

TDM Call for Papers: “Dispute Resolution from a Corporate Perspective”

While companies do not enter into contracts with the expectation of becoming embroiled in litigation, disputes do occur and are part of doing business. The assumption is that disputes should be managed systemically rather than as ad-hoc events. This TDM special on dispute resolution from a corporate perspective seeks to widen and deepen the debate on issues that are central to the efficient management of disputes from a corporate perspective. The editors thus seek contributions related to any of the areas set out below but welcome other relevant contributions as well.

* Commercial Dispute Resolution - Negotiation. In order to successfully resolve commercial disputes, lawyers must possess, in addition to their legal, technical, and industry expertise, the skills to understand, predict and manage conflict through negotiation. While discussion of legal concepts and theory among the community of international dispute resolution lawyers is highly sophisticated, there is less of a debate on negotiation and limited exchange with other disciplines researching the field of negotiation.

* Managing the cost of dispute resolution: Discussions between law firms and corporations often center on the subject of how much and how to bill, including for dispute related work. While there is an ongoing debate about whether traditional hourly rate billing creates the wrong incentives, alternative fee arrangements for dispute resolution still appear to be exceptional.

* The future of commercial dispute resolution: The arrival of “big data”, i.e., the increasing volume, velocity, and variety of data, is likely to catapult us into a world where analytics of very large data sets may allow predictions of outcomes and behavior that currently does not exist.

The editors of the special are: Kai-Uwe Karl (General Electric), Abhijit Mukhopadhyay (Hinduja Group), Michael Wheeler (Harvard Business School) and Heba Hazzaa (Cairo University).

Publication is expected in October 2014. Proposals for papers should be submitted to the editors by July 31, 2014

Contact details are available on the TDM website

Slovenian Supreme Court Rules on Service under Hague Convention

By Jorg Sladic, attorney-at-law and associate professor in Ljubljana.

Summary

In a recent decision (judgement of 19 November 2013 in case III Ips 86/2011) published in March 2014 the Supreme Court of the Republic of Slovenia had to give a ruling in judicial review limited to the points of law of appellate decisions (basically identical to the German *die Revision* and similar to French *la cassation*) on a question of service of documents instituting proceedings (application for payment as debtor's performance of an international sales contract) in Slovenia effected in Belarus on Belarussian defendants according to the Rules of the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The specifics of the Slovenian case are the link between the service of the application instituting proceedings (writ) and the summons to lodge a reply issued by the Slovenian court abroad and a default judgement (without application of Art. 15(2) of the 1965 Hague convention). However, the two issues that will be of importance for international legal community are (i.) the interpretation of the 1965 Hague Convention on service and (ii.) the interpretation of a contractual clause on prorogation of jurisdiction allegedly foreseeing the application of a foreign *lex fori*. The decision can be found on: <http://sodnapraksa.si/>

Facts

A Slovenian and a Belarussian company had concluded a sales contract on 30 August 2002. The contract contained also the following clause "all disputes by the parties shall be adjudicated before the courts in Ljubljana (*sc.: the capital of Slovenia*) according to the rules of the State of the defendant". The Slovenian seller had supplied the goods, the Belarussian buyer failed to pay for the goods. The Slovenian seller lodged an application for payment as a way of specific performance of buyer's obligations before the competent court in Ljubljana. The application had been served in Belarus on the Belarussian defendant in application of the Hague Convention of 1965 by the Belarussian central authority upon the request of the Slovenian court. The

defendant did not lodge a reply, the consequence being a default judgement issued by the Slovenian court of first instance. The default judgement was then contested by an appeal. After the dismissal of the appeal by an appellate court an application for judicial review limited to the points of law was lodged by the defendant.

