Vogenauer on Regulatory Competition in Contract Matters

Stefan Vogenauer, who is Professor of Comparative Law at Oxford University, has published Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence in the last issue of the *European Review of Private Law*.

> *This paper challenges the claim that there is regulatory competition in the areas of contract law and civil litigation. It is frequently assumed that law makers reform their contract laws and dispute resolution mechanisms with the purpose of attracting 'users', i.e. parties to cross-border contracts who choose the contract law or the courts of a given legal system. I shall discuss this assumption and its plausibility in the first part of the paper. In the second part I will test the assumption by presenting the available empirical evidence on the choices of contract law and forum that businesses in Europe actually make. For a long time such data has been largely absent from the debate. Moreover, I assemble evidence of law makers competing for the production of the most attractive legal regimes in the areas of contract law and civil litigation. I conclude that meaningful regulatory competition in the areas concerned cannot be predicted with confidence; nor is there evidence of its existence.*

Paris Court Orders Twitter to Provide Data on Antisemitic Tweets

On 24 January 2013, a French court ordered Twitter Inc. to provide any data it might have which could help identify the authors of antisemitic tweets.

The plaintiff were French Jewish organizations, as well as an organization fighting against racism. They complained about tweets sent on hashtags such as "*un bon juif*" or "*un juif mort*" (a good Jew, a dead Jew). They relied on several provisions of French law.

Twitter Inc., however, is incorporated in California, where it keeps its data, and it does not have an establishment in France. A Twitter France company was created in 2012, but its activity focuses on marketing. It is not involved in the technical aspects of the social network.

Territorial Reach of European Data Protection Law

As a consequence, Twitter Inc. argued that it was not subject to French law. Indeed, it underscored that French data protection law expressly provides that it only applies to persons established in France or making use of equipment, automated or otherwise, situated in France (French version, however, being less favorable to Twitter, as it does not refer to "equipment", but only to "moyens de traitement").

The Court agreed and held that French data protection law law did not apply.

Conservative Measure

However, the plaintiffs were also seeking the same remedies under another provision of French law, Article 145 of the French Code of Civil Procedure, which provides:

> *If there is a legitimate reason to preserve or to establish, before any legal process, the evidence of the facts upon which the resolution of the dispute*

> *depends, legally permissible preparatory inquiries may be ordered at the request of any interested party, by way of a petition or by way of a summary procedure.*

The Court ruled that it had the authority to order Twitter Inc. to provide any data it may have which could help identify the authors of the antisemitic tweets.

From a conflicts perspective, the Court held that:

- Conservative measures are governed by the law of the forum
- Twitter's own rules provide that international users will comply with local laws
- French criminal law applied to the authors of the tweets, as part of the offence was committed on French territory
- Twitter would not challenge the Court's jurisdiction, nor would it dispute that the tweets were unlawful
- Twitter acknowledged that it kept certain data, and had to under California law

Twitter is therefore ordered to provide the requested data within two weeks. It will have to pay € 1,000 per day then if it does not comply (the plaintiffs had asked for € 10,000 per day).

Readers might wonder whether the Court uses the distinction between substance and procedure as an escape device. There seems to be a confusion in the judgment between the law governing interim remedies, which is clearly the law of the forum, and the law governing substance. Article 145 was clearly applicable, but the legitimate reason it serves cannot be assessed in isolation from the law applicable to the substantive rights. To the court's credit, however, the French supreme court has often failed to make this distinction in the past.

NYU Conference on Forum Shopping in International Arbitration

NYU's Center for Transnational Litigation and Commercial Law will host a conference on "Forum Shopping in the International Commercial Arbitration Context" from 28 February to 2 March 2013.

The list of speakers include Prof. George A. Bermann, Ms. Christopher Boog, Prof. Jack Coe, Jr., Prof. Filip De Ly, Mr. Domenico Di Pietro, Mr. John Fellas, Prof. Franco Ferrari, Mr. Brian King, Mr. Alexander Layton, Mr. Pedro Martinez-Fraga, Prof. Loukas Mistelis, Prof. Peter B. Rutledge, Prof. Maxi Scherer, Prof. Linda Silberman, Mr. Aaron Simowitz and Mr. Robert H. Smit.

