Cuniberti on the International Attractiveness of Contract Laws

I (University of Luxembourg) have posted The International Market for Contracts – the Most Attractive Contract Laws on SSRN.

> *The aim of this Article is to contribute to a better understanding of the international contracting process by unveiling the factors which influence international commercial actors when choosing the law governing their transactions.*
>
> *Based on the empirical study of more than 4,400 international contracts concluded by close to 12,000 parties participating in arbitrations under the aegis of the International Chamber of Commerce, the Article offers a method of measuring the international attractiveness of contract laws. It shows that parties' preferences are quite homogenous and that the laws of five jurisdictions dominate the international market for contracts. Among them, two are chosen three times more often than their closest competitors: English and Swiss laws.*
>
> ***International Attractiveness, 2007-2012***
>
> - ***English Law: 11.20***
> - ***Swiss Law: 9.91***
> - ***U.S. State Laws: 3.56***
> - ***French Law: 3.14***
> - ***German Law: 2.03***
>
> *The Article then inquires which features made these laws more attractive than others and seeks to verify whether the postulate that international commercial parties are rational actors is true. It concludes that while some parties might have the resources to study the content of available laws before deciding which one to choose, others have no intention of investing such resources and are happy to rely on cheaper means to assess the content of foreign laws, including*

proxies. Furthermore, some parties suffer from cognitive limitations, the most important of which being the fear of the unknown and the correlative need for selecting a law resembling their own. Finally, unsophisticated parties might not fully appreciate the extent of their freedom to choose the law governing their transaction and might wrongly believe that it is constrained by largely irrelevant factors such as the venue of the arbitration.

The article is forthcoming in the *Northwestern Journal of International Law and Business.*

The EU prepares to become a party to the Hague Convention on Choice of Court Agreements

By Pietro Franzina

Pietro Franzina is associate professor of international law at the University of Ferrara.

On 30 January 2014 the European Commission adopted a proposal for a Council decision on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements. In short, the Convention lays down uniform rules conferring jurisdiction on the court designated by the parties to a cross-border dispute in civil and commercial matters, and determines the conditions upon which a judgment rendered by the designated court of a contracting State shall be recognised and enforced in all other contracting States.

In light of the Lugano Opinion rendered by the Court of Justice in 2006, the conclusion of the Convention comes under the exclusive external competence of the Union.

Once the Council decision will be enacted, and the approval effected, the European Union – which signed the Convention in 2009 (following Council decision No 2009/397/EC of 26 February 2009) – shall join Mexico as a contracting party to the Convention, thereby triggering its entry into force on the international plane. Pursuant to Article 31, the Convention shall in fact enter into force "on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession".

In the Commission's view, the European Union should avail itself of the possibility to make a declaration under Article 21 of the Convention, stating that the latter shall not apply to matters in respect of insurance contracts. The text of the proposed declaration is annexed to the proposal (as Annex II) and may be found here.

When the Hague Convention will become binding upon the Union, the issue will arise of its relationship with the rules on choice of court agreements and the recognition and enforcement of judgments laid down in the Brussels I and the Brussels I *bis* regulation, as well as in the Lugano Convention of 30 October 2007.

The coordination between the Convention and the two regulations is addressed in the explanatory memorandum accompanying the proposal. The relevant passage begins by noting that the said regulations do not "govern the enforcement in the Union of choice of court agreements in favor of third State courts". This would rather be achieved by the Convention. The amendments to the Brussels I regulation introduced with the recast of 2012 "have strengthened party autonomy" and now "ensure that the approach to choice of court agreements for intra-EU situations is consistent with the one that would apply to extra-EU situations under the Convention, once approved by the Union".

The Commission recalls that the relationship between the Convention and the existing and future EU rules is the object of a disconnection clause set out in Article 26(6). Pursuant to this provision, the Convention shall not affect the application of the regulation "where none of the parties is resident in a Contracting State that is not a Member State" of the Union and "as concerns the recognition or enforcement of judgments as between Member States".

