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).

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.