The event will start on Thursday, 28 February, at 4 pm, and will take place at 245 Sullivan St., Furman Hall, Pollack Room, 10012 NY. More information is available here.

To RSVP (required), please send an email to: cassy.rodriguez@nyu.edu

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German Society of International Law: 33rd Bi-annual Conference

From 13 to 16 March 2013 the German Society of International Law will host its 33rd bi-annual at the University of Lucerne in Switzerland. The conference will focus on the "Hybridisation of legal systems" on the one hand and "Immunity" on the other. The list of speakers include Daniel Thürer, Paul Richli, Andreas Paulus, Nina Dethloff, Thomas Giegerich, Ingeborg Schwenzer, Heike Krieger, Andreas Ziegler, Stefan Talmon and Haimo Schack,

More information is available here (in German).

De Werra on ADR as a Default Method for IP Disputes

Jacques de Werra, who is a professor of law at the University of Geneva, has posted Can Alternative Dispute Resolution Mechanisms Become the Default Method for Solving International Intellectual Property Disputes? on SSRN.

> *This essay explores how the use of alternative dispute resolution (ADR) mechanisms can be promoted to solve international IP disputes. It presents the case of internet domain name dispute resolution and focus particularly on the Uniform Domain Name Dispute Resolution Policy (UDRP) and the way in which this policy has been adopted as a model by legislators. On this basis, it analyzes how, and under what conditions, other types of IP ADR systems can be developed in light of the UDRP, and will explore whether ADR systems can become the default method for solving international IP disputes.*

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

International Commercial Arbitration: A Guide for U.S. Judges

The U.S. Federal Judicial Center has just published a new monograph entitled "International Commercial Arbitration: A Guide for U.S. Judges." The text, which was written by Professor S.I. Strong of the University of Missouri, provides

readers with information on the intricacies of international commercial arbitration and the various ways that U.S. courts may become involved in the process. The book is part of the Federal Judicial Center's International Litigation Series and helps further the Federal Judicial Center's statutory mission of providing research and education to the U.S. federal judiciary. The text, which is broken down on a motion-by-motion basis, provides judges as well as practitioners with a useful introduction to international commercial arbitration practice in the United States. The book is available in both hard copy and electronic form, and copies can be downloaded for free from the Federal Judicial Center's website (here).

German Federal Court Rules on Jurisdiction Clauses and Mandatory Rules

Beatrice Deshayes is a member of the Paris and the Cologne bars and a partner at Hertslet, Wolfer and Heintz, Paris.

On September 5th, 2012, the German Federal Court (BGH) upheld the inapplicability of a jurisdiction clause in an agency contract that gave jurisdiction to the Courts of Virginia to rule on the agent's right to indemnity after termination of the agency contract.

The dispute arose out of an agency contract between an American firm and a German commercial agent acting in several European countries. The contract provided for the exclusive jurisdiction of the Courts of Virginia and for the application of US laws. It also provided for an exclusion of indemnity in case of termination of the contract.

Arguing that the Courts of Virginia would apply solely their own law, the Court of Appeal of Stuttgart refused to enforce the jurisdiction clause, stating that doing

so would lead to the rejection of the claim for indemnity and to an obvious violation of Art. 17 and 18 of Directive 86/653 EEC. The defendant wanted to submit a request for a preliminary ruling before the ECJ, however the BGH ruled that there was no need for such a request.

Th BGH ruled that there is no doubt that Directive 86/653 gives the possibility to "refuse to recognize" such a clause, as:

- the law chosen by the parties (here, the law of Virginia) does not provide for mandatory indemnity or compensation for the agent after termination of the contract;
- the foreign court will not apply the mandatory provisions of European and German law, and will reject the agent's claim.

