Implied Choice of Law in International Contracts

Manuel Penadés Fons has just published a new book on the implied choice of law in international contracts, entitled *Elección tácita de ley en los contratos internacionales* (Thomson Reuters Aranzadi).

Abstract provided by the author:

> The autonomy of the parties to choose the law applicable to their international commercial contracts does not always manifest through an express clause in the agreement. This silence leads occasionally to litigation over the possibility that the parties exercised such freedom, even though it was not explicitly reflected in the contract. Despite the harmonised solution provided to this issue by the European legislation, practice shows that the answer given by the courts of different Member States is substantially divergent. This reality makes the question highly controversial and unpredictable in the context of international commercial litigation. The book at hand studies the theoretical underpinnings of the institution and explores the criteria used by European caselaw under the Rome Convention and the Rome I Regulation, offering valuable professional guidance to deal with the question of implied choice of law before national and arbitral tribunals.

Summary (click here for whole table of contents)

Manuel Penadés Fons, LLM London School of Economics, teaches Private International Law at the University of Valencia.

The Court of Justice – holiday over

Amidst a raft of judgments and opinions handed down by the CJEU on 6 September 2012, are several of note which relate to the EU private international law instruments, as follows:

Brussels I Regulation

1. Judgment: Case C-619/10, Trade Agency Ltd v Seramico Investments – application of Arts. 34(1) and (2) to the enforcement of an English default judgment, including an assessment as to whether the enforcement of a judgment given in default of appearance, without reasons, may be opposed on public policy grounds (answer: it depends).
2. Judgment: Case C-190/11, Mühlleitner v Yusufi – the consumer contract provisions (Art. 15) may apply to a contract arising from directed activities of the kind referred to in Art. 15(1)(c) even if it has not been concluded at a distance.
3. Opinion: Case C-456/11, Gothaer Allgemeine Versicherung AG v Samskip GmbH – a preliminary judgment on a question of jurisdiction (as to the validity and effectiveness of a choice of court agreement in favour of the courts of Iceland) is a "judgment" which must be recognised under the Regulation, and findings as to the validity and scope of the agreement are binding on the court addressed regardless of its status as res judicata in the Member State of origin or the Member State addressed.

Evidence Regulation

1. Judgment: Case C-170/11, Lippens v Kortekaas – the Regulation does not preclude a Member State court, acting under its own procedural rules, from summoning a party to appear as a witness before it.
2. Opinion: Case C-332/11, ProRail NV v Xpedys NV – the Regulation does

> not preclude a Member State court, acting under its own procedural rules, from ordering the taking of expert evidence, partly in another Member State, provided that the performance of that part of the investigation does not require the cooperation of the authorities of that Member State.

It looks like it's time to shake off the holiday season, and prepare for another year on the EU private international law rollercoaster.

Shill on Judgment Arbitrage in the United States

Gregory H. Shill, who is visiting assistant professor at Hofstra law school, has posted Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States on SSRN.

> *Recent multi-billion-dollar damage awards issued by foreign courts against large American companies have focused attention on the once-obscure, patchwork system of enforcing foreign-country judgments in the United States. That system's structural problems are even more serious than its critics have charged. However, the leading proposals for reform overlook the positive potential embedded in its design.*
>
> *In the United States, no treaty or federal law controls the domestication of foreign judgments; the process is instead governed by state law. Although they are often conflated in practice, the procedure consists of two formally and conceptually distinct stages: foreign judgments must first be recognized and then enforced. Standards on recognition differ widely from state to state, but under current law once plaintiffs have secured a recognition judgment all American courts must enforce it. Thus, plaintiffs can enforce in states that would have rejected the foreign judgment in the first place.*

This extreme form of forum shopping, which I call "judgment arbitrage," creates a fundamental structural problem that has thus far escaped scholarly attention: it undermines the power of individual American states to determine whether foreign-country judgments are enforced in their territory and against their citizens. It also suggests a powerful, if implied, conflict of recognition laws among sister U.S. states that precedes and often determines the outcome of what scholars currently consider the primary conflict, between American and foreign law. Finally, this system impedes the development of state law and weakens practical constraints on the application of foreign nations' laws in the United States.

