Recent Private International Law Scholarship

I have just posted a few recent pieces on SSRN that relate to private international law. These pieces are on forum non conveniens in U.S. courts, the role of ethics in international law, and international investment law. I would welcome any comments.

Fourth Issue of 2012's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The fourth issue of 2012 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features three articles and two comments.

In the first article, *Bruno Nascimbene*, Professor of European Union Law at the University of Milan, offers a critical appraisal of fair trial and defense rights in antitrust proceedings before the Commission ("Equo processo e diritti della difesa nel procedimento antitrust avanti alla Commissione: necessità di una riforma?"; in Italian).

In the second article, *Luca G. Radicati di Brozolo*, Professor of International Law at the Catholic University of Milan, discusses non-national rules and conflict of laws in light of the Unidroit and Hague principles ("Non-National Rules and Conflicts of Laws: Reflections in Light of the Unidroit and Hague Principles"; in English).

In the third article, *Manlio Frigo*, Professor of International Law at the University of Milan, addresses the analogies and differentiations of, respectively, insolvency of undertakings and insolvency of States ("Insolvenza delle imprese e insolvenza degli Stati: analogie ed elementi di differenziazione" in Italian).

In addition to these articles, the following comments are also featured:

- *Silvia Marino* (Researcher in International Law at the University of Insubria), "Nuovi sviluppi in materia di illecito extracontrattuale on line" (New Developments in Online Torts; in Italian);
- *Giulia D'Agnone* (Ph.D. candidate in International Law at the University of Macerata), "L'interpretazione delle clausole sui *waiting periods* nella giurisprudenza dei tribunali ICSID: obblighi o raccomandazioni?" (The Interpretation of Clauses on Waiting Periods in the Case-Law of ICSID Tribunals: Obligations or Recommendations?; in Italian).

Indexes and archives of the RDIPP since its establishment (1965) are available on the website of the Department of Italian and Supranational Public Law of the University of Milan.

Hague Academy Seventh Newsletter

The seventh Newsletter of the Hague Academy of International Law can be found here.

U.S. Circuits Split on the Implementation of 1980 Hague Child Convention

The U.S. Court of Appeals for the Second Circuit has ruled earlier this week in Ozaltin v. Ozaltin that the 1980 Hague Convention on the Civil Aspects of International Child Abduction affords a private right of action to parents who may seek to enforce their right of access in U.S. federal courts.

The Court of Appeals for the Fourth Circuit had ruled the opposite in 2006 in Cantor v. Cohen. Rights afforded by the Convention, the Court ruled, could only be vindicated in the United States by applying to the U.S. State Department.

A useful summary is available here.

H/T: Opiniojuris.

ECJ Rules Jurisdiction Clauses do not Follow Property

On February 7th, 2013, the Court of Justice for the European Union ruled in Refcomp SpA v. Axa Corporate Solutions Assurance SA (Case C-543/10) that jurisdiction clauses do not follow goods along chains of successive contracts transferring their ownership.

Compressors manufactured by Italian company Refcomp were purchased by another Italian company, Climaveneta, to be sold to French company Liebert and eventually to French property developer Doumer.

The first contract between Refcomp and Climaveneta included a clause providing for the jurisdiction of Italian courts.

Doumer's insurer sued Refcomp and other parties in French courts. Refcomp challenged the jurisdiction of French courts on the ground that it benefited from a jurisdiction clause. It argued that all participants to the chain of contracts which successively transferred ownership of the goods were bound by it.

Under the French law of obligations, the action from Doumer against Refcomp would indeed be contractual. The doctrine is that the rights and obligations follow the goods.

But the French are isolated on that front in Europe. Unsurprisingly, the European Court rules that buyers who were not parties to the first contract are not bound by the jurisdiction clause. The Court had already rejected the French doctrine when it defined contractual matters under the Brussels Convention in its *Handte* decision in 1992.

Ruling:

> *Article 23 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that a jurisdiction clause agreed in the contract concluded between the manufacturer of goods and the buyer thereof cannot be relied on against a sub-buyer who, in the course of a succession of contracts transferring ownership concluded between parties established in different Member States, purchased the goods and wishes to bring an action for damages against the manufacturer, unless it is established that that third party has actually consented to that clause under the conditions laid down in that article.*

Many thanks to Clotilde Normand for the tip-off.

Paris, Lugano or Brussels?

The Brussels I Regulation and the Lugano Convention have each a territorial scope based on the same criteria. But it is not always easy to assess which instrument applies in a given dispute.