Decision

The Slovenian Supreme court first examined the requirement of duly correct service as a precondition for issuing a default judgement (par. 7 of the judgement) and concluded that Slovenia and Belarus are both contracting parties to the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, therefore no procedural requirement had been infringed by ordering a service on a foreign defendant according to the cited convention. Referring to the Art. 6 of the 1965 Hague Convention the Supreme Court found that Belarussian judicial authorities did not complete the certificate on service according to the said convention (par. 12). However, considering that Slovenian courts did not issue a special request for service. As the 1965 Hague Convention under Art. 5(1) only provides for two ways of service; namely by methods prescribed by the requested state's internal law for service of documents in domestic actions upon persons who are within its territory (sub-paragraph a), and by a particular method requested by the requesting state (the applicant), unless such a method is incompatible with the law of the state addressed. The interpretation of that provision given by Slovenian Supreme Court is that unless a special method is required by the requesting court (the applicant) then the service abroad is to be performed according to the *lex fori* of the requested or addressed state. If service is performed on a foreign entity according to the *lex fori* of the foreign addressed state, a failure to complete the certificate (on the reverse of the request) has no influence on the whole process of service (par. 13). Perhaps a slightly different approach by the CJEU should be mentioned. Indeed, the CJEU seems to consider that the question whether an application or a document instituting proceedings was duly served on a defendant in default of appearance must be determined in the light of the provisions of the 1965 Hague Convention (CJEU, C-292/10 *de Visser*, par. 54, C-522/03 *Scania Finance France*, par. 30).

The second issue, i.e. an alleged reference to the foreign *lex fori* in the contractual clause on prorogation of jurisdiction has been dealt quite fast. The rules of procedure are always of mandatory nature and belong to the legal order of the court competent for hearing the case and cannot be chosen by the parties. However, even if the parties had agreed on the application of the Belarus procedural law, this would only imply only a partial voidness of the clause on the choice of law and would not have any influence on the choice of substantive law.

No Need to Know Where Malaysia Airlines Flight 370 is...

to initiate court proceedings.

But where?

Trimble on Foreigners in US Patent Litigation

Marketa Trimble (University of Nevada William S Boyd School of Law) has posted *Foreigners in U.S. Patent Litigation: An Empirical Study of Patent Cases Filed in Nine U.S. Federal District Courts in 2004, 2009, and 2012* on SSRN.

One of the greatest challenges facing patent holders is the enforcement of their rights against foreign (non-U.S.) infringers. Jurisdictional rules can prevent patent holders from filing patent infringement suits where they have the greatest likelihood of success in enforcement, such as where the infringer is located, has his seat, or holds his assets; instead, patent holders must file lawsuits in the country where the infringed patent was issued. But filing a patent lawsuit in a U.S. court against a non-U.S. infringer may be subject to various difficulties associated with the fact that U.S. substantive patent law (particularly as regards its territorial scope) and conflict of laws rules are not always compatible and interoperable with the conflict of laws rules of other countries. Such insufficient compatibility and interoperability can lead to U.S. judgments not being enforceable outside the United States.

In the Hague Conference's Judgments Project, which the Conference re-launched in 2012, the United States has an opportunity to negotiate internationally uniform conflict of laws rules to improve cross-border litigation, including cross-border patent litigation. This article provides

data on cross-border patent litigation that can be used to assess the extent to which the United States should be concerned about cross-border patent litigation problems and the degree to which the United States should be involved in the Judgments Project to improve cross-border patent litigation.

The statistics in this article are the result of an empirical study of 6,420 patent cases filed in 2004, 2009, and 2012 in nine selected U.S. federal district courts – the federal district courts in which the largest numbers of patent cases per court were filed in 2012. The results show that the numbers of patent cases involving foreign parties are on the rise, although the percentage of such cases in the total number of patent cases filed did not increase from 2009 to 2012. The article brings up to date the author's earlier research on cross-border aspects of patent litigation, contributes to the rapidly growing body of empirical literature on patent litigation (including the literature on the "patent troll" phenomenon), and enriches the literature on foreign litigants in patent disputes and on transnational litigation in general (both of which suffer from a dearth of statistical data).