This Article constructs a novel framework for conceptualizing these problems, and addresses them by proposing a federal statute that would allow states to capture the benefits — and require them to internalize the costs — of their own recognition rules. Rather than scrap the current state-law regime in favor of a single federal rule, as the ALI and leading scholars call for, the statute proposed in this Article would provide incentives for competition among states for recognition law. The Article argues that sharpening jurisdictional competition would encourage experimentation, the development of superior law, and, eventually, greater uniformity in an area where scholars agree uniformity is desirable. The proposal may also suggest ways to manage other sister-state conflicts of law in an age when horizontal conflicts are proliferating.

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

Marshall on the Proper Law of the Contract

Brooke Adele Marshall, who is an associate to the Chief Justice of the Federal Court of Australia, has published Reconsidering the Proper Law of the Contract in the last issue of the *Melbourne Journal of International Law*.

This article appraises the choice of law rule that applies where parties have either impliedly chosen, or failed to choose, the law governing their contract. It reconsiders the problems besetting the common law rule, known as the proper law of the contract, that were identified by Australia's Law Reform Commission twenty years ago. While the choice of law rule in Australia remains unchanged, it has undergone significant reform in the European Community and is now the subject of reform at the Hague Conference on Private International Law. Despite these reforms, a comparative analysis reveals that several of the common law problems persist. This article proffers a proposal for Australian legislatures based on the author's refined version of the Draft Hague Principles and the Rome I Regulation. It also suggests that the Hague Conference adopt these refinements. Under this proposal, tacit choice of law is absorbed as a subset of express choice and must be clearly established by the terms of the contract or the circumstances of the case. The probative value of an exclusive jurisdiction agreement will be made apparent in the drafting of the clause on tacit choice of law itself. It is further proposed that, in the absence of choice, the closest connection test be reduced to an escape clause applicable in default of fixed rules tailored to the exigencies of commercial contracting. The reformulated test will be used to ascertain the law of the country most appropriate for determining the issues arising in the case.

French Conference on the Future of European Insolvency Law

The Law Faculty of Rouen will host a conference on the Future of European Insolvency Law on September 21st, 2012. The speeches will be delivered in French.

Le droit européen des procédures d'insolvabilité à la croisée des chemins

9 h : Rapport introductif (Michel Menjucq, Ecole de droit de la Sorbonne)

1ère séance : L'affinement des règles initiales
Présidence : Jocelyne Vallansan, Université de Caen – Basse Normandie

9 h 30 : *Les procédures entrant dans le champ d'application du Règlement* (Gilles Podeur, Clifford Chance Europe LLP)

9 h 50 : *Les notions de centre des intérêts principaux et d'établissement* (Maud Laroche, Université de Rouen)

10 h 10 : *L'articulation entre la procédure principale et les procédures secondaires* (Laurence-Caroline Henry, Université de Bourgogne)

10 h 30 : Débat
Pause

11 h 30 : *L'égalité entre créanciers* (David Robine, Université de Rouen)

11 h 50 : *La garantie des créances salariales, influences et conséquences des procédures d'insolvabilité transfrontalières* (Isabelle Didier, Smith-Violet)

12 h 10 : *Les défaillances bancaires et financières* (Frédéric Leplat, Université de Rouen)

12 h 30: Débat

Déjeuner

2ème séance : L'adoption de règles nouvelles
Présidence : Paul Le Cannu, Ecole de droit de la Sorbonne

14 h 30 : *Les groupes de sociétés* (Michel Menjucq, Ecole de droit de la Sorbonne)

14 h 50 : *Les relations avec les Etats tiers* (Fabienne Jault-Seseke, Université de Versailles Saint-Quentin en Yvelines)

15 h 10 : *Les actions annexes* (Cécile Legros, Université de Rouen)

15 h 30 : Débat
Pause

3ème séance : Le regard des autres Etats membres sur la réforme du Règlement
Présidence : Gilles Cuniberti, Université de Luxembourg

16 h 15 : *Le regard italien* (Stefania Bariatti, Universita degli studi di Milano)

16 h 45 : *Le regard belge* (Yves Brulard, DBBLaw)

17 h 15 : *Rapport de synthèse* (Jean-Luc Vallens, Magistrat, Université de Strasbourg)

More details on the conference are available here.