In practice, "the Convention affects the application of the Brussels I regulation if

at least one of the parties is resident in a Contracting State to the Convention", and shall "prevail over the jurisdiction rules of the regulation except if both parties are EU residents or come from third states, not Contracting Parties to the Convention". As regards the recognition and enforcement of judgments, the regulation "will prevail where the court that made the judgment and the court in which recognition and enforcement is sought are both located in the Union". Thus, to put it with the Commission, the Convention will "reduce the scope of application of the Brussels I regulation", but "this reduction of scope is acceptable in the light of the increase in the respect for party autonomy at international level and increased legal certainty for EU companies engaged in trade with third State parties".

SIDIBlog's Symposium: Towards a EU PIL Codification?

SIDIBlog, the blog of the Italian Society of International Law (SIDI-ISIL), has launched an **online symposium on the codification of Private International Law at the EU level**. Here is the English presentation of the event:

> *Scholars have been wondering about the possibility of elaborating a legal instrument regulating the "general part" of European Private International Law (a hypothetical future – not yet scheduled – "Rome 0" Regulation). In the context of a sectorial progress of the legal instruments enacted so far on the basis of Article 81 of the TFEU, one wonders if civil and commercial matters could form the subject for such a codification in European private international law. In the context of the civil judicial cooperation of the European Union, the same term "codification" deserves a reflection.*
>
> *Some of these questions have lastly been addressed in the volume Brauchen wir eine Rom 0- Verordnung?, which collects the contributions of distinguished Private International Law scholars who participated to the conference held in Bayreuth in June 2012, devoted to this topic (but it is worth mentioning also a*

previous book entitled Quelle architecture pour un code européen de droit international privé?, edited by M. Fallon, P. Lagarde and S. Poillot Peruzzetto, including an embryon de règlement portant Code europeén de droit international privé, drafted by Prof. Paul Lagarde and published also in RabelsZ, 2011, 673 ff.). Similarly, in December 2012, and following its previous resolution of 7 September 2010, the European Parliament published a document entitled Current gaps and future perspectives in European private international law: towards a code on private international law?

With the […] post of Prof. Francesco Salerno, the SIDIBlog intends to start a debate on the above mentioned issues, trusting to host, in the coming weeks, the contributions of other Italian and foreign scholars and practitioners, in order to discuss the matters raised by the hypothetical "Rome 0" Regulation.

As mentioned in the presentation, the first post of the symposium (in Italian) is authored by Prof. *Francesco Salerno* (Univ. of Ferrara), and touches upon several aspects of the envisaged codification, analysing it both under a general perspective and in the light of specific issues. Subsequent posts in different languages, written by scholars from various jurisdictions, will be published in the coming weeks. Interested readers may follow the debate on this page of SIDIBlog, which will collect all the contributions. Comments to the posts and additional proposals for contributions are most welcome: editors of SIDIBlog may be contacted here.

La responsabilidad de las multinacionales por violaciones de derechos humanos (book)

One of the most significant trends in the evolution of human rights protection is the increasing role of NGO´s, such as International Amnesty or Human Rights Watch, that have undertaken monitoring and evaluation tasks. Unfortunately,

another trend has to do with private actors, specially multinational corporations, acting as agents or accomplices of violations of human rights and the environment. As a result, there is a remarkable extension of the already wide list of potential violators of human rights across the world. The fact that corporations are capable, as private individuals, of perpetrating serious violations of human rights, has attracted the attention of scholars, national and international public instances. Furthermore, many civil actors and individuals as global citizens feel the need to know more about the challenges of globalization and its threats, aiming to a better understanding of the world in where we live. Having this in mind and in order to contribute with some light on this new challenge in the history of human rights, the recently released volume of the collection "Human Rights and Democracy" (University of Alcala – Ombudsman, Spain) gathers essays of various specialists in Human Rights and International Law.

