French Constitutional Council Upholds Gay Marriage Bill

The French Constitutional Council has rejected the challenge against the bill adopted by the French Parliament opening marriage to same sex couples. It will therefore become law in the coming days.

The bill included French traditional choice of law rules providing for the application of the law of the nationality of each spouse to the substantive validity of marriage (Civil Code, Art. 202-1, para. 1), and the application of the law of the place of celebration to its formal validity (Civil Code, Art. 202-2).

Requirements as to the sex of the spouses being substantive in character, the consequence of these rules would have been that only nationals from one of the 14 jurisdictions allowing gay marriage could have married in France.

This is the reason why the bill also included a more innovative rule providing that two gay people would still be allowed to marry if the national law or the law of the residence of one of them only allowed gay marriage (Civil Code, Art. 202-1, para. 2).

The rule would enable a French national to marry a national from any country in France. This would also apply to French residents, probably to avoid discrimination on the ground of nationality, especially between EU nationals.

> *Code Civil*
>
> *Chapitre IV bis Des règles de conflit de lois*
>
> *Art. 202-1. – Les qualités et conditions requises pour pouvoir contracter mariage sont régies, pour chacun des époux, par sa loi personnelle.*
>
> *Toutefois, deux personnes de même sexe peuvent contracter mariage lorsque, pour au moins l'une d'elles, soit sa loi personnelle, soit la loi de l'État sur le territoire duquel elle a son domicile ou sa résidence le permet.*
>
> *Art. 202-2. – Le mariage est valablement célébré s'il l'a été conformément aux formalités prévues par la loi de l'Etat sur le territoire duquel la célébration a eu*

lieu.

The constitutionality of the provision was challenged on the ground that it violated the principle of equality before the law, as Article 202-1, para. 2, only applies to, and protects, same sex marriage, and that a different rule thus applies to heterosexual marriages.

On May 17th, the Constitutional Council rejected the challenge by ruling that the French Parliament had treated differently people in different situations, and that there was therefore no violation of the equality principle.

> *29. Considérant, en premier lieu, que, par les dispositions du second alinéa de l'article 202-1 du code civil dans sa rédaction résultant du paragraphe II de l'article 1er de la loi déférée, le législateur a entendu introduire un dispositif spécifique selon lequel « deux personnes de même sexe peuvent contracter mariage lorsque, pour au moins l'une d'elles, soit sa loi personnelle, soit la loi de l'État sur le territoire duquel elle a son domicile ou sa résidence le permet » ; qu'il était loisible au législateur de permettre à deux personnes de même sexe de nationalité étrangère, dont la loi personnelle prohibe le mariage entre personnes de même sexe, de se marier en France dès lors que les autres conditions du mariage et notamment la condition de résidence sont remplies ; que le législateur, qui n'était pas tenu de retenir les mêmes règles pour les mariages contractés entre personnes de sexe différent, n'a pas traité différemment des personnes se trouvant dans des situations semblables ; que, par suite, le grief tiré de l'atteinte au principe d'égalité devant la loi doit être écarté ;*

I thought that the rationale for allowing same sex marriage was to give the same rights to everybody, because there should be no difference between gay and heterosexual couples, but maybe I have missed something.

Transnational Dispute

Management 3 (2013) – Corruption and Arbitration

The latest issue of TDM is now available. This special issue on Corruption and Arbitration analyzes new trends and challenges regarding the intersection between allegations of corruption and decisions by arbitral tribunals regarding jurisdiction, admissibility and the merits of commercial and investment disputes. As any transnational practitioners will know, allegations of corruption abroad pervade both arbitral and litigation practices–whether its affirmative claims of corruption before investor-state tribunals, or the enforcement of foreign judgments before national courts. This issue is an important contribution to the field.

The articles included in this issue are:

* *Nailing Corruption: Thoughts for a Gardener – A Comment on World Duty Free Company Ltd v The Republic of Kenya* by S. Nappert, 3 Verulam Buildings

* *Proving Corruption in International Arbitration: A Balanced Standard for the Real World* by C. Partasides, Freshfields

* *Corruption in International Arbitration and Problems with Standard of Proof: Baseless Allegations or Prima Facie Evidence?* by S. Wilske, Gleiss Lutz Rechtsanw?lte T.J. Fox, Gleiss Lutz Rechtsanw?lte

* *Random Reflections on the Bar, Corruption and the Practice of Law* by F.P. Feliciano, SyCip Salazar Hernandez & Gatmaitan (SyCipLaw)