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Second Issue of 2012's Journal of Private International Law

The second issue of the Journal of Private International Law has recently been released. The table of contents reads as follows:

- *Hill, Jonathan*, **The Significance of Foreign Judgments Relating to an Arbitral Award in the Context of an Application to Enforce the Award in England,** pp. 159-193
- *Elbalti, Beligh,* **The Jurisdiction of Foreign Courts and the Enforcement of their Judgments in Tunisia: A Need for Reconsideration**, pp. 195-224
- *Kuipers, Jan-Jaap,* **Schemes of Arrangement and Voluntary Collective Redress: A Gap in the Brussels I Regulation**, pp. 225-249
- *Nagy, Csongor István,* **The Word is a Dangerous Weapon: Jurisdiction, Applicable Law and Personality Rights in EU Law – Missed and New Opportunities**, pp. 251-296
- *Papettas, Jenny,* **Direct Actions Against Insurers of Intra-community Cross-Border Traffic Accidents: Rome II and the Motor Insurance Directives**, pp. 297-321
- *Fitchen, Jonathan*, **"Recognition", Acceptance and Enforcement of Authentic Instruments in the Succession Regulation**, pp. 323-358

- *Borg-Barthet, Justin*, **The Principled Imperative to Recognise Same-Sex Unions in the EU**, pp. 359-388
- *Smith, Peter De Verneuil; Lasserson, Ben; Rymkiewicz, Ross*, **Reflections on Owusu: The Radical Decision in Ferrexpo**, pp. 389-405
- *Hartley, Trevor*, **Private International Law by AE Anton, Third Edition by PR Beaumont and PE McEleavy** ,pp. 407-410

ATS Suit Dismissed

On September 4, Judge Naomi Buchwald of the Southern District of New York dismissed an Alien Tort Statute suit against President Mahinda Rajapaksa of Sri Lanka, on the basis of a Suggestion of Immunity filed by the Justice Department, at the request of the State Department Legal Adviser. Under customary international law and longstanding U.S. practice, sitting heads of state or government are considered to have immunity from civil suits in U.S. courts.

Judge Buchwald's decision is also notable for her rejection of the plaintiff's argument that head of state immunity should not shield officials accused of *jus cogens* violations.

Source: J. B. Bellinger, Lawfare blog (click to see the whole post and for a link to the decision)

Latest Issue of "Praxis des

Internationalen Privat- und Verfahrensrechts" (5/2012)

Recently, the September/October issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Urs Peter Gruber***: "Scheidung auf Europäisch – die Rom III-Verordnung" – the English abstract reads as follows:

Regulation (EU) No. 1259/2010 („Rome III") contains uniform conflict-of-laws rules on divorce and legal separation. Compared with the previous conflict-of-laws rules of the Member States, it brings about fundamental changes. Primarily, in contrast to the majority of the pre-existing national laws, it favours party autonomy. Only absent a valid agreement on the applicable law, divorce or legal separation are governed by the law of the state where the spouses have their common habitual residence or – under certain circumstances – were last habitually resident. The common nationality of the spouses and the lex fori are only subsidiary connecting factors.

The Regulation also touches some politically intricate subjects. First of all, the Regulation is also applicable to same-sex marriages; however, pursuant to a compromise reached in article 13, those Member States which do not accept same-sex marriages are not obliged to pronounce the divorce of such a marriage. Art. 10 which deals with gender discrimination might lead to a rigid exclusion of Islamic laws.

- ***Christopher Wilhelm***: "Die Anknüpfung von Treuhandverträgen im Internationalen Privatrecht unter besonderer Berücksichtigung der Rom I-VO" – the English abstract reads as follows:

Having contractual as well as property rights elements, and because of the great variety of its possible fields of application, the German Treuhand does not only pose problems in German substantive law, but also in private international law. The present article shows how to find the law applicable to the contractual fiduciary relationship according to the Rome I Regulation. It points out and answers certain questions arising from the material scope of the regulation,

and discusses the possibility and the advantages of choice of law. The main focus is on the law applicable in the absence of choice by the parties, Article 4 Rome I, and the specific problems occurring. The article closes by summing up the key aspects and a comment of the author.

