Kreuzer on Jurisdiction and Choice Law under the Cape Town Convention

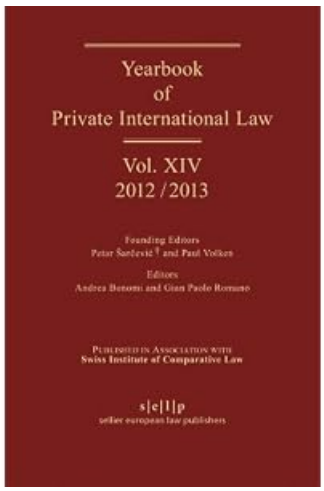
Karl Kreuzer, who is emeritus professor at the University of Wuerzburg, will publish an article on Jurisdiction and Choice of Law under the Cape Town Convention and the Protocols thereto in the second issue of the *Cape Town Convention Journal*. A preliminary draft can be downloaded here.

> *By introducing a new supranational substantive law institution in the form of an 'international interest' the Cape Town Convention and the Protocols thereto eliminate, within their material scope of application, the need for conflict of laws rules. However, as the Convention/Protocol-regime is not a complete codification, recourse to provisions designating the gap-filling substantive rules remains unavoidable. In this respect, with the exception of a provision in the Protocols authorizing the parties to choose the law applicable to their contractual obligations, the Convention and the Protocols refrain from establishing autonomous conflict of laws rules. Instead, Article 5 of the Convention generally refers to the conflict of lawsrules of the forum state for issues not settled under the Convention or the relevant Protocol in order to determine the applicable substantive law provisions. The rare jurisdictional rules of the Convention – choiceofcourt agreement, concurrent jurisdiction in cases of urgency, orders against the Registrar – aim at guaranteeing the enforceability of rights acquired under the Convention.*

The paper was presented in a conference in Oxford earlier this week. The outline and the slides of the presentation can be found on the conference website.

Yearbook of Private International Law, Vol. XIV (2012-2013)

The latest volume of the Yearbook of Private International Law was just released.



Doctrine

- Marc Fallon & Thalia Kruger, The Spatial Scope of the EU's Rules on Jurisdiction and Enforcement of Judgments: From Bilateral Modus to Unilateral Universality?
- Pierre Mayer, Conflicting Decisions in International Commercial Arbitration
- Horatia Muir Watt, A Semiotics of Private International Legal Argument
- Thomas Kadner Graziano, Solving the Riddle of Conflicting Choice of Law Clauses in Battle of Forms Situations: The Hague Solution
- Sirko Harder, Recognition of a Foreign Judgment Overturned by a Non-Recognisable Judgment
- Marta Requejo Isidro, The Use of Force, Human Rights Violations and the Scope of the Brussels I Regulation

A General Part for European Private International Law?

- Stefan Leible & Michael Müller, The Idea of a "Rome 0 Regulation"
- Luís de Lima Pinheiro, The Methodology and the General Part of the Portuguese Private International Law Codification: A Possible Source of Inspiration for the European Legislator?

Protection of Personality Rights

- William Bennett, New Developments in the United Kingdom: The Defamation Act 2013
- Laura E. Little, Internet Defamation, Freedom of Expression, and the Lessons of Private International Law for the United States
- Michel Reymond, Jurisdiction in Case of Personality Torts Committed over the Internet: A Proposal for a Targeting Test
- Thomas Thiede, A Topless Duchess and Caricatures of the Prophet Mohammed: A Flexible Conflict of Laws Rule for Cross-Border Infringements of Privacy and Reputation

The Chinese Private International Law Acts: Some Selected Issues

- Jin HUANG Creation and Perfection of China's Law Applicable to Foreign-Related Civil Relations
- Yujun Guo, Legislation and Practice on Proof of Foreign Law in China
- Yong Gan, Mandatory Rules in Private International Law in the People's Republic of China
- Qisheng He, Changes to Habitual Residence in China's lex personalis
- Guangjian Tu, The Codification of Conflict of Laws in China: What Has/Hasn't Yet Been Done for Cross-Border Torts?
- Wenwen Liang, The Applicable Law to Rights in rem under the Act on the Law Applicable to Foreign-Related Civil Relations of the People's Republic of China
- Weidong Zhu, The New Conflicts Rules for Family and Inheritance Matters in China