Internet L@w Summer School in Geneva

The University of Geneva is launching an Internet l@w summer school which will take place from June 16 to June 27, 2014 (www.internetlaw-geneva.ch).

The Internet l@w summer school offers a unique opportunity to learn and discuss Internet law and policies with experts from leading institutions including the Berkman Center for Internet and Society at Harvard University, the Internet Society, the International Telecommunication Union (ITU), the United Nations Commission on International Trade Law (UNCITRAL), the World Economic Forum (WEF), the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO), as well as from other prestigious academic or governmental institutions and global Internet companies (eBay and Google). The topics that will be covered include privacy and surveillance, free speech, telecom and Internet infrastructure, intellectual property, antitrust, choice of court & choice of law, on-line contracts, consumer protection, legal issues of social media and cloud computing.

Website: www.internetlaw-geneva.ch

Registration deadline: May 15, 2014 (early bird: April 15).

French Supreme Court Denies Effect to Foreign Surrogacies On the Ground of Fraude a la Loi

On 19 March 2014, the French Supreme Court for civil and criminal matters (*Cour de cassation*) ruled that an Indian surrogacy would be denied effect in France on the ground that it aimed at strategically avoiding the application of French law (*fraude à la loi*), which forbids surrogacy.

A French male had entered into a surrogacy agreement with an Indian woman in Mumbai. After a child was born, the man attempted to register the child as his (and hers) on French status registries. A French prosecutor challenged the registration. A court of appeal rejected the challenge on the grounds that it was not alleged that the applicant was not the father, and that the birth certificate was legal.

The *Cour de cassation* allowed the appeal of the French prosecution service and ruled that the behaviour of the French national and resident aimed at avoiding the application of French law. The Court held:

Attendu qu'en l'état du droit positif, est justifié le refus de transcription d'un acte de naissance fait en pays étranger et rédigé dans les formes usitées dans ce pays lorsque la naissance est l'aboutissement, en fraude à la loi française, d'un processus d'ensemble comportant une convention de gestation pour le compte d'autrui, convention qui, fût-elle licite à l'étranger, est nulle d'une nullité d'ordre public selon les termes des deux premiers textes susvisés

In 2011, the *Cour de cassation* had denied effect to foreign surrogacies on the ground that they violated public policy. Since September 2013, the Court has founded its rulings on the strategic behaviour doctrine.

Paech on Close Out Netting and Insolvency

Philipp Paech (LSE Law) has posted Close-Out Netting, Conflict of Laws and Insolvency on SSRN.

Close-out netting is a risk mitigation tool globally employed by financial market participants. It affords a special protection to those being able to use it and is remotely comparable to a super-priority or a security interest. It therefore potentially conflicts with the pari passu principle and its emanations. A number of jurisdictions, often called 'netting-friendly', have solved that conflict more or less comprehensively. As a consequence, close-out netting agreements are generally enforceable in these jurisdictions, even in the event of insolvency of one of the parties.

However, the financial market is global and the parties, their branches and assets might be located in different jurisdictions. Even if all relevant jurisdictions are netting friendly they differ in their approach to solving the conflict between granting the privilege of close-out netting on the one hand, and preserving the core of pari passu on the other hand. At the core of the issue is the question of whether and to what extent the lex contractus, ie. law governing the close-out netting agreement determines the limits of enforceability in insolvency — or whether the lex fori concursus alone is relevant.

Countries failed to agree on an international standard for conflict-of-laws rules and did not include a relevant principle in the 2013 Unidroit Principles on the operation of close-out netting provisions. As a result, legal uncertainty will persist in this area despite the fact that the EU is currently improving its regime in this regard.