- ***Matthias Lehmann***: "Vorschlag für eine Reform der Rom II-Verordnung im Bereich der Finanzmarktdelikte" – the English abstract reads as follows:

On today's interconnected financial markets, illegal behaviour – such as false or misleading information in prospectuses, violation of disclosure and shareholder transparency rules, ill-founded credit rating, merger offers not complying with legal requirements, insider trading or market manipulation – often has repercussions in different countries. This raises the question of the law that applies to the civil liability of the tortfeasor. In the European Union, the answer has to be found in the Rome II Regulation, which provides a comprehensive set of conflict rules for non-contractual obligations. However, the regulation does not contain any specific provision on financial torts. Its general rule, Article 4 (1), points to the law of the state in which the damage occured, i.e. either the state of the investors' home or that of their bank accounts. When looking from the perspective of the tortfeasor – typically an issuer or an intermediary – this has the effect that a multitude of different laws governs, which moreover cannot be predicted in advance. In order to remedy this situation, the German Council for Private International Law, a body established by the German Ministry of Justice, suggests amending the Rome II Regulation. The proposal, an English version of which is annexed to this article, provides for new, specific connecting factors, an escape and a fallback clause, as well as special rules regarding collective redress, bilateral relationships and party autonomy.

- ***Martin Illmer***: "Anti-suit injunctions and non-exclusive jurisdiction agreements" – the English abstract reads as follows:

Due to uncertainty about the interpretation and scope of two earlier, potentially conflicting Court of Appeal decisions concerning anti-suit injunctions enforcing non-exclusive jurisdiction agreements, the state of the law was unclear. Setting aside an anti-suit injunction granted by the High Court at first

instance, the Court of Appeal made a fresh start. It distinguished the earlier case law on the matter and laid down general guidelines for the grant of anti-suit injunctions enforcing non-exclusive jurisdiction agreements. The decision itself as well as the accompanying plea on behalf of textbook writers deserve full support.

- ***David-Christoph Bittmann***: "Das Gemeinschaftsgeschmacksmuster im Europäischen Zivilprozessrecht" – the English abstract reads as follows:

The following article deals with a decision rendered by the Oberlandesgericht Munich. Subject of this decision is an application for declaration of enforceability of an injunctive relief from the Tribunal de Grande Instance of Paris. With this injunctive relief the French court prohibited further infringements of a community design committed by a French and a Belgium enterprise, which are part of one concern. The applicant was in fear of further infringements of the community design through this concern in Germany so it applied for the declaration of enforceability of the French injunctive relief at the Landgericht Munich I. The German court however declined the application on the grounds that it has no jurisdiction as far as the Belgium enterprise is concerned; furthermore an injunctive relief was not a decision that could be subject of a declaration of enforceability. The Oberlandesgericht changed the decision and released the declaration of enforceability. The following article takes a closer look to the reasoning of the senate that had to deal with questions of international jurisdiction, of remedies in cases of protection of industrial property and of the enforcement of foreign judgements according to the Regulation Brussels I.

- ***Stefan Reinhart:*** "Die Durchsetzung im Inland belegener Absonderungsrechte bei ausländischen Insolvenzverfahren oder Qualifikation, Vorfrage und Substitution im internationalen Insolvenzrecht" – the English abstract reads as follows:

In a recent case the German Federal Court had to decide on cross-border insolvency issues that – at first hand – looked straight forward, which, however, are much more complicated at a second look. A secured creditor applied for enforcement measures in real property situated in Germany against a debtor

who had been declared bankrupt in England. The Federal Court held that the application had to be dismissed since on the basis of German enforcement law the enforceable title had not been reindorsed and readressed against the English trustee and had not been served upon the trustee prior to initiating execution proceedings.