Take for instance a contract whereby a French bank assigned a claim to a French national domiciled in Switzerland. The contract contains a clause providing for the jurisdiction of French courts. The bank initiates proceedings in France. Which legal regime governs the clause?

Answer of the Paris Court of appeal: the French code of civil procedure governs, and the clause is unenforceable. Reason: the contract was not truly international, and thus only French law governed, as the only connection with a foreign country was the *residence* in Switzerland of one party, which was not material.

WRONG, rules the French supreme court for private and criminal matters (*Cour de cassation*) in a judgment of 30 January 2013. The Lugano Convention applies, as, the court rules, the French national was *domiciled* in Switzerland.

Well, even if the French national, who happened to be the defendant, was domiciled in Switzerland, the other party was domiciled in France, and the clause provided for the jurisdiction of French courts. So why would not the Brussels regime apply?

First Issue of 2013's Journal du Droit International

The first issue of French *Journal du droit international* (*Clunet*) for 2013 was just released. It contains two articles addressing issues of private international law and several casenotes. A full table of content is available here.

In the first article, Marie-Eve Pancrazi (University of Aix Marseille) explores the

regime of Foreign Assets in International Insolvency (*L'actif étranger du débiteur en procédure collective*). The English abstract reads:

> *Bankruptcy law has always tried to be pragmatic. It never eludes difficulties likely to arise from the scattering of companies' assets over several countries. Bankruptcy law takes up this challenge by proclaiming that domestic insolvency proceedings exercise their authority over all the debtor's assets, urbi et orbi, as it were. But is not this posture rather vainglorious? One would be inclined to think so, when considering national sovereignties. And yet, this cautious attitude needs to be put in perspective, since it is not valid within Europe, and since, in any case, no reaction from foreign jurisdictions could eclipse the obligations which such authority implies for the debtor, the creditors and the bodies of the procedure.*

The second article is an empirical study on exequatur in *la Grande Region*, i.e. Luxembourg and surrounding regions of France, Belgium and Germany. The study was conducted by a team of researchers of the university of Luxembourg who collected data on judgments rendered by courts of Arlon, Trier, Saarbrücken, Lorraine and Luxembourg.

> *The proposal to recast the Brussels I Regulation issued by the European Commission in December 2010 has launched a debate among European scholars and policy makers as to whether the exequatur procedure should be abolished within the European Union. While the European lawmaker has argued that the exequatur procedure is too costly, most scholars have responded that the public policy exception is a unique remedy against violations of human rights. Are the costs of the exequatur procedure really too high? This article contributes to this debate by offering an empirical analysis of the exequatur orders delivered by nine courts of four different member states based in the Grande Region surrounding Luxembourg.*

Roger Alford's New Article on 28 U.S.C. sec. 1782: Ancillary Discovery To Prove Denial of Justice

Roger Alford has just posted on SSRN his latest article, "Ancillary Discovery to Prove Denial of Justice," which has been published in the Virginia Journal of International Law. It analyzes Section 1782 discovery proceedings in the context of BIT arbitration and argues that there is now uniform agreement among federal courts that investment arbitration panels are "international tribunals" within the meaning of Section 1782. But as he points out today on opiniojuris, the article has relevance outside that context, too. As recent cases have demonstrated, this mechanism is becoming a typical (and powerful) tool for international litigators to obtain discovery in aid of any non-U.S. proceeding. This is a fabulous article on the recent wave developments in regard to this mechanism, and reaches a number of salient conclusions regarding the growing use of ancillary discovery in international adjudication.

Sciences Po PILAGG Workshop Series, Spring 2013

The workshop on Private International Law as Global Governance (PILAGG) at the Law School of the Paris Institute of Political Science (*Sciences Po*) will take place on Fridays from 12:30 to 2:30 pm, at the Law School.

The speakers for the Spring 2013 will be:

- Workshop I: Fri 22nd February, *PIL and legal theory: A renewal?*

Benoît FRYDMANN (Brussels)

Horatia MUIR WATT (SPLS)

- Workshop II: Fri 22nd March, *Global Commons*

Makane MBENGUE (Geneva)
Stefano RODOTÀ (Rome)
Bram ven den EEM (Rotterdam)

- Workshop III: Fri 19th April, *Migrations*

Charles GOSME (SPLS)
Karine PARROT (Paris)
Veerle VAN DEN EECKHOUT (Leiden)

More information is available here.