The initial chapter invites the reader to reflect on whether judicial actions lodged against corporations for human rights violations are an isolated phenomenon, or rather they constitute an expression of a broader, more general trend pointing towards a social, juridical and political shift. The remaining chapters address several issues of interest in the effort to provide a better knowledge of the subject: the well- known Ruggie Principles, the access to remedy in the European setting, the fight against supply chains as new forms of slavery, the extraterritoriality question in Kiobel Case, the financial complicity and transitional justice in Brasil, the due diligence of enterprises in the field of human rights, the human right to a healthy environment, the right to water and the procedural ways to claim liability for environmental harm.

La responsabilidad de las multinacionales por violaciones de derechos humanos has been edited by Francisco J. Zamora and Jesus Garcia Civico (Professors of the Universitat Jaume I, researchers of the Human Rights Effectiveness Research Center, HURIERC), and Dr. Lorena Sales, from the University of Castilla-La Mancha .

> VVAA, *La responsabilidad de las multinacionales por violaciones de derechos humanos*, Francisco J. Zamora, Jesús García Cívico, Lorena Sales (eds.). Cuadernos de la Cátedra de Democracia y Derechos Humanos, nº 9, Universidad de Alcalá-Defensor del Pueblo, 2013, 245 pp. ISBN: 978-84-15834-25-0.

Tribunal Constitucional, 27 January 2014: Joinder of Claims and Fundamental Right of Citizens to Effective Judicial Protection

On the 27 January 2014 the Spanish Constitutional Court (*Tribunal Constitucional*) has issued an important decision in the context of collective proceedings brought before the *Audiencia Nacional* regarding the liability of the Spanish public administration (AENA and Ministerio de Fomento) in the air traffic controllers' case in 2010- The *Tribunal Constitucional* has upheld the appeal for *amparo*– protection of constitutional rights- declaring null and void two decisions of the *Audiencia Nacional* which considered that the conditions established in arts 34 ff. of the Act on the Jurisdiction for judicial review were not met – i.e. claims referring to several acts, provisions or actions shall be joined when some claims are a reproduction, confirmation or execution of other or some other direct connection exists between the claims. When those requisites are met, the court may at any point rule for joinder on an *ex officio* basis or at the request of any party.

Briefly, in its *auto* of 17 September 2012 and *providencia* of 19 June 2012, the *Audiencia Nacional* had denied the request for joinder of claims lodged by hundreds of passengers affected by the airspace closure following the air traffic controllers' strike in December 2010. Nevertheless, the *Audiencia Nacional* had allowed individual air passenger claims against the Public administration as a means of guaranteeing the fundamental right to obtain effective protection from the courts -granted by art 24 of the Spanish Constitution.

Abdelkader Castellanos and others filed the aforementioned appeal for the protection of constitutional rights before the Constitutional Court in 2012. They alleged mainly a violation of their right to obtain effective protection from the judges and courts and their right of access to justice (art. 24 Spanish

Constitution). Those violations were allegedly caused by the rejection of the joinder and that the rulings under appeal contravened the duty to state the reasons on which a decision is based- art. 24. 1 of the Spanish Constitution, lack of *motivación*.

After reviewing the *Audiencia Nacional* legal reasoning, the Constitutional Court concluded that when the *Audiencia* denied the joinder it did not provide the grounds for rejecting that claim, so the fundamental right of citizens to obtain effective judicial protection was effectively violated. Accordingly, it has declared null and void both *Audiencia Nacional* decisions and requested the Court to re evaluate the case and either provide detailed grounds for its initial findings or admit the joinder of claims.

The full Constitutional Court decision is downloadable by clicking here (in Spanish).