Unfortunately, the Federal Court entirely missed to clarify why such rules of German enforcement law would govern the effect of the commencement of an insolvency proceeding abroad. Had the German court adressed the issue, it would have become evident that such issue is explicitly addressed by Art. 4 sub. 2 lit. f of the European Insolvency Regulation (EIR) which, however, declares the lex fori concursus applicable. On the other hand, the situation is comparable to the conflict rule in Art. 15 EIR which refers to the lex fori of the trial pending. The issue can only be solved by a new construction of the meaning of those two provisions. The author argues that the German legal requirement to transcribe the title and to serve the title on the foreign trustee does not fall under the scope of Art. 4 EIR, but concedes that such solution requires a new approach regarding the relation of Art. 15 and 4 EIR.

- ***Roland Abele***: "Ausländisches Arbeitsvertragsstatut und Wartezeit nach § 1 Abs. 1 KSchG" – the English abstract reads as follows:

A recent judgment by the German Federal Labour Court ("BAG") may be relevant to foreign employers who, after having contracted employees under home law, transfer them to Germany where they continue to perform services for their employer. In the case, heard by the BAG, the plaintiff, a Latvian citizen, who had an employment contract with a Latvian bank under Latvian law, moved to Germany to become director of one of the bank's subsidiaries located in Germany. Shortly afterwards, there was a change in the contract, this time under German law. Finally, the plaintiff was dismissed and he sued for unfair dismissal in Germany. The German statute granting protection against unfair dismissal ("KSchG") provides for a probationary period of six months ("Wartezeit", § 1 para. 1 KSchG). At the time the plaintiff was dismissed, he had not yet served six months under his (altered) contract as per German law. Nonetheless, the BAG sustained the suit, holding that the probationary period could be completed by two consecutive contracts with the same employer. The court also recognized that it is legally irrelevant if parts of the probationary

period have been completed under foreign law, provided that German law was applicable to the contract at the time when the employee received notice.

- ***Dominique Jakob/Matthias Uhl***: "Die liechtensteinische Familienstiftung im Blick ausländischer Rechtsprechung" – the English abstract reads as follows:

Several problems concerning Liechtenstein Foundations were repeatedly subject to judgments of Higher Regional Courts in Germany. These judgments were criticised in literature. Meanwhile also the Supreme Court of Austria (OGH) had to deal with a problem located at the crossroads of the principle of separation in foundation law and the legal concept of piercing the corporate veil. Similar to the jurisdiction in Germany the judgment of the OGH from 26.5.2010 seems to put the Liechtenstein Foundation under a general suspicion to present a vehicle for shifting capital in an abusive way. This allegation requires a critical analysis.

On 1.4.2009 a total revision of foundation law in Liechtenstein came into force. Its aim is to preserve the traditional features of the legal instrument while at the same time introducing modern control mechanisms. Indeed it is the Principality and its market participants who are primarily demanded to realise their wish for an improved reputation of the Liechtenstein Foundation. However, the (foreign) courts should accommodate the process by applying established dogmatic principles as well as by treating the Liechtenstein Foundation in line with other foreign legal entities.

- ***Arno Wohlgemuth***: "Anerkennung deutscher Scheidungsurteile in Russland" – the English abstract reads as follows:

Recognition of foreign divorce decrees in Russia is regulated by Chapter 45 (Art. 413–415) of the Russian Code of Civil Procedure, 2002, and Art. 160 of the Russian Family Code, 1995. In 2005 the Supreme Court of Russia dismissed the objections by the wife against a German divorce decree pronounced in 2001, when the Russian couple lived in Germany. Apart from default of the time-limit for filing objections, the Russian Supreme Court did not find any grounds for non-recognition enshrined in Art. 412 CCP. Neither international treaties signed by Russia nor formal procedures are prerequisites for recognition in

Russia. Predecessors to the rules on recognition of foreign judgements including those on personal status may be discovered in the Ukase of the Presidium of the Supreme Soviet of the USSR of 1988 on Recognition and Enforcement in the USSR of Foreign Court Decisions and of Foreign Arbitral Awards.

