The 3rd Petar Sarcevic conference on family law

The Third International Scientific Conference Petar Sarcevic: *Family and Children – European Expectations and National Reality* will take place in Opatija, Croatia, on 20-21 September 2013. The programme of this conference includes the following speakers and topics:

Friday, 20 September

Prof. Dr. KATARINA BOELE-WOELKI
Utrecht University
Family Law in Europe: Past, Present, Future – Keynote Address

Dr. BRANKA RESETAR
J. J. Strossmayer University of Osijek
European Principles on Parental Responsibility in the 2013 Draft Family Act

Prof. Dr. NENAD HLACA
University of Rijeka
Misuse of the Right to Family Reunification

Prof. Dr. AUKJE VAN HOEK
University of Amsterdam
Mediation in Family Matters with a Cross-Border Element – The Dutch Experience

Saturday, 21 September

Prof. PAUL BEAUMONT
Aberdeen University
A Possible Framework for a Hague Convention on International Surrogacy

Prof. Dr. COSTANZA HONORATI
University of Milano-Bicocca
The New Italian Provisions on Unicity of Status Filiationis and their PIL Implications

Dr. INES MEDIC MUSA
University of Split
Cross-Border Placement of a Child under the 1996 Hague Convention and the Brussels II Regulation

Dr. MIRELA ZUPAN
J. J. Strossmayer University of Osijek
Key Issues in the Application of the Maintenance Regulation

Dr. PATRICIA OREJUDO PRIETO DE LOS MOZOS
Compultense University of Madrid
Matrimonial Crisis under the Brussels II Regulation

Dr. THALIA KRUGER
University of Antwerp
Partners Limping Accross Borders?

Prof. Dr. VESNA TOMLJENOVIC and Dr. IVANA KUNDA
EU General Court, University of Rijeka
Rome III: Is it Right for Croatia?

The conference is scheduled to commence at 4 pm on Friday 20 September and continue the next morning at the hotel 4 opatijska cvijeta, with privileged prices for the conference attendees sending this accommodation form. The registration form for the conference should be sent to zeup@pravri.hr just as any questions regarding the conference. Here are also the details regarding the payment of the conference fee.

This conference follows the two Petar Sarcevic conferences reported previously, the first on the Brussels I Regulation and the second on maritime law. There seems to be no better topic for the third conference devoted to Petar Sarcevic than family law. His academic interests focused not only on private international law but extensively also on family law. In 1998 he became an associate member and in 2001 full member of the prestigious Institut de droit international and was appointed as Rapporteur of the Fourth Commission on the topic “Registered Partnership in Private International Law”. He was a member of numerous other international associations, including the International Society of Family Law, where he served as its president from 1997 to 2000 and member of the Executive Council for almost 15 years. Unfortunately, he was unable to lecture at The

Hague Academy of International Law on the topic “Private International Law Aspects of Cohabitation Without Formal Marriage” in July 2005.

Do we need a Rome 0-Regulation?

As reported earlier in our blog, Stefan Leible and Hannes Unberath from the University of Bayreuth hosted a conference on the question whether we need a Rome 0-Regulation in June 2012. Recently, the conference volume has been published. For the moment it is available in German only. However, the editors are contemplating an English version at a later stage.

The volume contains the following contributions:

- *Felix M. Wilke*, Einführung, pp. 23 et seq.
- *Erik Jayme*, Kodifikation und Allgemeiner Teil im IPR, pp. 33 et seq.
- *Rolf Wagner*, Das rechtspolitische Umfeld für eine Rom 0-Verordnung, pp. 51 et seq.
- *Michael Grünberger*, Alles obsolet? – Anerkennungsprinzip vs. klassisches IPR, pp. 81 et seq.
- *Giesela Rühl*, Allgemeiner Teil und Effizienz. Zur Bedeutung des ökonomischen Effizienzkriteriums im europäischen Kollisionsrecht, pp. 161 et seq.
- *Helmut Heiss/Emese Kaufmann-Mohi*, ”Qualifikation“ Ein Regelungsgegenstand für eine Rom 0- Verordnung?, pp. 181 et seq.
- *Gerald Mäsch*, Zur Vorfrage im europäischen IPR, pp. 201 et seq.
- *Oliver Remien*, Engste Verbindung und Ausweichklauseln, pp. 223 et seq.
- *Heinz-Peter Mansel*, Parteiautonomie, Rechtsgeschäftslehre der Rechtswahl und Allgemeinen Teil des europäischen Kollisionsrechts, pp. 241 et seq.
- *Marc-Philippe Weller*, Der ”gewöhnliche Aufenthalt“ – Plädoyer für einen willenszentrierten Aufenthaltsbegriff, pp. 293 et seq.
- *Martin Gebauer*, Stellvertretung, pp. 325 et seq.
- *Jan von Hein*, Der Renvoi im europäischen Kollisionsrecht, pp. 341 et seq.