News from Brussels

- Susanne Knöfel / Robert Bray, The Proposal for a Common European Sales Law: A Snapshot of the Debate
- Maria Álvarez Torne, Key Points on the Determination of International Jurisdiction in the New EU Regulation on Succession and Wills

National Reports

- Adi Chen, The Limitation and Scope of the Israeli Court's International Jurisdiction in Succession Matters
- Sandrine Giroud, Do You Speak Mareva? How Worldwide Freezing Orders Are Enforced in Switzerland

- Anil & Ranjit Malhotra, All Aboard for the Fertility Express: Surrogacy and Human Rights in India
- Tuulikki Mikkola, Pleading and Proof of Foreign Law in Finland
- Zeynep Derya Tarman, The International Jurisdiction of Turkish Courts on Personal Status of Turkish Nationals

Forum

- Rui Pereira Dias, Suing Corporations in a Global World: A Role for Transnational Jurisdictional Cooperation?
- Johanna Guillaumé, The Weakening of the Nation-State and Private International Law: The "Right to International Mobility"
- Tamas Dezso Czigler / Izolda Takacs, Chaos Renewed: The Rome I Regulation vs Other Sources of EU Law: A Classification of Conflicting Provisions

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European Parliament Reports on Property Rights for Couples

On 21 August 2013, the Committee on Legal Affairs of the European Parliament issued its Report on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM(2011)0126 – C7-0093/2011 – 2011/0059(CNS)).

The procedure file of the proposal is available here. The rapporteur was Alexandra Thein.

On the same day, the same Committee also released another report: Report on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships (COM(2011)0127 – C7-0094/2011 – 2011/0060(CNS)).

The procedure file of the proposal is available here. The rapporteur was again

Alexandra Thein.

According to the final draft agenda of the Parliament, a joint debate took place yesterday on the property rights for couples in the EU, namely on the two above-mentioned reports. The final draft agenda is available here.

H/T: Edina Márton

US Court Enforces Award Nullified in Country of Origin

On August 27th, 2013, the U.S. District Court for the Southern District of New York held in Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX–Exploración y Productión that an arbitral award made in Mexico could be enforced in the U.S. despite being nullified by a Mexican Court.

The arbitration was conducted in Mexico City in accordance with the rules of the International Chamber of Commerce. The plaintiff was a subsidiary of a Texan company, the defendant an instrumentality of the Mexican state.

In September 2011, the Mexican Eleventh Collegiate Court on Civil Matters of the Federal District held that the award was invalid, because the arbitrators were not competent to hear and decide cases brought against the sovereign, or an instrumentality of the sovereign, and that proper recourse of an aggrieved commercial party is in the Mexican district court for administrative matters. The court based its decision in part on a statute that was not in existence at the time the parties' entered their contract.

The U.S. Court held that the Mexican judgment violated basic notions of justice in that it applied a law that was not in existence at the time the parties' contract was formed and left the plaintiff without an apparent ability to litigate its claims. As a consequence, it declined to defer to the Mexican Court's ruling, and confirmed the Award.

French courts also enforce awards nullified in their country of origin. An important difference in the US doctrine is the focus on the foreign judgment nullifying the relevant award. U.S. court in principle defer to judgments nullifying arbitral awards and thus enforce them. In *Termo Rio*, it was held:

> *when a competent foreign court has nullified a foreign arbitration award, United States courts should not go behind that decision absent extraordinary circumstances not present in this case.*

The US Court distinguished this case from *Termo Rio* and *Baker Marine*, where US Courts had deferred to foreign judgments:

> *this is a very different case from Baker Marine and from TermoRio. In neither of those cases did the annulling court rely on a law that did not exist at the time of the parties' contract. In both Baker Marine and TermoRio, the nullification was based on the failure of arbitrators to follow proper procedure. The courts of Nigeria and Colombia did not hold that the cases could not be subject to arbitration, and therefore there was no contradiction between the government entities' agreements to arbitrate and the courts' rulings. Here, in contrast, the Eleventh Collegiate Court ruled that the entire case was not subject to arbitration based on public policy grounds, a ruling that was at odds with PEP's own agreement, the PEMEX enabling statute, and the law of Mexico at the time of contracting and the commencement of arbitration.*

H/T: Sébastien Manciaux

Belgian Court to Rule on Enforceability of US Argentine

Debt Injunction

On August 23rd, the US Court of Appeals for the Second Circuit affirmed an injunction ordering Argentina to make ratable payment to holders of initial defaulted bonds whenever it would make payments on its restructured debt.

Despite not being parties to the injunction, the US Court made clear that holders of the restructured debt might be found in contempt if they assisted Argentina in evading the injunction.

Several European holders of the restructured debt, including Knighthead Capital Management LLC, are seeking a declaration from a Belgian court that the injunction is unenforceable in Europe and that Belgian intermediaries may pass payments despite the injunction. Katia Porzecanski at Bloomberg reports that a hearing is scheduled today in Brussels.

I understand that the defense to the recognition of the injunction is a 2004 Belgian Law prohibiting any obstruction in cash payments made by settlement agents. This suggests that the argument should be framed in public policy terms.

In June, Knighthead Capital Management LLC and other third parties had sought an interim injunction ordering Belgium based intermediary Euroclear to pass payments to be made by Argentina to holders of the restructured debt. The Belgian Court held that the application was premature, as the issue of the impact of the injunction on Euroclear would only arise if Argentina actually made the relevant payments. At the time, however, the Court found that it had not been provided with evidence that Argentina would, in breach of the injunction. The Court suggested that, should Argentina want to pay holders of the restructured debt, plaintiffs would still have 30 days to apply for a declaration that Euroclear should pay notwithstanding the US injunction.

Fellowship Announcements

With thanks to Professor S.I. Strong for bringing these openings to our attention, there are serveral fellowships currently accepting applications that might be of interest to our readers.

The first position is the Brandon Research Fellowship at the Lauterpacht Centre for International Law at the University of Cambridge in the United Kingdom. The Brandon Fellowship supports research on various topics of international public and private law, including international arbitration. Further details are available at http://www.lcil.cam.ac.uk/news/content/brandon-research-fellowships-international-law-2014 . The closing date for applications is September 23, 2013.

The second position is also based at the Lauterpacht Centre. This fellowship is sponsored by the British Red Cross and involves research relating to the International Committee of the Red Cross Study on Customary International Humanitarian Law. More information can be found at http://www.redcross.org.uk/About-us/Jobs or by contacting Elizabeth Knight on EKnight@redcross.org.uk or 020 7877 7452 quoting ref number UKO 46734. The closing date is September 22, 2013.

The final position is the U.S. Supreme Court Fellowship in Washington, D.C. Four fellowships are awarded each year, and several of the positions provide the opportunity to consider matters relating to international and comparative law. Although the fellowships are affiliated with the U.S. Supreme Court, there does not appear to be a requirement that candidates be U.S. nationals, although applicants from outside the United States should check. The program has been significantly revamped this year and is now open to both junior and mid-career candidates. Further information is available at http://www.supremecourt.gov/fellows/default.aspx. Applications are due by November 15, 2013.

New Edition of Cachard's Private International Law

The second edition of Professor Olivier Cachard's manual on private international law was just released.

The book is a concise survey of French private international law. It essentially aims at being a manageable book for students, but should also be a useful introduction to French private international law for foreign scholars. Of course, many developments focus on European regulations.

The book also includes a number of materials (cases, articles' extracts).

More information can be found here.

Canadian Conferences with Conflicts Components

Two Canadian conferences upcoming this autumn have sessions devoted to the conflict of laws.