This paper shows that it is a fallacy to believe that maintaining ambiguity in the conflict-of-laws regime governing cross-jurisdictional insolvencies of financial institutions is necessary for the sake of preventing the erosion of national mandatory law. States must acknowledge that globalised financial markets cannot work properly and safely against a backdrop of heterogeneous and thus potentially conflicting national frameworks. They should relax their insistence on the primacy of their own insolvency law in cross-jurisdictional situations, at least to some small extent, in exchange for a comprehensive and consistent international framework better able to serve the aims of certainty and stability. Such framework is to be provided by EU law or, ideally, by a global standard.

Fourth Issue of 2013's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata - University of Milan - for the following presentation of the latest issue of the RDIPP)

✖ The fourth issue of 2013 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features two articles and one comment.

Paola Ivaldi, Professor at the University of Genoa, examines the issue of environmental protection in the context of European Union law and private international law in **“Unione europea, tutela ambientale e diritto internazionale privato: l'art. 7 del regolamento Roma II”** (European Union, Environmental Protection and Private International Law: Article 7 of the Rome II Regulation; in Italian).

Art. 7 of Regulation No 864/2007 (so called Rome II Regulation) provides for a specific conflict of law rule concerning liability for environmental damage, which empowers the person sustaining the damage to choose between the application of the lex loci damni and the application of the lex loci actus. The present article analyses the rationale underpinning the attribution to only one of the parties concerned (the person sustaining the damage) of the unilateral right to choose the law applicable to their relationship, and it concludes that the provision at issue does not purport to alter the equal balance between such parties, as it rather aims at ensuring a high level of environmental protection, both by preventing a race to the bottom of the relevant national legal standards and by discouraging the phenomenon known as environmental dumping. Furthermore, the article compares the specific provision laid down by Art. 7 of the Rome II Regulation with the general conflict of laws rule provided by Art. 4 and Art. 14 of the same instrument, with particular reference to the role played - in the peculiar context of environmental liability - by party autonomy and to the different relevance attributed by such rules to the lex loci damni and to the lex loci actus.

Anne Röthel, Professor at the Brucerius Law School in Hamburg, discusses

party autonomy under the Rome III Regulation in **“Il regolamento Roma III: spunti per una materializzazione dell'autonomia delle parti”** (The Rome III Regulation: Inputs for Concretizing Party Autonomy; in Italian).

Regulation (EU) No 1259/2010 of December 20th 2010, the so-called “Rome III” Regulation, lays down uniform conflict-of-laws rules on divorce and legal separation. It represents the first case of enhanced cooperation between (part of) the Member States of the European Union, and it became applicable on June 21st 2012. After reporting the criticism of German legal literature, the author points out that the Regulation, although at first sight only aiming at international private law, finally covers substantial matters such as the scope of autonomy when it comes to divorce and legal separation. Her analysis comprises as a first step a comparative view which underlines the existence of deeply rooted legal and cultural differences in the field of divorce. She also presents statistical data regarding the situation in Germany. In this context she highlights the meaning of the “availability” of divorce in the “conservative” legal systems and in the “liberal” ones, that basically depends on whether marriage is conceived entirely as a legal institution or as well as a contract depending on the autonomy of the parties. Secondly, she focuses on Art. 5 of Regulation No 1259/2010 that allows the spouses to determine the law applicable to divorce and legal separation. In this respect, the Regulation goes farther than the existing national rules of international private law. The author questions therefore the legitimacy of party autonomy within private international law. Finally, she examines the conditions for a valid choice of law. The German legislator decided to impose the form of a public (notarial) act for the choice-of-law agreement. The author questions whether the fulfillment of the formal requirements can sufficiently guarantee by itself that the parties are aware of the impact of their decision. She therefore suggests a further judicial control to take place in order to guarantee autonomous decisions in the light of the fundamental rights and the jurisprudence of German Federal Constitutional Court on agreements in matters of matrimonial property regimes.

