ELI – UNIDROIT Joint Workshop on Civil Procedure

In 2013, the European Law Institute (ELI) and UNIDROIT agreed to work together in order to adapt the 2004 Principles of Transnational Civil Procedure developed by the American Law Institue and UNIDROIT from a European perspective and develop European Rules of Civil Procedure. This project will take the 2004 Principles as its starting point and will develop them in light of: i) the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union; ii) the wider acquis of binding EU law; iii) the common traditions in European countries; iv) the Storme Commission's work; and v) other pertinent European sources.

The 1st exploratory workshop in Vienna

The 1st exploratory workshop, to be held in Vienna on 18 and 19 October 2013, aims at an initial analysis of a series of different topics, ranging from due notice of proceedings to enforcement, with a view to identifying the most promising issues and the most appropriate methodological approach for the project. The event will be divided into a public conference, scheduled for 18 October, and an in-depth workshop for invited participants following the public discussion, which should lay the foundations for the elaboration of the ultimate project design by the ELI and UNIDROIT.

The workshop will bring together leading experts from academia and legal practice in the field of civil procedural law. It is anticipated that it will both produce an inspiring debate and mark an important first step towards establishing a working group that can carry the project to a successful conclusion.

Programme: Public Conference

Friday 18 October 2013

Venue: Palace of Justice, Schmerlingplatz 11, Vienna, Austria

Chair: **Loïc Cadiet** (University Paris 1, President of the International Association of Procedural Law)

10:30-11:00 Opening and Welcome by the Secretary-General of UNIDROIT and the President of the ELI

11:00-12:00 The 2004 ALI/UNIDROIT Principles: **Geoffrey C. Hazard** and **Antonio Gidi** *(American Law Institute)*

12:00-12:30 General Discussion

12:30-13:30 Lunch break

13:30-14:00 The European Acquis of Civil Procedure: Constitutional Aspects
Alexandra (Sacha) Prechal *(Court of Justice of the European Union)*

14:00-14:30 European Acquis of Civil Procedure: The Existing Body of Rules
Burkhard Hess *(Max Planck Institute Luxembourg)*

14:30-14:45 Procedure: The Agenda of the European Commission
Paraskevi Michou *(European Commission)*

14:45-15:15 General Discussion

Beginning at 15:30 on Friday 18 October, and continuing on the morning of 19 October from 09:00 to 14:00 there will be a closed expert seminar. Friday's session will be chaired by **Thomas Pfeiffer** from Heidelberg University, and will focus on the following topics: Structure of the Proceedings, Provisional and Protective Measures and Access to Information and Evidence. **Marcel Storme** will chair the session on Saturday morning and oversee discussions on: Due Notice of Proceedings, Obligation of the Parties and Lawyers and Multiple Claims and Parties. It will be followed by the afternoon session, chaired by **Verica Trstenjak** where the following topics will be discussed: Costs, Lis Pendens and Res Judicata and Transparency of assets and enforcement.

More information is available here.

ECHR Upholds Abolition of Exequatur

On 18 June 2013, the European Court of Human Rights delivered its judgment in *Povse v. Austria.*

Readers will recall that the Court of Justice of the European Union had also delivered a judgment in the same case in 2010. Marta Requejo had reported on the case and summarized the facts here.

The case was concerned with a dispute relating to the custody of a child under the Brussels IIa Regulation. A return order had been issued by an Italian court. As the Brussels IIa Regulation has abolished exequatur with respect to return orders, the issue was whether an Austrian court was compelled to enforce an Italian order despite the allegation that the Italian court might have violated human rights.

The Strasbourg court held that the return order could be challenged before the court of origin, and that it would always be possible to bring proceedings against Italy should such challenge fail. The abolition of exequatur, therefore, was not dysfunctional from the perspective of the European Court of Human Rights.

> *86. The Court is therefore not convinced by the applicants' argument that to accept that the Austrian courts must enforce the return order of 23 November 2011 without any scrutiny as to its merits would deprive them of any protection of their Convention rights. On the contrary, it follows from the considerations set out above that it is open to the applicants to rely on their Convention rights before the Italian Courts. They have thus far failed to do so, as they did not appeal against the Venice Youth Court's judgment of 23 November 2011. Nor did they request the competent Italian court to stay the enforcement of that return order. However, it is clear from the Italian Government's submissions that it is still open to the applicants to raise the question of any changed circumstances in a request for review of the return order under Article 742 of the Italian Code of Civil Procedure, and that legal aid is in principle available.*

Should any action before the Italian courts fail, the applicants would ultimately be in a position to lodge an application with the Court against Italy (see, for instance neersone and Kampanella v. Italy, no. 14737/09, 12 July 2011, concerning complaints under Article 8 of the Convention in respect of a return order issued by the Italian courts under the Brussels IIa Regulation).

87. In sum, the Court cannot find any dysfunction in the control mechanisms for the observance of Convention rights. Consequent]y, the presumption that Austria, which did no more in the present case than fulfil its obligations as an EU member State under the Brussels Ila Regulation, has complied with the Convention has not been rebutted.

H/T: Maja Brkan

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.

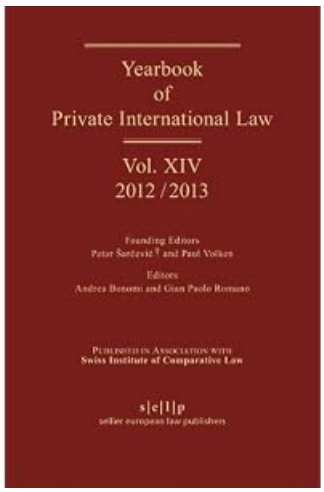
By introducing a new supranational substantive law institution in the form of an 'international interest' the Cape Town Convention and the Protocols thereto eliminate, within their material scope of application, the need for conflict of laws rules. However, as the Convention/Protocol-regime is not a 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.