The University of Windsor is hosting "Justice Beyond the State: Transnationalism and Law" on September 20-21, 2013. One session is entitled "Private International Law, Comity, Judicial Co-ordination" and another is entitled "Private International Law, the Foreign within the Domestic". Additional information is available here.

McGill University is hosting the 43rd Annual Workshop on Commercial and Consumer Law on October 11-12, 2013. The closing session is entitled "International Jurisdiction after *Club Resorts v. Van Breda*". Additional information is available here.

US Court Threatens European Holders of Argentinian Bonds

In October 2012, the U.S. Court of Appeals for the Second Circuit interpreted the *pari passu* clause contained in Argentinian bonds as meaning that all bondholders would be treated as least equally with any other external creditor. As a consequence, U.S. courts issued an injunction ordering Argentina to treat equally bondholders who had refused to participate in previous debt restructuring, and thus directing that whenever Argentina would pay on the bonds or other obligations that it issued when it restructured its debt, it would also have to make a "ratable payment" to plaintiffs who hold initial defaulted bonds.

Plaintiffs included NML Capital, a creditor which refused to participate in the debt restructuring and instead sued Argentina in U.S. Courts for defaulting on the bonds it holds. Readers will recall that NML won and has since then sought to enforce the U.S. judgments throughout the world, and that Argentina could sometimes resist enforcement on the ground of its sovereign immunity.

Assisting Argentina in Evading the Injunction

On August 23rd, 2013, the same U.S. Court of Appeals addressed another issue: whether bondholders who participated in the restructuring, and that Argentina is happy to pay, might be held in contempt of court if they actually accepted payment.

The injunction only directs Argentina to treat equally bondholders. Bondholders, therefore, are not parties to the injunction. However, as third parties, they might still be found to be in contempt of court if they assisted Argentina in evading the injunction, i.e. in accepting payment when Argentina would not pay NML.

Many of those third parties being based abroad, in particular in Europe, they challenged that they could be reached even indirectly by the injunction.

Due Process

The first argument that comes to mind was of course that the U.S. court might lack jurisdiction over these third parties. Put differently, the injunction could not have an extraterritorial effect. The Court postponed the resolution of the issue by ruling that it had not issued any injunction against the third parties, and that its jurisdiction over them was thus irrelevant. It would only become so when a third party would be brought to the court in contempt proceedings. It would then be a proper party to the contempt proceedings, and could raise any defense it would want, including of course lack of jurisdiction.

Remarkably, before getting into this discussion, the Court had denied third parties the right to intervene in the proceedings and to become parties. This was because, the Court ruled, their "interests were not plausibly affected by the injunction"… Third parties are, the Court held,

> *creditors, and, as such, their interests are not plausibly affected by the injunctions because a creditor's interest in getting paid is not cognizably affected by an order for a debtor to pay a different creditor. If Argentina defaults on its obligations to them, they retain their rights to sue.*

The foreign creditors were thus denied the right to appeal, but the Court deigned to admit them to offer comments as amici curiae.

Interestingly enough, while being denied the right to become parties to the proceedings, third parties were allowed to ask the court for clarification on the scope and meaning of the injunction, so that they could know whether any given action would be a breach.

The result is that third parties may participate in the US proceedings as long as they comply, but they may not if they are unpolite and intend to disagree.

An interesting question is whether this would be regarded as comporting with procedural fairness on the other side of the Atlantic, and whether a European court would find that the US jugdment finding a third party in contempt for any action taking place before it would have been given the right to be heard violates procedural public policy.

New Edition of Loussouarn, Bourel and Vareilles-Sommieres´ Private International Law

The 10th edition of the French manual of Loussouarn, Bourel and Vareilles-Sommieres on private international law was published a few weeks ago.

The book was first published in 1928 by Lerebours-Pigeonniere. Yvon Loussouarn and Pierre Bourel, who both taught at Paris II University, took over in 1970 for the first, and 1977 for the second. Pascal de Vareilles-Sommieres, who is a professor at Paris I university, was associated to the 9th edition, and has updated alone the book for the 10th.

More information is available here.