* *Fraud and Corruption in International Arbitration* by C.B. Lamm, White & Case LLP H.T. Pham, White & Case LLP R. Moloo, Freshfields Bruckhaus Deringer LLP

* *Unlawful or Bad Faith Conduct as a Bar to Claims in Investment Arbitration* by A. Cohen Smutny, White & Case LLP P. Polášek, White & Case LLP

* *Suspicion of Corruption in Arbitration: A German Perspective* by M.S. Rieder, Shearman & Sterling A. Schoenemann, Shearman & Sterling

* *The Potential for Arbitrators to Refer Suspicions of Corruption to Domestic*

Authorities by K.S. Gans, DLA Piper LLP D.M. Bigge, US Department of State, Office of the Legal Advisor

* *The Courses of Action Available to International Arbitrators to Address Issues of Bribery and Corruption* by A. Crivellaro, Bonelli Erede Pappalardo

* *Enforcing Anti-Corruption Measures Through International Investment Arbitration* by S. Kulkarni

* *State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration* by A.P. Llamzon, Permanent Court of Arbitration

* *The Legal Consequences of Investor Corruption in Investor-State Disputes: How Should the System Proceed?* by T. Sinlapapiromsuk, Faculty of Law, Chulalongkorn University

* *The Judicial Scrutiny of Arbitral Awards in Setting Aside and Enforcement Proceedings Involving Issues of Corruption* by M. Hwang, Michael Hwang S.C. K. Lim, Michael Hwang Chambers

* *West Africa: The Actions of the OHADA Arbitral Tribunal in the Face of Corruption* by C.N. Nana, London Metropolitan University

* *Host-State Counterclaims: A Remedy for Fraud or Corruption in Investment-Treaty Arbitration?* by S. Dudas, Leaua & Asociatii N. Tsolakidis, Johann Wolfgang Goethe-University

* *Commercial Arbitration and Corrupt Practices: Should Arbitrators Be Bound By A Duty to Report Corrupt Practices?* by S. Nadeau-Séguin, Baker Botts LLP

* *On the Divide Between Investor-State Arbitration and the Global Fight Against Corruption* by D. Litwin, McGill University, Faculty of Law

* *International Commercial Arbitration and Corruption: The Role and Duties of the Arbitrator* by C.A.S. Nasarre, McGill University, Faculty of Law

* *Legal Consequences of Corruption in International Investment Arbitration: An Old Challenge With New Answers* by R.H. Kreindler, Shearman & Sterling LLP

New Czech Act on Private International Law

See this post over at *Transnational Notes*.

New U.S. Casebook on Conflict of Laws

Professor Laura Little (Temple University's Beasley School of Law) is the author of a new U.S. casebook on the Conflict of Laws published in the Aspen Casebook Series.

Though relying essentially on U.S. sources, the casebook contains a number of comparative developments, in particular with European regulations.

> ***About the Book***
>
> *This progressive new casebook offers a contemporary, practical approach to a subject in which there are few right answers and plenty of opportunity for creativity, by connecting course content to law practice and offering modern cases and a problem pedagogy.*
>
> ***This title features**:*
>
> - ***Well-balanced** casebook presents the deep jurisprudential lessons imbedded in the conflict of laws subject matter while maintaining a clear presentation of doctrines relevant to current law practice*
> - ***Thematic approach** puts conflicts of law in the context of actual issues*

confronted in law practice

- ***Problem pedagogy*** *helps students apply various approaches and concepts. Extensive teaching manual outlines detailed answer to each problem.*
- ***Clear, accessible writing*** *without the "hide the ball" approach of many other books provides accessibility for a difficult course*
- ***Innovative organization****, beginning with personal jurisdiction, follows the way issues arise in litigation and highlights the importance of forum selection. Modular presentation allows professors to adapt book took their own organization*
- ***Contemporary cases*** *and hypotheticals allow students to apply rules to current situations. Traditional cases are also included so as to maintain continuity with the venerable parts of the discipline*
- ***Full coverage of current topics*** *such as internet issues, same sex marriage, choice of law clauses, and class actions*
- ***International and comparative materials*** *cover global aspects of conflicts*
- ***PowerPoint slides, charts, and diagrams*** *available on line and in teaching manual provide appealing visual tools and add to the books' teachability*
- ***Emphasis on the Restatement (Second) of Conflicts****, which is now the predominant United States approach but is insufficiently covered in most other texts*
- ***Author Laura Little*** *brings her considerable expertise to the book—as a Professor of Law at Temple University School of Law, she specializes in federal courts, conflict of laws, and constitutional law and teaches, lectures, and consults internationally on these subjects. She is the author of numerous books and articles, including the successful Federal Courts: Examples & Explanations (Aspen), and Has received numerous awards for innovative and effective teaching*
- ***Comprehensive Teachers Manual*** *includes answers to every problem, teaching suggestions, sample syllabi, and a graphical depiction of each main case as well as unique insights and case backgrounds*

More information is available here. Extracts can be downloaded here.

