Weighing European Private International Law in the Balance

The United Kingdom Government is currently undertaking a review of the competences of the European Union, asking what the European Union does, and how it affects government and the general public in the United Kingdom.

As part of that review, the Ministry of Justice has published a Call for Evidence on the impact of European civil justice instruments and has organised two consultation events, in collaboration with Eva Lein, Research Fellow in Private International Law at the British Institute of International and Comparative Law. The first, on the instruments dealing with civil and commercial matters, was held on Monday 3 June. The second, examining the instruments in the area of family and succession law, is due to be held on Thursday 20 June. Chaired by John Hall of the Ministry, the list of speakers is as follows:

- Carolina Marín Pedreño, Dawson Cornwell
- Mark Harper, Withersworldwide
- Richard Frimston, Russell Cooke
- Professor Paul Matthews, King's College London

The event is free, but places are limited. If you would like to attend, please book online at the Institute's website. The Ministry has also invited written responses to the Call for Evidence (e-mail to balanceofcompetences@justice.gsi.gov.uk or in hard copy to Ministry of Justice, 102 Petty France, SW1H 9AJ). You can also, if this is your thing, share your thoughts about #BOCreview on Twitter @MojGovUK.

The current malaise among many in the UK with the European Union, its institutions and laws is well known. This, however, is an area in which the *acquis*, although not problem free, seems to be working relatively well and to have been favourably received by commercial organisations, including in the financial sector. The Brussels I and Rome I Regulations are generally well-regarded, and (although it is too early to pass judgment) the Rome II Regulation seems to be bedding down without undue difficulty. Moreover, the UK's opt-out in the civil justice field has given it the flexibility to participate in those instruments that it

considers likely to be in the overall interest of businesses and citizens, while exercising caution in other areas. Greater disparities between the common law and the civil law in the areas of family law, wills and succession have resulted in the more frequent exercise of the opt-out, but the UK has remained engaged during negotiations to see if a better fit, satisfactory to other Member States, can be achieved (as in the case of the Maintenance Regulation). Overall, therefore, the balance of EU competence in this area appears satisfactory from the UK's perspective.

It should follow that the UK's policy goal in this area should not be one of retrenchment, but of continued engagement with its partners in the EU to enhance co-operation in the civil justice field, to the benefit of all. That does not, it must be emphasised, require a raft of new measures, or consistent tinkering with the old ones. Instead, it is submitted, the following activities should provide the focus of co-operation in the coming years:

- Strenghtening the EU's institutional framework in the civil justice field, notably by establishing a specialist chamber or court (with specialist judges) dealing only with private law matters. This step, above all, is essential if the EU's legislative activity is to be effective and to maintain the confidence of the Member States and the citizens.
- Ensuring better integration of the private international law instruments with other legislative instruments (particularly Directives) adopting substantive private law rules for the internal market, including for the protection of consumers and employees. The Commission should, as a matter of course, assess the inter-action of proposed, private law measures with the private international law instruments at an early stage.
- Monitoring the application and judicial development across the EU of the civil justice *acquis* as a whole over a longer period, allowing a period of reflection to assess its impact and encourage discussion of possible refinements and incremental developments to ensure better co-ordination of the instruments. The practice of routinely including "5-year review" clauses in civil justice instruments, resulting in a merry-go round of legislative reviews and proposals, should be abolished. It's time to take stock of what we have – after all, it doesn't look too bad.

Liber Amicorum Jean-Michel Jacquet

A Liber Amicorum will be published at the end of the month to honor J.M. Jacquet, who has been the professor of private international law at the Graduate Institute for International Studies in Geneva since 1994 and the Editor in Chief of the *Journal du droit international (Clunet)* since 2003 (*Mélanges en l'honneur du professeur Jean-Michel Jacquet)*.

The book will be structured as follows:

Première partie – Arbitrage et Juridiction Internationale

- Dolores Bentolila, Quelques réflexions sur le statut des tribunaux arbitraux fondés sur des traités en matière d'investissement
- Andrea Bonomi et David Bochatay, L'aménagement de la priorité laissée à l'arbitre pour statuer sur sa propre compétence
- Olivier Cachard, Arbitrage et soupçons de la légalisation de revenus issus d'activités illicites
- Lucius Caflisch, Arbitrage et protection des droits de l'homme dans le contexte européen
- Jean Devèze, L'expert et l'arbitre, différents mais si proches
- Gabrielle Kaufmann-Kohler, The transnationalisation of national contract law
- Catherine Kessedjian, La pratique arbitrale
- Pierre Mayer, La dispersion des demandes connexes entre plusieurs procédures arbitrales est-elle inéluctable ?
- Éric Wyler, Le concept d'acceptabilité du Jus auctoritas au cœur de la juridiction internationale ?