- ***Philipp Habegger/Anna Masser***: "Die revidierte Schweizerische Schiedsgerichtsordnung (Swiss Rules)" – the English abstract reads as follows:

The revised version of the Swiss Rules of International Arbitration (Swiss Rules) entered into force on 1 June 2012. This article addresses the main changes and innovations. After taking into consideration various provisions which aim at further enhancing the efficiency of arbitral proceedings, special emphasis is put on the revised provision on consolidation and joinder and on the new emergency relief proceedings allowing for interim relief prior to the constitution of an arbitral tribunal. The authors conclude that the revision brings to be welcomed amendments that will lead to even more time and cost efficient proceedings.

- ***Carl Friedrich Nordmeier***: "Cape Verde: New Rules on International Civil Procedure" (in English)

Since 1.1.2011, a new Code of Civil Procedure is in force in Cape Verde. It is similar to the Portuguese codification of civil procedure law and contains rules on international civil procedure. The present article analyses these new rules on international jurisdiction, on procedures with connection to a foreign country and on recognition and enforcement of foreign judgments. Under the new regime, reciprocity is granted in accordance with § 328 (1) 5 of the German Code of Civil Procedure.

- ***Erik Jayme/Carl Zimmer*** on the conference in Potsdam on cultural relativism: "Kulturelle Relativität – Völkerrecht und Internationales Privatrecht" – Tagung in Potsdam

Third issue of 2012's Journal du Droit International

The third issue of French *Journal du droit international* (*Clunet*) for 2012 was just released. It contains two articles addressing issues of private international law and several casenotes. A full table of content is (or will soon be) accessible here.

The first article is the second part of the survey of the French law on arbitration *(« Liberté, Égalité, Efficacité » : La devise du nouveau droit français de l'arbitrage – Commentaire article par article*) offered by Thomas Clay (Versailles Saint Quentin University). The first part was published in the previous issue of the *Journal*. The English abstract reads:

> *It was the long-awaited reform. The arbitration regulation has just been amended and modernized, more than thirty years after the previous regime came into force. This has been achieved by different means : by rewriting certain unclear or outdated sections, by implementing case law-developed solutions already being applied in arbitral proceedings and, finally, by promoting new (sometimes avantgardist) solutions. All the above has resulted in the enactement of a real new Arbitration act.*
>
> *Therefore, an article-by-article review seems to be a suitable form for an accurate and comprehensive study. This study consists of a comparison between the replaced articles and the new ones, a an analysis of the first commentaries on the reform and an interpretation of the case law following the enactment of the new regulation.*
>
> *The proposed analysis also evidences the main principles governing the new French law of arbitration. Surprisingly they are in fact rooted in the foundations, not only of private law, but also on the principles of our Republic since they apply (almost perfectly), our Republican maxim, except that brotherhood is substituted by efficiency (the later being more representative).*

In conclusion, it is without any doubt a successful text and the long wait was worth it. However it is useful to explain the circumstances of its endless development, which has experienced many disruptions. The article below starts by describing such circumstances.

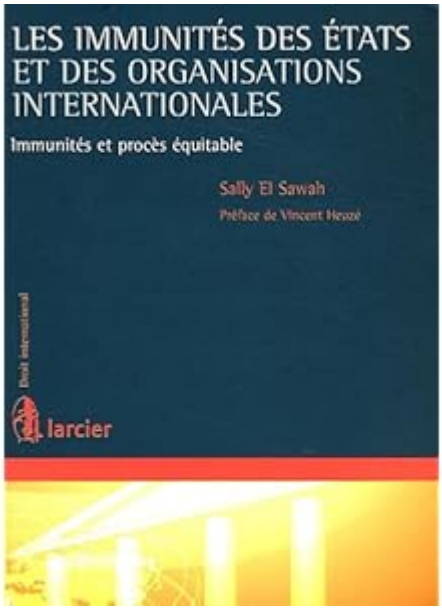
In the second article, David Sindres, who lectures at Paris I Pantheon Sorbonne University, wonders whether the public policy exception triggered by the proximity of the dispute with the forum is in decline (*Vers la disparition de l'ordre public de proximité ?*).