AJIL Agora on Kiobel

The American Journal of International Law has issued a call for submissions for an agora on "Transnational Human Rights Litigation After *Kiobel*." Here's the call:

> *The American Journal of International Law is calling for short submissions (maximum 3000 words, including footnotes) for a forthcoming agora on "Transnational Human Rights Litigation After Kiobel." Contributions must not have been previously published in whole or in substantial part (on the web or elsewhere). Some of the chosen contributions will be published in the October 2013 issue of the Journal. Other selected contributions may be published electronically in a special ASIL online publication. All contributions must be submitted no later than June 15 in order to be considered. Contributions on U.S. law issues, and on comparative and non-U.S. dimensions, are welcome. The editors aim to publish a set of distinctive contributions, rather than many making similar points. All selections for publication in AJIL or in the ASIL online publication will be peer reviewed by a committee of the AJIL editorial board consisting of Carlos Vázquez (chair), Curtis Bradley, and Ingrid Wuerth, in consultation with Co-Editors in Chief José Alvarez and Benedict Kingsbury. Decisions on publication (including requests for revisions) will be made on a rolling basis, but in any case no later than June 30. Submit contributions toajil@asil.org with "Kiobel Agora" in the subject line.*

Strong on Discovery under 28 USC

1782

Stacie Strong (University of Missouri School of Law) has posted Discovery Under 28 U.S.C. §1782: Distinguishing International Commercial Arbitration and International Investment Arbitration on SSRN.

> *For many years, courts, commentators and counsel agreed that 28 U.S.C. §1782 – a somewhat extraordinary procedural device that allows U.S. courts to order discovery in the United States "for use in a proceeding in a foreign or international tribunal" – did not apply to disputes involving international arbitration. However, that presumption has come under challenge in recent years, particularly in the realm of investment arbitration, where the Chevron-Ecuador dispute has made Section 1782 requests a commonplace procedure. This Article takes a rigorous look at both the history and the future of Section 1782 in international arbitration, taking care to distinguish between requests made in the context of international commercial arbitration and requests made in the context of international investment arbitration. In so doing, the Article considers issues relating to grants of jurisdiction, state interests and standard interpretive canons.*

The paper is forthcoming in the *Stanford J. of Complex Litigation.*

Second Issue of 2013's Journal du Droit International

The second issue of French *Journal du droit international* (*Clunet*) for 2013 was just released. It contains articles addressing issues of public international law only. The table of contents is available here.

2013 Summer Seminar in Urbino

The Faculty of Law of the University of Urbino will host this summer its 55th Seminar of European Law.

Many of the courses taught over the two weeks of the seminar (19-31 August 2013) will deal with conflict issues. Although courses can be taught in English, this is a franco-italian seminar where courses are typically taught in French or Italian, with a translation in the other language.

Speakers are leading academics and practitioners, including Professors Bertrand Ancel, Tito Ballarino, Luigi Mari and Cyril Nourissat.

The full programme can be found here.

Three New Papers of Professor Veerle Van Den Eeckhout

Professor Veerle Van Den Eeckhout , who teaches private international law at the Universities of Antwerp and of Leiden, has just published three new papers on SSRN.

The first one is entitled “The Instrumentalisation of Private International Law: Quo Vadis? Rethinking the “Neutrality” of Private International Law in an Era of Globalisation and Europeanisation of Private International Law”. The abstract reads as follows:

> Private International Law is known as a very abstract, legal-technical and inaccessible discipline. Yet it is striking that PIL issues are conspicuously often interwoven with a number of heated, topical socio-legal debates, see for

example 1) the debate on transnational corporate social responsibility, 2) the debate on posting of employees from Eastern to Western Europe, 3) the debate on residency and social-security entitlements of foreigners based on family relationships. Although at first glance the role of PIL in discussions about how these subjects should be regulated may seem rather modest, on further consideration it turns out to be crucial how the PIL questions that can be recognised are (or are not) identified and addressed. PIL is a "silent force". If one looks closer, it is clear that PIL often even functions as a hinge between legal branches in these debates – e.g. between migration law and family law. But scholars – both PIL-lawyers and lawyers from other disciplines – have, so far, essentially left unexplored the PIL-issues of these debates.