The BGH stated that such refusal of recognition protects the international mandatory scope of these provisions, as defined by the ECJ in the *Ingmar* decision dated November 9th, 2000 (C-381/98).

Another issue raised durig the litigation was whether the partial ineffectiveness of the jurisdiction clause shall lead to the incompetence of the US courts for the entire litigation. In addition to an indemnity based on the termination of the agency contract, the agent had claimed for unpaid commission stemming from the contract. The defendant wanted the BGH to ask the ECJ for an additional preliminary ruling regarding the jurisdiction clause: if it was considered partially ineffective because of the above mentioned reasons, would it have to be invalidated for the whole in order to guarantee the "effet utile"?

The BGH ruled that this question must only be discussed on the basis of German law, as Art. 17-19 of Directive 86/653 EEC concern only the claim for indemnity after termination of contract and not the right for pending commissions.

This seems to be a very strict but coherent approach to the jurisdiction question by the BGH and may lead to the non-application of foreign jurisdiction clauses in many cases when agents carry out their activity in Europe.

Aligning Human Rights and Investment Protection

Transnational Dispute Management has a new issue forthcoming, on *Aligning Human Rights and Investment Protection*. This issue is edited by Professor Dr. Ursula Kriebaum (University of Vienna) and analyses how national courts and international tribunals may operate in the fields of human rights law, and take into account the developments occurring in the other realm. With private international lawyers and international litigators eagerly awaiting the United State's Supreme Court's decision in *Kiobel*–which is just the latest example of a national court applying international norms–this issue is a welcome addition to discipline.

Private International Law Bibliography

With thanks to Symeon Symeonides, see here for a bibliography of recent books and articles.

Private International Law and Policies of Migration Law (Paper on SSRN)

Professor Veerle Van Den Eeckhout, who teaches private international law at the

Universities of Antwerp and of Leiden, has just published an article entitled "Private International Law Questions that Arise in the Relation between Migration Law (in the Broad Sense of the Word) and Family Law: Subjection of PIL to Policies of Migration Law?" on SSRN. Click here to download.

Abstract:

In many analyses of international family law attention is exclusively given to "cultural" aspects; the analysis of rules of international family law is often embedded in the debate on the collision of cultures. But in analyses of international family law a so-called socio-economic component can be distinguished, certainly if international family law is studied in interaction with migration law: in regulating mobility, residence, nationality and social security issues – at present sensitive areas -, one is inevitably confronted with the intricacies of PIL – for example, the recognition of a foreign marriage or of a foreign judgment containing a change of age of a foreigner (both typical issues of PIL) could be decisive in evaluating a residence claim or a retirement claim. Awareness of this impact of international family law apparently functions as a catalyst on various levels: in parallel with current "two-track policies" in migration law, a double-track policy is also emerging in the process of dealing with international family law. On the one hand, the European Union has "brought in" international family law as an instrument to stimulate the freedom of movement of European citizens: the awareness that mobility of European citizens within the European Union can be influenced by the way people weigh the pros and cons of its impact on the regulation of their family life, spurs the elaboration of a liberal international family law. On the other hand, when international family law issues involve non-European foreigners, national authorities sometimes tend to use international family law rules in such a way as to prevent non-European migrants from claiming residence, social security and nationality. Thus, if one examines the "economic" component of international family law, both the so-called European context (mobility of European citizens and their family members within Europe, whereby principles as free movement of persons, non-discrimination of EU citizens and European citizenship are crucial) and the so-called non-European context (migration from non-European countries) should be examined – with attention for the shaky dividing line which seems to exist between the two, as well as the double-track policy which, when comparing

dynamics, seems to develop (trends to liberalisation in a European context versus opposite trends in a non-European context). An analysis of the "instrumentalization" of PIL requires a) research into the foundations of PIL b) as well as research into PIL's "hinge-function". There is a need to lay down the scientific foundations for future developments in this area through the identification of a series of mechanisms, the critical analysis of the legitimacy and side-effects of current practices and the exploration of future scenarios.