- *Florian Eichel*, Interlokale und interpersonale Anknüpfungen, pp. 397 et seq.
- *Hans Jürgen Sonnenberger*, Eingriffsnormen, pp. 429 et seq.
- *Wolfgang Wurmnest*, Ordre public, pp. 445 et seq.
- *Eva-Maria Kieninger*, Ermittlung und Anwendung ausländischen Rechts, pp. 479 et seq.
- *Stefan Leible*, Hannes Unberath, p. 503

More information is available on the publisher's website (in German).

PhD Positions in Private International Law in Luxembourg

The Faculty of Law of the University of Luxembourg will be seeking to recruit several PhD candidates in Private International Law.

Candidates should be PhD students who will be expected to work on their doctorate, to teach a few hours per week (one to three) and to contribute to research projects in private international law, mostly under my supervision. They are 3-year contracts, which can be extended for one year.

Ideally, candidates would hold a Master's degree in private international law or in international dispute resolution (litigation or arbitration). Their language skills should be sufficient to work in a multilingual environment. Skills in another social science (economics, political science, etc…) would be an advantage.

Applications should include:

- A motivation letter.
- A detailed curriculum vitae with list of publications and copies thereof, if applicable.
- A transcript of concluded university studies.
- The name, current position and relationship to the applicant, of one

referee.

They should be sent to me by email (gilles.cuniberti@uni.lu). I am also available to answer any questions at the same address.

Deadline for applications: September 1st, 2013.

Lex Mercatoria, International Arbitration and Independent Guarantees

What is the relationship among the new *lex mercatoria*, international commercial arbitration, and independent contract guarantees?. Under the title "*Lex Mercatoria*, International Arbitration and Independent Guarantees: Transnational Law and How Nation States Lost the Monopoly of Legitimate Enforcement", a recently published essay by Cristian Gimenez Corte analyses how these elements interact; whether their interaction may have led to the establishment of a new, truly autonomous, transnational legal system; and, if it does, whether and how the transnational legal system is related to, and impacts on, national legal systems. Accordingly, the essay does not seek to provide an in-depth analysis of the nature of each of these legal institutions separately; it rather studies the relations among them, and the outcome of these relations.

Let's start with the relationship between the new *lex mercatoria* and international commercial arbitration. An international contract may be governed solely on the basis of the transnational *lex mercatoria*, without reference to any national law. However, if a dispute arises, one of the parties may bring a claim before a national court, and then national law will necessarily come into play. The parties to an international contract may still, nonetheless, circumvent the jurisdiction of national courts, which are the constitutional organs of the state with the power to adjudicate legal disputes, and refer their dispute to arbitration. This interplay between the substantive *lex mercatoria* and international commercial arbitration

as a dispute settlement mechanism has been seen as establishing an 'autonomous' legal system, independent from national legal systems.

Yet, if the arbitral award is not executed voluntarily, the wining party will have to request the assistance of a national court, and of national law, to *enforce* the arbitral award. Thus, at the end of the day, the transnational legal system would not be entirely autonomous; it would depend upon national law, because at the moment of truth, legitimate enforcement remains a monopoly of the governments of nation states.

At this point, independent contract guarantees enter into play. Parties to an international contract may choose the new *lex mercatoria* as the substantive law of the contract; they may also incorporate an arbitration clause; and, finally, they may agree on an independent contract guarantee as a warrant for the execution of the award. In accordance with the terms and conditions of the independent contract guarantee, the guarantor will pay the winner of the arbitration upon demand, accompanied by the award. Hence, the arbitral award will be enforced without the intervention of any national court.