Deuxième partie – Droit du commerce international et droit international économique

- Philippe Delebecque, Droit du commerce international et droit maritime

- Pascale Deumier, Les sources du droit et les branches du droit. À propos d'une conception doctrinale des sources du droit du commerce international
- Marcelo G. Kohen, La portée et la validité des clauses contractuelles exorbitantes de renonciation à l'immunité des États
- Éric Loquin, Retour sur les sources premières de la lex mercatoria : les usages du commerce international
- Suzy H. niKièma, Les« mesures » d'expropriation indirecte en droit international des investissements : les actes et omissions de l'État d'accueil
- Jean-Baptiste Racine, La protection du professionnel contractant en matière internationale
- Luca G. Radicati di Brozolo, Règles transnationales et conflit de lois : réflexionsà la lumière des principes UNIDROIT et des principes de la Haye
- Mélanie Samson, L'Organisation mondialedu commerce : un forum approprié pour la protection de la santé publique ?
- Jorge E. Viñuales, Vers un droit international de l'énergie : essai de cartographie

Troisième partie – Droit international privé

- Isabelle Barrière Brousse, Le droit international privé de la famille à l'heure européenne
- Sabine Corneloup, Entre autonomie conflictuelle et autonomie substantielle le choix du futur Droit commun européen de la vente. À propos de la proposition de règlement de la Commission européenne du 11 octobre 2011
- Hélène Gaudemet-Tallon, Unité et diversité : quelques mots de Droit international privé européen
- Marie-Ange Moreau, Continuité des règles de DIP en matière de contrat de travail international et communautarisation
- Thomas Schultz, Postulats de justice en droit transnational et raisonnements de droit international privé. Premier balisage d'un champ d'étude
- Anne Sinay-Citermann, État des lieux sur les articles 14 et 15 du Code civil en droit international privé

- Claude Witz, L'application du droit étranger en Allemagne (Questions choisies)

Quatrième partie – Droit africain

- Néji Baccouche, Impôt, révolution et démocratisation du système politique tunisien
- Parfait Diédhiou, La reconnaissance et l'exécution des sentences arbitrales dans l'Acte uniforme relatif au droit de l'arbitrage de l'OHADA
- Joseph Issa-Sayegh, Regards sur l'intégration régionale du droit social dans les États africains francophones subsahariens
- Ousmane mBaye, L'Ouest africain à l'épreuve de la mondialisation : étude clinique du Sénégal
- Paul-Gérard pouGoué et Gérard nGoumtsa Anou, L'applicabilité spatiale du nouveau droit OHADA de la vente commerciale et le droit international privé : une réforme inachevée

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Folkman on Comity

Theodore J Folkman (Murphy & King, P.C.) has posted Two Modes of Comity on SSRN.

> *Some have suggested that US courts should not deny recognition and enforcement to foreign judgments on grounds of fraud or a denial of due process in the particular foreign proceeding, as long as the foreign judiciary is systematically adequate. This paper, based on remarks given at the University of Pennsylvania Journal of International Law's Fall 2012 Symposium, evaluates that suggestion by considering the various kinds of comity that US courts accord to one another, in particular, the comity required by the Full Faith and Credit Clause and the comity a federal court gives to a state court in habeas corpus cases. It outlines the ways in which each of these two models of comity can be a model for US treatment of foreign court judgments, and it considers recent decisions in which US courts have shown a tendency to use a more deferential model of comity when considering whether to recognize foreign*

judgments.

HEC Seeks to Recruit Assistant Professor of PIL

The Department of Law and Taxation of HEC Paris (France) invites applications for Tenure-track faculty positions to begin in 2014.

HEC Paris is the leading Business School in France and one of the leading Business Schools in Europe. The teaching of Law is one of its distinctive features. In addition to a large diversity of mandatory and elective law and taxation courses, HEC Paris offers to its students specializations in international business law and taxation.

JOB DESCRIPTION/QUALIFICATIONS: The position's opening is in International Private Law, with emphasis on International Contract law, Legal environment of International negotiations, Arbitration. A strong track record in both research and teaching is required. Support for research is excellent, including grants from HEC. During their first three years at HEC, assistant professors benefit from a reduced number of teaching hours, simplified access to research funds and an exemption of administrative duties.