Meanwhile, recent developments show that PIL is, occasionally, "instrumentalised" in a policy-related way, both by European and national authorities. There are, for example, tendencies on a Dutch national level to make PIL subservient to migration policy, ultimately transforming PIL into an instrument of restrictive migration policy. PIL could, thus, function as the "Achilles heel" of the legal protection of migrants. In several areas, there is pressure on PIL "from outside". The question arises how the phenomenon of instrumentalisation of PIL – in its various forms – must be valued from the perspective of PIL: the PIL of European countries has of old been set up as a neutral reference system; the classical PIL paradigm implies that, independent of any legal political consideration or policy objective, the law applied to an international relationship is the law most closely connected to that legal relationship. Recognition of ongoing dynamical developments in the sense of instrumentalisation of PIL c.q. attempts to instrumentalise PIL thus raises a number of fundamental questions in respect of essential characteristics of PIL and the interaction of PIL with other branches of law: an analysis of the "instrumentalisation" of PIL requires a) research into the foundations of PIL b) as well as research into PIL's "hinge-function". Both where it concerns situations governed by European PIL rules and where it concerns situations that are not (yet) governed by European PIL rules, the question arises what position PIL should take in the forces at play and to what extent PIL can or should still adopt a "neutral" position. Could PIL be modelled, for example, into an instrument in the fight against international environment pollution, or into an instrument to guarantee labour protection?

In this project, all three above-mentioned debates will be analysed as "case-studies". The project thus includes several broad and complex themes, all of them with major international relevance and national relevance for each of the EU-countries, in a context of globalisation, in order to make it possible to come to a general, over-all view: the overall ambition of the project is to arrive – through the thorough analysis of these cases and the exploration of future scenarios for each of them – at more synthetic insights on a) the essential characteristics of PIL itself and b) the characteristics of PIL in its hinge-function, in interaction with other disciplines. There is at present a very great need for a further and thorough study of each of the case studies as such, but as the case-studies have been well-selected, it will ultimately be possible to achieve a theoretical model and a typology.

Click here to download.

Two other, shorter papers entitled "The Role of Private International Law in Achieving Social Justice" and "New Possibilities for Argumentation in International Labour Law and Corporate Liability Coming Up?", can be downloaded clicking here and here.

The Max Planck Institute Luxembourg has been inaugurated

It is my great pleasure to announce that the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law has been officially inaugurated. The Opening Ceremony took place on Wednesday in Luxembourg in the presence of the Grand Duke Henri, the Luxembourgian Prime Minister Jean-Claude Juncker, the Minister for Higher Education and Research of Luxembourg, the German Ambassador, the State Secretary at the Federal Ministry of Education and Research, Germany, and the President of the Max Planck Society. The event was attended by more than 150 prominent persons from the ECJ, the

Luxembourgian University and the academia of different countries. The following authorities addressed their Opening Remarks :

- Professor Peter Gruss, President of the Max Planck Society
- Ms Martine Hansen, Minister for Higher Education and Research, Luxembourg
- Ms Cornelia Quennet-Thielen, State Secretary at the Federal Ministry of Education and Research, Germany
- Professor Rolf Tarrach, President of the University of Luxembourg
- Ms Viviane Reding, Vice-President of the European Commission and Commissioner for Justice, Fundamental Rights and Citizenship (by means of a video message).

After these Welcome speeches, the Institute was presented by Professor Wolfgang Schön, Vice-President of the Max Planck Society, and by the Executive Director of the Institute, Professor Burkhard Hess.

The Opening Ceremony was preceded by an Opening Symposium on "Dispute Resolution and Law Enforcement in the Financial Crisis", held on Tuesday with the participation of Professor Eddy Wymeersch (University of Ghent), Professor David Skeel (University of Pennsylvania), Professor Stefania Bariatti (University of Milan) and Professor Paolo Giudici (Free University of Bozen-Bolzano), as well as Professor Burkhard Hess (Executive Director of the Institute) and Professors Verica Trstenjak and Marco Ventoruzzo (External Scientific Members of the Institute).

The MPI Luxembourg has the ambition to promote research at the highest international standard. Its activity in this regard has already commenced and will go on with a carefully designed programme of lectures and seminars announced at the website of the Institute (www.mpi.lu). The Library, *noyau dur* of the Institute already established in the fall of 2012 is already open to researchers from other academic institutions.

All the best to the new Institute.