As seen, the *classical* theory of the *lex mercatoria* as an autonomous system of law finds its own limits at the enforcement stage. The incorporation of independent contract guarantees, however, allows that limit to be exceeded by providing the *lex mercatoria* with its own means of enforcement, thus establishing a truly autonomous and transnational system of law.

In this scenario, the transnational legal system is composed of substantive transnational customary law, which is implemented by private arbitrators, who may even enforce their own decisions without support from national courts. Hence, there is no participation or control by the constitutional organs of national states over the production, adjudication, or even enforcement of transnational law. This situation should necessarily lead to the question of the formal validity and the legitimacy of transnational law—that is, how and on whose behalf this 'law' is invoked and applied.

As said, these arguments are developed in depth in an article published in the *Transnational Legal Theory* journal, which further examines whether and how national law 'validates' transnational law, by analysing the interplay and linkages between them. As a conclusion, the study briefly addresses the issue of the

legitimacy of the transnational legal system.

Source: Transnational Legal Theory, Volume 3, Number 4, 2012, pp. 345-370. Click here to access. Also available at SSRN.

Rolph on Australia as a Destination for 'Libel Tourism'

David Rolph (University of Sydney Law School) has posted Splendid Isolation? Australia as a Destination for 'Libel Tourism' on SSRN.

> *The phenomenon of 'libel tourism' has caused tension between the United States and the United Kingdom. The issue highlights the differences between American and English defamation laws and conflict of laws rules. Both in the United States and the United Kingdom, there has been legislation proposed or enacted to address the real or perceived problem of 'libel tourism'. This article analyses 'libel tourism' and the responses to it in both countries. Given that Australia's defamation laws and conflict of laws rules are arguably more restrictive than those of the United Kingdom, this article examines the prospect of Australia becoming an attractive destination for 'libel tourism'.*

The paper was published in the *Australian International Law Journal* in 2012.

Brand on Implementing the 2005 Hague Convention

Ronald A. Brand (University of Pittsburgh School of Law) has posted Implementing the 2005 Hague Convention: The EU Magnet and the US Centrifuge on SSRN.

> *Competence for the development of rules of private international law has become more-and-more centralized in the European Union, while remaining diffused in the United States. Nowhere has this divergence of process in private international law development been clearer than in the approach each has so far taken to the ratification and implementation of the 2005 Hague Convention on Choice of Court Agreements. In Europe, ratification has been preceded by the 2012 Recast of the Brussels I Regulation, coordinating internal and external developments, and reaffirming Union competence for future developments, both internally and externally. In the United States, debate has arisen over whether the Convention should be implemented in a single federal statute – as was done for the New York Convention in the Federal Arbitration Act – or through state-by-state enactment of a Uniform Act promulgated by the National Conference of Commissioners on Uniform State Laws. These differences in approach are important to future negotiations in multilateral fora such as The Hague Conference on Private International law, UNCITRAL, and UNIDROIT. They demonstrate a coherence of approach within the EU which attracts not only its own Member States, but also external constituencies in international negotiations, and diffuse development of the law in the United States, which tends to make leadership in multilateral negotiations difficult.*

The paper is forthcoming in the *Liber Amicorum Alegrias Borras*.

TDM Special Issue: "Reform of Investor-State Dispute Settlement: In Search of A Roadmap."

Investor-State Arbitration has become a salient feature of international dispute settlement, but its continued vitality is not beyond reproach. I myself have waded into the debate with an article published this month in the ICSID Review. Furthering this dialogue, TDM is pleased to announce a forthcoming TDM special issue: "Reform of Investor-State Dispute Settlement: In Search of A Roadmap."

Co-edited by Jean E. Kalicki (Arnold & Porter LLP and Georgetown University Law Center) and Anna Joubin-Bret (Cabinet Joubin-Bret and World Trade Institute), this special issue will explore recent calls for reform of the investor-State dispute settlement system, along with the viability of five "reform paths" recently proposed for discussion by UNCTAD, the United Nations Conference on Trade and Development (see UNCTAD IIA Issues Note, "Reform of Investor-State Dispute Settlement: In Search of a Roadmap," 29-30 May 2013).