In addition to the foregoing, the following comment is also featured:

Ester Di Napoli, PhD in Law, “A Place Called Home: il principio di territorialità e la localizzazione dei rapporti familiari nel diritto internazionale privato post-moderno” (A Place Called Home: The Principle of Territoriality and the Localization of Family Relations in Post-Modern Private International Law: in Italian).

The way in which space is conceived and represented in private international law is changing. This development reflects, on the one hand, the emergence of non-territorial spaces in the legal discourse (the market, the Internet etc.) and, on the other, the acknowledgment, in various forms

and subject to different limitations, of the individual's "right to mobility". The interests of States and those of social groups are gradually losing ground to the interests of the individual, the freedom and self-determination of whom is now often likely to be exercised in the form of a choice of law. In the field of family law, European private international law shapes its rules by taking into account the "fluidity" of postmodern society: conflict-of-laws rules become more flexible and "horizontal", while the "myth" of abstract certainty is outweighed by the quest for adaptability and effectiveness.

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale. This issue is available for download on the publisher's website.

Van Den Eeckhout on International Employment Law and European Fundamental Freedoms

Veerle Van Den Eeckhout (Leiden University and University of Antwerp) has posted on SSRN an English version of a paper on international employment law previously published in Dutch in "Tijdschrift Recht en Arbeid" ("TRA", Kluwer, 2009, issue 4).

The paper discusses the relationship between International labour law and European fundamental freedoms, including an analysis from a PIL-perspective of the cases Viking, Laval, Rüffert and C./Luxembourg, and an analysis of the relationship between the Rome Convention, the Rome I Regulation and the Posting Directive. The paper is entitled "International Employment Law Mangled between European Fundamental Freedoms". An extended version (not yet translated into English) of this paper can be found on SSRN (also available [here](#) and [here](#)) – in this extended version, the relationship between the Rome convention, the Rome I regulation and the Posting Directive is analysed in a more profound way, including also aspects such as: the relationship between the Posting Directive on the one hand, the

applicability of the law of the host State on the other hand, the consequences – seen from the perspective of the protection of the employee – of the *non*-applicability of the Posting Directive etc.

The author is grateful to Ms. Emanuela Rotella for the English translation of the paper.

French Book on PIL Legislation Applicable in France

Dean Sandrine Clavel (University of Versailles Saint Quentin en Yvelines) and Estelle Galland (Paris I University) have published a book gathering the essentials of applicable legislation in the field of private international law in France. 

The materials include national legislation, European regulations and directives and international conventions.

Traditionnellement d'origine nationale et jurisprudentielle, le droit international privé français s'est enrichi, au cours des dernières décennies, de sources supranationales et textuelles ; ce phénomène s'est encore récemment accentué sous l'influence de l'Union européenne. La transformation des sources s'est accompagnée d'une inflation de celles-ci. Et la multiplication des textes, alliée à la diversité de leurs origines, a rendu l'accès aux sources du droit international privé particulièrement complexe.

L'objectif de cet ouvrage est, pour simplifier la tâche des « usagers » du droit international privé, qu'ils soient universitaires, étudiants ou praticiens du droit, de leur offrir un « portail » des sources textuelles du droit international privé français contemporain, tendant à l'exhaustivité sans toutefois y prétendre.

Le lecteur y trouvera, le plus souvent en texte intégral, l'essentiel des règles de conflit de lois et de juridiction, mais aussi des règles matérielles de droit international privé d'origine supranationale et des règles de procédure internationale et d'arbitrage international, ce aussi bien en matière civile et commerciale qu'en matière familiale, patrimoniale et extrapatrimoniale (à l'exclusion notable des règles régissant la nationalité et la condition des étrangers). L'usage de cet

ouvrage se veut simplifié par la mise à disposition d'un index thématique qui permet au lecteur d'embrasser, d'un seul coup d'oeil, l'ensemble des textes régissant une question de droit spécifique (par exemple, l'adoption, le transport aérien ou la propriété industrielle, etc.).

More information can be found [here](#).