LSE/PILAGG Conference on the Idea of Arbitration

On 13 February, the London School of Economics and Sciences Po PILAGG will host a common conference in London at the occasion of the publication of *The Idea of Arbitration* (OUP 2013) by **Jan Paulsson** (U Miami / LSE)

Debating Jan Paulsson's Idea of Arbitration

5:40 pm Welcome

5:50 pm Panel 1
Should arbitrators be allowed to apply the law and decide issues of public policy?
Discussants: **Horatia Muir Watt** (Science Po) and **Jan Kleinheisterkamp** (LSE)

6:40 pm Panel 2

Jurisdictional contests: Who decides them? When? And with what degree of finality? Discussants: **Bernard Rix** (20 Essex Street) and **Charles Poncet** (CMS); moderator: **Tariq Baloch** (3VB)

7:30 pm Panel 3
Images in a Crystal Ball Discussants: **VV Veeder** (Essex Court Chambers) and **Derek Roebuck** (IALS); moderator: **Catherine Rogers** (U Penn)

8:20 – 8:30 – Closing remarks by Jan Paulsson

To register, please email to Law.TL.Project@lse.ac.uk

Slovenia: Conference on Evidence in European Civil Law

International scientific conference "**Dimensions of evidence in European civil procedure law**" is scheduled for 20-22 March 2014 in Maribor, Slovenia. The conference will provide an opportunity to review 28 national reports on the issue, and to share and discusse new unifying tendencies in EU law on civil procedure. It is aimed at approving and extending the Report on application of the Council Regulation (EC) 1206/2001, providing additional guidelines for better and swifter implementation of the Regulation, along with conclusions on its possible modernisation.

The conference program and other details, including the EU project within which the conference is taking place, are available at the conference official website.

Michaels on Non State Law in the Hague Principles

Ralf Michaels (Duke Law School) has posted Non-State Law in the Hague Principles on Choice of Law in International Contracts on SSRN.

> *Article 3 of the Hague Principles on Choice of Law in International Contracts is the first quasi-legislative text on choice of law to allow explicitly for the choice of non-state law also before state courts. This paper, forthcoming in a Festschrift, puts the provision into a broader context, discusses their drafting history and particular issues involved in their interpretation. It also provides a critical evaluation. Article 3 does not respond to an existing need, and its formulation, the fruit of a compromise between supporters and opponents of choosing non-state law, makes the provision unsuccessful for state courts and arbitrators alike.*

TDM 1 (2014) – Reform of Investor-State Dispute Settlement: In Search of a Roadmap

Edited by Jean E. Kalicki and Anna Joubin-Bret, this TDM special issue has close to 70 papers making it the largest TDM Special Issue to date. The interest in this topic, and the breadth of proposals offered by our contributors, demonstrates both the importance of holding this dialogue and the creativity of astute users and observers of the present system. It should be of interest to all international disputes lawyers. This Special Issue is particularly timely in light of the European Union public consultation on investor-state dispute settlement and the Transatlantic Trade and Investment Partnership just begun by EU Trade Commissioner Karel De Gucht.

The Table of Contents is available here.

New Book on European Insolvency Law

The evaluation on the application of the European Insolvency Regulation in the 27 Member States conducted by the Universities of Heidleberg and Vienna was just published.

The book is called European Insolvency Law – The Heidelberg-Luxembourg-Vienna Report. It is presented by the authors of the general report: B. Hess, P. Oberhammer and T. Pfeiffer, in cooperation with A. Piekenbrock and C. Seagon.

> *This book presents the results of the External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings (JUST/2011/JCIV/PR/0049/A4) which was commissioned by the EU-Commission in March 2012 as a basis for the pending reform of the European Insolvency Regulation. Most of it was prepared within a period of about half a year in which the editors were in constant contact with the EU-Commission and participated in the process that led to the presentation of the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM[2012] 744 final) dated 12 December 2012. Therefore, we believe that it is fair to say that both our initial approach to the relevant reform tools and issues and the findings in the course of the preparation of this study had a significant impact on the reform process which in turn of course also influenced the outcome of the study.*
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> *The book contains the document generally known as the Heidelberg-Luxembourg-Vienna Report on the reform of the European Insolvency Regulation and two other documents which served as a basis for this report, i. e. a detailed systematic summary of the national reports based on extracts from*

the original text and a systematic compilation of the relevant case-law. Unfortunately, it would have gone far beyond the limits of this book to publish all national reports, although most of them were indeed worth publishing. However, these reports are available online at: *http://www.ipr.uniheidelberg.de/InsReg/Study_Annex_II.html*.

The full table of content is available here.