You can find an extensive call for papers on the TDM website.

Publication is expected in October or November 2013. Proposals for papers (e.g., abstracts) should be submitted to the editors by 15 September 2013. Contact info is available on the TDM website.

Low on the Psychology of Choice of Laws

Gary Low (Singapore Management University School of Law) has posted A Psychology of Choice of Laws on SSRN.

> *There is certainly a lot of choice going around in the market for contract law.*

This is a good thing, since choice is key to self-determination and may help improve our laws. Yet there may be such a thing as choice overload, and the introduction of the Common European Sales law is a timely reminder to consider its and effect for the market for contract law. This article does just that. It explains what choice overload is, why it comes about, and what can be done to ameliorate its effects. The conclusion is that CESL will not cause choice overload but will not help in that respect either. Given the prospect of overload, this article evaluates the possible solutions to the problem, and advances the argument in favour of categorizing laws in order to help decision-makers to choose prudently.

The paper was published in the *European Business Law Review* in 2012.

Third Issue of 2013's ICLQ

The third issue of *International and Comparative Law Quarterly* for 2013 includes one short article by Cameron Sim on *Choice of Law and Anti-Suit Injunctions: Relocating Comity.*

English private international law generally gives a potential role, where appropriate, to foreign law, by allowing for the application of choice of law rules to determine its relevance. Yet in the context of anti-suit injunctions granted otherwise than in aid of a contractual right not to be sued, choice of law is conspicuously absent. In those cases, courts simply apply the lex fori without paying any regard to foreign law, although the notion of comity is taken into account in the final decision on whether to grant anti-suit relief. Clearer identification of the grounds for granting such relief should limit application of the lex fori to instances where the anti-suit injunction serves as a form of ancillary relief to protect the judicial processes of the forum, and in which comity plays no role. In all other cases, which ultimately concern private justice between the parties, comity is best understood as an expression of justice in cases involving foreign elements, and better reflected through choice of law rules, which might lead to the application of foreign law. This approach is

preferable to invoking comity as a consideration relating to the manner in which the court regulates the grant of anti-suit relief, because courts tend to bestow rights, which parties may not otherwise have, under the cloak of comity. Understanding comity as the catalyst for taking account of foreign law assuages concerns about interfering with foreign courts, acts as a deterrent to remedy shopping, and provides greater certainty as regards the vindication of rights. The case for widening the application of choice of law in this context does not depend on Rome II, but if the principle is accepted, courts must follow the process which it specifies.

Brand on the New Hague Judgments Project

Ronald A. Brand (University of Pittsburgh School of Law) has posted Jurisdictional Developments and the New Hague Judgments Project on SSRN.

A Working Group of the Hague Conference on Private International Law is revisiting possible multilateral rules on the recognition of foreign judgments. This was the subject of broader negotiations on jurisdiction and judgments that ran from 1992 until 2005, concluding in the Hague Convention on Choice of Court Agreements. Any effort to coordinate judgments recognition rules necessarily requires consideration of the jurisdictional bases of authority of the court from which a judgment originates. Problems of coordination are exacerbated because differences in existing jurisdictional bases are colored by: (1) basic differences between civil law and common law approaches to judicial analysis, (2) differences in the extent to which jurisdiction is a constitutional matter, and (3) differences in focus on the interests of plaintiffs and defendants. Recent developments in both the United States and the European Union have both highlighted existing differences in approaches to adjudicative jurisdiction, and demonstrated some areas in which there may be greater hope for common ground. While rules on general jurisdiction may be moving closer together,

rules on specific jurisdiction seem to be suffering greater divergence. Any new multilateral efforts will also have to take into account the impact on parallel efforts to obtain ratifications of the Choice of Court Convention. While there are jurisdictional bases on which agreement should not be difficult in a new judgments project, those are probably the bases for which recognition and enforcement abroad will be least valuable to the judgment creditor.

The paper is forthcoming in *A Commitment to Private International Law – Essays in Honor of Hans Van Loon*.