The remuneration and benefits package is competitive by international standards and will be commensurate with experience and profile. While HEC Paris is a bilingual school (English/French), the ability to teach in French is not mandatory.

Applicants are required to have (or be about to complete) a Ph.D. degree.

APPLICATION PROCEDURE: Interested applicants should send a cover letter, vitae, and selected research papers, to Elizabeth Hautefeuille by June 10, 2013 at the following address: email: hautefeuille@hec.fr

For additional information about HEC Paris, please refer to our website at:

Brekoulakis on International Arbitration Scholarship and the Concept of Arbitration Law

Stavros Brekoulakis (Queen Mary University of London) has posted International Arbitration Scholarship and the Concept of Arbitration Law on SSRN.

This article is about the concept of arbitration law and its relationship with international arbitration scholarship. It argues that the field of international arbitration scholarship has developed in isolation and never fully engaged with the crucial movements of international legal scholarship that advanced a more progressive and humanitarian concept of international law. The dearth of interdisciplinary scholarship in arbitration has had two undesirable implications. First, it has had a negative impact on how non-arbitration scholars and the public perceive arbitration. Secondly, and more importantly for the purposes of this article, it has crucially impaired the concept and autonomy of arbitration law. By remaining adherent to an old-fashioned version of positivism that accepts state regulation only, arbitration scholarship has failed to develop an account of international arbitration as a non-state community that has the capacity to produce legal rules. Eventually, it has failed to advance persuasive claims of normativity and autonomy of international arbitration. The article revisits the concept of arbitration law and advances the thesis that arbitration community has the normative potency to generate procedural practices and standards that guide the conduct of arbitration and breed expectations of compliance.

The paper is forthcoming in the *Fordham International Law Journal*.

Can a Court Sit Outside its Territorial Jurisdiction?

In *Parsons v The Canadian Red Cross Society*, 2013 ONSC 3053 (available here), Winkler CJ (of the Court of Appeal, here sitting down in the Superior Court of Justice) has held that a judge of the SCJ can sit as such outside Ontario. No authority, it seems, requires the SCJ to sit only in Ontario.

The decision seems to me, at least on an initial reading, largely based on pragmatism. It seems efficient to so allow and so the court does. But I have some preliminary sense that there are some larger concerns here that are not being fully thought through. The place where a court sits seems awfully fundamental to its existence and authority as a court. In addition, the brushing aside of concerns about the open court principle (see paras 48-50) seems too minimal.

Part of the decision is based on *Morguard* and the federal nature of Canada (see para 25), so maybe the judge could not so sit outside Canada?

For news coverage of the decision, see this story.

Could this idea get pushed beyond the fairly narrow bounds of this case? Say a case is started in Ontario and the defendant seeks a stay in favour of Alberta because of all the factual connections to that province. Could the plaintiff, if otherwise likely to see the proceedings in Ontario get stayed, ask the court to have one of its judges hear the case in Alberta, sitting as a judge of the Ontario court? That way the plaintiff gets an Ontario judgment and the defendant gets the case heard in Alberta…

Seminari estensi di diritto internazionale privato (Ferrara Workshops on Private International Law) – Summer 2013

A very interesting series of workshops on Private International Law has been **launched by the Department of Law of the University of Ferrara: *Seminari estensi di diritto internazionale privato* (Ferrara Workshops on Private International Law)**. The first two events, which will be hosted in the coming weeks, will take the form of a colloquium (in English) between an invited speaker and a discussant, ended by concluding remarks by a third scholar. Here's the programme:

Friday 28 June 2013 – 11h00
Taking evidence abroad in civil matters – Open issues regarding Regulation (EC) No 1206/2001 (.pdf)

Invited speaker: *Jorg Sladic* (University of Maribor);
Discussant: *Pietro Franzina* (University of Ferrara);
Concluding remarks: *Elena D'Alessandro* (University of Turin).

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Friday 5 July 2013 – 10h30
The individual in the prism of private international law – Subject, Citizen, Person, Body (.pdf)

Invited speaker: *Chris Thomale* (University of Freiburg im Breisgau);
Discussant: *Pietro Franzina* (University of Ferrara);
Concluding remarks: *Alessandro Somma* (University of Ferrara).

Venue (for both seminars): Dipartimento di Giurisprudenza, Sala consiliare – Corso Ercole I d'Este, 44 – Ferrara.

