a self-restricting unilateral scope rule under the national Private International Law of an individual EU Member State. The interpretative ruling of the Court does not, however, affect cross-border parental liability for company group members under Private International Law having regard to contractual or non-contractual (cf. tort, insolvency) liability.

- Monique Hazelhorst, 'The ECtHR's decision in *Povse*: guidance for the future of the abolition of exequatur for civil judgments in the European Union', p. 27-33. Case notes European Court of Human Rights 18 June 2013, decision on admissibility, Appl. no. 3890/11 (*Povse* v. *Austria*). The abstract reads:

The European Court of Human Rights' decision on admissibility in Povse is worthy of analysis because it sheds light on the preconditions for the abolition of exequatur for judgments in civil matters within the European Union. The abolition of this control mechanism is intended to facilitate the free movement of judgments among Member States on the basis of the principle of mutual recognition. Concerns have however been expressed about the consequences this development may have for the protection of fundamental rights. The Human Rights Court's Povse decision provides welcome guidance on the limits imposed by the European Convention on Human Rights on the abolition of exequatur. This case note analyses the preconditions that may be inferred from the decision. It concludes that the Human Rights Court's approach leaves a gap in the protection of fundamental rights which the accession of the EU to the Convention intends to fill.

Nagy on the law of companies and freedom of establishment

Csongor István Nagy (Budapest University of Technology and Economics) has posted **The Personal Law of Companies and the Freedom of Establishment Under EU Law. The Enthronement of the Country-of-Origin Principle and the Establishment of an Unregulated Right of Cross-Border Conversion**, published in the *Hungarian Yearbook of International Law and European Law 2013* on SSRN.

This paper presents, from a critical perspective, the development of the CJEU's case-law on the collision between the personal law of companies and the freedom of establishment with special emphasis on the CJEU's recent judgment in VALE.

It is argued that this ruling treats the incorporation theory as 'the law of the land', putting an end to the explanation that EU law does not establish a connecting factor, the determination of which is a Member State competence, but simply precludes some plights that frustrate the freedom of establishment. Furthermore, the case-law on the personal law of companies is put in the context of the country-of-origin concept as a general and fundamental principle of EU law. It is argued that although the incorporation theory fits better the system of the internal market characterised by free movement rights, as a general proposition, the categorical application of this principle to all fields of private law suppresses conflicts analysis and, as such, is a dubious development. Conflicts problems should receive a conflicts law answer. The oversimplified application of the country-of-origin principle, though certainly warranted in the field of public law, does away with private international law problems without carefully examining and adequately solving them.

Furthermore, it is also argued that in Cartesio and VALE the CJEU seems to have created an unregulated right of cross-border conversion. In Cartesio, the Court established a right of 'departure', i.e. companies have the right to move their seat to another Member State in order to convert into the legal person of the receiving country, while losing their original legal personality. In VALE, the CJEU seems to have established a right of 'arrival', derived from the principle of non-discrimination. However, EU law prescribes only the theoretical possibility of conversion ('departure' and 'arrival'), and leaves the technicalities

of this conversion to national law.

Gopalan on the Making of International Commercial Law

Dean Sandeep Gopalan (Newcastle Law School, Australia) has posted New Trends in the Making of International Commercial Law on SSRN.

> *This paper analyzes trends in the making of international commercial law including the impetus for generating conventions, the growth of regional conventions, and soft law.There has never been a better time to be an international commercial law scholar. After decades of being held hostage to state-centered ideas, international commercial law has finally broken through to become more solution oriented. Increasingly, nation states are becoming less important in the creation of international commercial law with the growth of regional organizations, non-state actors, and international arbitration. This is spurred on by the march of globalization and the need for international commercial law. The term "harmonization will be used as a surrogate to discuss the creation of international commercial law as it is the primary means by which international commercial law is created. This article seeks to explore two preponderant trends that have become visible in the making of international commercial law. In Part I, I shall describe the background. In Parts II and III, I will highlight the growing role of regional endeavors at harmonization, and the rise of non-binding instruments.*

Swiss Conference on European

Procedural Law and Third States

On 5/6 June 2014, the Institut für Internationales Privatrecht und Verfahresnrecht of the University of Bern, the Centre for Conflict Resolution of the University of Lucern and the Swiss Institute of Comparative Law will host in Lausanne a conference on the Challenges of European Civil Procedure for the Lugano States and Third States.

The conference focuses on the role of the Lugano Convention in the changing legal context in Europe, due to the European Union's inputs of the past decade.

The role of organizations like the Hague conference and the importance of multilateral and bilateral negotiations for the development of international civil procedure, in addition and in parallel with the European evolution, are the topics that will engage the discussion of the panelists.

The program of the conference may be found here:

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).