Language Implications of Harmonisation and Cross-Border Litigation

An issue of the theme-based peer-reviewed e-journal Erasmus Law Review (free access) dedicated to the topic 'Law and Language; Implications for Harmonisation and Cross-Border Litigation' has just been published. It includes five contributions, preceded by a short introduction.

Simone Glanert, Europe Aporetically: A Common Law Without a Common Discourse.

In response to the European Union's avowed ambition to elaborate a uniform European private law, some critics have maintained that uniformisation is illusory on account of the disparities between the governing legal languages within the different Member States. This objection has, in its turn, given rise to an argument according to which uniformisation could be ensured through the emergence of a

common discourse. It has been said that such outcome is possible even in the absence of a common language. For the proponents of this claim, the theory of communicative action developed by Jürgen Habermas offers significant support. By way of reaction to the common-discourse thesis, this paper proposes to explain why it cannot be sustained and why one cannot usefully draw inspiration from Habermas's thinking in order to promote a uniform private law within the European Union.

Astrid Stadler, Practical Obstacles in Cross-Border Litigation and Communication between (EU) Courts.

In cross-border civil litigation the use of different official court languages causes severe problems when – at least one of the parties – is not familiar with the official language of the court, since the parties' constitutional right to a fair trial depends very much on the communication with the court. As a consequence, interpreters must often be used during the trials and hearings and legislatures have to decide to what extent legal documents should be translated. The article takes the position that the European legislature sometimes underestimates the language problem and does not always provide sufficient safeguards for the parties' right to be heard (in a language they can understand). In particular, the defendant's procedural rights often require a translation of documents in cross-border service of process and must take precedence over procedural economy. European regulations also tend to emphasise the cooperation between courts in different Member States without taking into consideration that there is often no common language and that many judges will not have the language skills to communicate with their colleagues. The use of standard forms available in the 23 official languages is no perfect solution for all situations.

Elena Alina Ontanu & Ekaterina Pannebakker, Tackling Language Obstacles in Cross-Border Litigation: The European Order for Payment and the European Small Claims Procedure Approach.

In cross-border litigation, language differences are one of the main obstacles preventing parties from taking action and defending their rights. The Regulations creating a European Order for Payment Procedure (EOP) and establishing a European Small Claims Procedure (ESCP) have introduced the first EU-wide procedures, the goals of which are to simplify, speed up, and reduce the costs of cross-border litigation; they also include an attempt to reduce language obstacles.

However, the simplification they propose must not sacrifice parties' right of access to justice and fair trial. This paper addresses the question as to the way language obstacles in cross-border litigation are tackled by the EOP and the ESCP. It further seeks to determine the extent to which these instruments balance the aim to simplify the procedures by reducing language obstacles and the parties' right to a fair trial and access to justice.

Christoph A. Kern, English a Court Language in Continental Courts.

Most recently, several countries on the European continent have admitted, or are discussing to admit, English as an optional court language. This article provides some information about the background of these recent initiatives, projects and reforms, clarifies the idea on which they are based and explores the purposes they pursue. It then identifies in a theoretical way the various possible degrees of admitting English as a court language and the surrounding questions of practical implementation. These general issues are followed by a presentation of the initiatives, projects and reforms in France, Switzerland and Germany. Not surprisingly, the idea of admitting English as a court language has not only found support, but has also been criticised in legal academia and beyond. Therefore, the article then attempts to give a structured overview of the debate, followed by some own thoughts on the arguments which are being put forward. It concludes with an appeal not to restrict the arguments in favour of admitting English as a court language to merely economic aspects, but also to give due weight to the fact that admitting English may facilitate access to justice and may result in bringing back cases to the public justice system.

Isabelle Bambust, Albert Kruger & Thalia Kruger, Constitutional and Judicial Language Protection in Multilingual States: A Brief Overview of South Africa and Belgium.

The purpose of this contribution is to provide a very modest comparison of judicial language protection in South Africa and in Belgium. First of all, the authors sketch briefly the historical context and the constitutional status of languages in both countries. It is difficult to argue that one always has a right to use his or her own language. However, the use of language has clear links to constitutional rights such as the right to a fair trial. The authors then consider the rules on the use of languages in court generally and in criminal proceedings particularly. Belgium has strict rules on the use of language, and these rules are based on

strong principles of territoriality and monolingualism. South Africa, on the other hand, has 11 official languages, not linked to territories, but in practice these languages do not all enjoy the same protection. The pragmatic approach by the South African courts is indicated with reference to the case law.