For further information: pilworkshops [at] unife.it.

New Model Clauses for Use of UNIDROIT Principles

At its 92nd session (8 – 10 May 2013) the UNIDROIT Governing Council has adopted the Model Clauses for Use of UNIDROIT Principles of International Commercial Contracts

The Model Clauses were prepared by a restricted Working Group. Details on the "legislative" process are available here.

Recent Canadian Conflicts Scholarship

The following articles about conflict of laws in Canada were published over the past year or so:

Brandon Kain, "Solicitor-Client Privilege and the Conflict of Laws" (2012) 90 Can Bar Rev 243-99

Christina Porretta, "Assessing Tort Damages in the Conflict of Laws: *Loci, Fori, Illogical*" (2012) 91 Can Bar Rev 97-134

Matthew E Castel, "Anti-Foreign Suit Injunctions in Common Law Canada and Quebec Revisited" (2012) 40 Adv Q 195-212

Nicholas Pengelley, "'We all have too much Invested to Stop': Enforcing Chevron in Canada" (2012) 40 Adv Q 213-32

These are in addition to the several articles, mentioned in an earlier post, about

the Supreme Court of Canada's decision in Club Resorts.

Electronic access to these articles depends on the nature of the subscriptions. Some journals are available immediately through aggregate providers like HeinOnline while others delay access for a period of months or years.

Italian Society of International Law's XVIII Annual Meeting (Naples, 13-14 June 2013)

On 13 and 14 June 2013, the **Italian Society of International Law** (Società Italiana di Diritto Internazionale – SIDI) will hold **its XVIII Annual Meeting at the University of Naples "L'Orientale"**. The conference is dedicated to **"Diritto internazionale e pluralità delle culture"** (International Law and Plurality of Cultures) (see the complete programme here).

The meeting will be opened by a general report by *Franco Mazzei* (Univ. of Naples "L'Orientale"): "Gestione della diversità culturale, sfida geopolitica del XXI secolo". The first session, in the afternoon of Thursday 13 June, will be devoted to cultural aspects in international law of the sea ("Pluralità e unità culturale dei popoli dei 'mari tra le terre'"). In the morning of Friday, 14 June, the meeting will be structured in two parallel sessions, respectively dealing with private international law ("**Diritto internazionale privato e diversità culturale**") and international economic law ("Diritto dell'economia, commercio internazionale e diversità culturale"). The final session (Friday 14 June, afternoon) will take the form of a round table and will analyse the international protection of cultural diversities ("La tutela internazionale delle diversità culturali").

Here's the programme of the parallel sessions:

Friday, 14 June 2013 (parallel sessions: 9h30 – 13h30)

Diritto internazionale privato e diversità culturale

Chair: *C. Campiglio* (Univ. of Pavia)

- *Jean-Yves Carlier* (Univ. de Louvain et de Liège): Diversité culturelle et droit international privé: de l'ordre public aux accommodements réciproques;
- *Pasquale Pirrone* (Univ. of Catania): "Ordine pubblico di prossimità" tra tutela dell'identità culturale e diritti umani;
- *Pietro Franzina* (Univ. of Ferrara): Né cosa né persona: lo statuto giuridico del corpo nel diritto internazionale privato, tra identità culturale, autonomia e responsabilità;
- *Chiara E. Tuo* (Univ. of Genova): Il rispetto delle diversità culturali e il riconoscimento degli effetti delle adozioni straniere.

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Diritto dell'economia, commercio internazionale e diversità culturale

Chair: *P. Picone* (Univ. of Rome "La Sapienza"; Accademia dei Lincei)

- *Pierre-Marie Dupuy* (Graduate Institute of International and Development Studies of Geneva): Arbitrato tra Stati e investitori privati stranieri e diversità culturale. Alcune osservazioni;
- *Valentina Grado* (Univ. of Naples "L'Orientale"): Unità e diversità d'approcci sulla responsabilità sociale d'impresa: il caso dei c.d. "conflict minerals";
- *Flavia Zorzi Giustiniani* (Univ. Telematica Internazionale Uninettuno): Protezione delle conoscenze e pratiche tradizionali dalla biopirateria: quali prospettive dopo l'adozione del Protocollo di Nagoya?;
- *Federica Mucci* (Univ. of Rome "Tor Vergata"): La Convenzione UNESCO del 2005 sulla diversità delle espressioni culturali: dall'"eccezione culturale" alla declinazione della dimensione culturale dello sviluppo sostenibile.