Is international public policy based upon proximity disappearing from the French legal landscape ? One may have this feeling in the wake of two recent evolutions of positive law. The first one stems from the adoption of the « Rome III » regulation on the law applicable to divorce and legal separation, whose article 10 condemns, without any requirement of proximity, laws which do not grant one of the spouses equal access to divorce or legal separation on grounds of their sex. The second one results from a decision rendered by the French Cour de cassation on October 26, 2011, which opposed international public policy to Ivorian Law insofar as it deprived a child from the right to establish his filiation with his alleged father : once again, the exclusion of foreign law based upon international public policy was not justified by the links between the situation and the French legal order. These two solutions take the opposite view of previous decisions by the Cour de cassation, which had subordinated the intervention of international public policy to the links between the situation and the French legal order in cases purporting to unilateral repudiations and the establishment of filiation.

This decline of international public policy based upon proximity echoes the criticism that this mechanism has drawn from several authors. At the stage of the creation of the situation within the forum, it presents the risk of weakening international public policy. As for the refusal to recognize situations which were created abroad, based upon their links with the French legal order, it proves discriminatory. Under these circumstances a better solution would be to return to the classical distinction between full and attenuated international public policy, which achieves a satisfactory compromise between two objectives of private international law : the protection of the fundamental values of the forum and the respect granted to vested rights.

El Sawah on Immunities and the Right to a Fair Trial

Sally El Sawah, who practices at the French arbitration boutique Leboulanger, has published a monograph in French on Immunities of States and International Organizations (*Les immunités des Etats et des organisations internationales – Immunités et procès équitable*).



The book, which is more than 800 page long, is based on the doctoral dissertation of Ms El Sawah. The main project of the author is to confront the law of sovereign immunities with human rights, and more specifically the Right to a Fair Trial.

The most provocative idea of Ms El Sawah is that the existence of rules of customary international law on sovereign immunities is a myth, and that the wide divergences of the national laws on the topic clearly show that there is no superior rule binding on national states.

After arguing that customary international law is essentially silent on the matter, the author makes her central claim. States should be considered as being essentially constrained by fundamentals rights when unilaterally adopting rules on sovereign immunities. As a consequence, and contrary to the case law of the European Court of Human Rights, the laws of sovereign immunities should not be considered immune from an assessment from a human rights perspective.

Ms El Sawah concludes that the French law of sovereign immunities should be significantly amended, in particular insofar as it distinguishes between immunity

to be sued in court and immunity from measures of constraint (enforcement).

More details can be found on the publisher's website.

The French abstract is available after the jump.

> *Le débat sur le conflit entre les immunités et le droit au procès équitable a pris toute son ampleur après les décisions décevantes de la CEDH, jugeant que les immunités constituent une limitation légitime et proportionnée au droit d'accès au juge. Or, il résulte de l'étude des fondements, sources et régimes des immunités et du droit au procès équitable que leur conflit dépasse leur antinomie étymologique : les immunités portent atteinte au droit d'accès au juge dans sa substance même.*
>
> *L'imprécision et l'incohérence du régime des immunités étatiques aussi bien que l'absence de voie de recours alternative aux immunités des organisations internationales portent atteinte au droit d'accès concret et effectif au tribunal. Néanmoins, le conflit entre les immunités étatiques et le droit au procès équitable est moins problématique que le conflit entre ce dernier et les immunités des organisations internationales. Contrairement aux immunités étatiques qui n'ont qu'une source nationale, il existe un véritable conflit de normes de valeur égale entre le droit au procès équitable, droit fondamental en droit interne et international, et les immunités des organisations internationales, régies par des conventions internationales. La résolution du conflit entre le droit des immunités et le droit au procès équitable, qui ne mérite pas de se réaliser par le sacrifice de l'un au profit de l'autre et inversement, requiert l'intervention du législateur, compte tenu de la fonction politique des immunités et des principes de l'état de droit.*
>
> *Une conciliation qui prend en compte les intérêts légitimes poursuivis par les droits en conflit est possible. Le droit au procès équitable ne doit plus constituer un motif d'exclusion des immunités. Il doit désormais servir à définir le régime des immunités des états et des organisations internationales. Si un déni de justice subsiste, le justiciable ne sera pas pour autant désarmé. Son droit de recours au juge sera préservé ; il pourra agir contre l'état du for pour rupture de l'égalité devant les charges publiques.*