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 This has been achieved by different means : by rewriting certain unclear or outdated sections, by implementing case law-developed solutions already being applied in arbitral proceedings and, finally, by promoting new (sometimes avantgardist)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.*
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> *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.*
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> *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).*
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> *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.

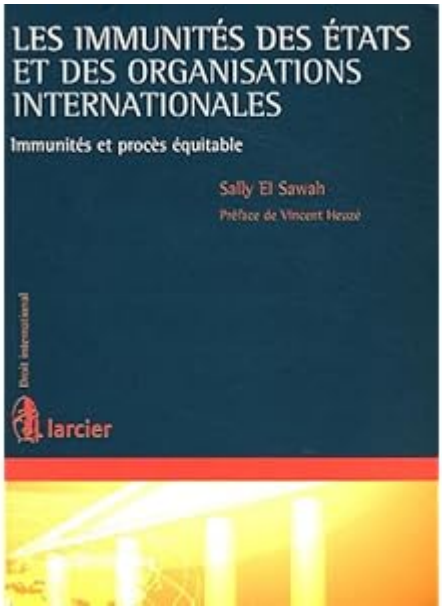
In the second article, David Sindres, who lectures at Paris I Pantheon Sorbonne University, wonders whether the public policy exception triggered by the proximity of the dispute with the forum is in decline (*Vers la disparition de l'ordre public de proximité ?*).

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.*
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> *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.*
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> *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.*

Max Planck Post-Doc Conference on European Private Law

It has not yet been mentioned on this blog that the Max Planck Institute for Comparative and International Private Law in Hamburg has recently issued a call for applications for another Post-Doc Conference on European Private Law (including Private International Law) to be held on 22 and 23 April 2013. In contrast to the last Post-Doc Conference that took place in May 2012 the call is only addressed to Post-Docs from Germany, Austria and Switzerland. The conference language will be German. More information is available on the Institute's website.

International Maritime Law Essay Competition

The Editorial Board for *ELSA Malta Law Review*, under the Patronage of Prof. David Attard, and in collaboration with the University of Malta's Research, Innovation and Development Trust, are launching this first edition of the IMLI Essay Competition.

The prize of 600 Euros will be awarded to the best essay submitted on any aspect of law covered by the syllabus of the LL.M. Programme offered by the International Maritime Law Institute. First runner-up essay will be awarded a book prize.

Both prizes are being generously offered by Profs. Attard through the University of Malta's Research, Innovation, and Development Trust.

Any member of the European Law Students Association, in any of its regional and national networks, is eligible to participate in this competition, subject to any further restrictions set under the Competition Rules.

Essays must be between 5,000 and 6,000 words long (excluding footnotes) and in the English language. Deadline for entry submissions is 1 October 2012.

More information is available here.

C- 619/10: Art. 34 (1) and (2) Brussels I Regulation

One of the first cases to be addressed by the ECJ after the holiday will be the so-called *Trade Agency*, concerning grounds for refusing recognition and the power of the enforcing court to determine whether the application initiating proceedings had been served on the defendant in default, when service is accompanied by a certificate as provided for by Article 54 of the regulation. Quoting AG Kokott, this are the items to be solved:

> "Article 34(2) permits the withholding of recognition or enforcement of a default judgment that has been pronounced against a defendant who was not served with the document which instituted the proceedings in sufficient time and in such a way as to enable him to arrange for his defence. Article 54 of the regulation provides for the issue by the State in which judgment was given ('State of origin') of a certificate showing the various underlying procedural data. This certificate has to be submitted together with the application for enforcement of a judgment. The information to be stated there also includes the date of service of the claim form. In light of this, the question in this case concerns the extent to which the court in the State where enforcement is sought should examine service of the claim form: Is it still entitled, despite the date of service being stated in the certificate, to examine whether the document instituting the proceedings was served or does the certificate have binding legal effect in this respect?

> The ground for withholding recognition under Article 34(2) does not apply if the defendant failed to commence proceedings in the State of origin to challenge the default judgment when it was possible for him to do so. This case provides the Court with an opportunity of further clarifying its case-law on the question of when it is incumbent upon the defendant to lodge an appeal in the State of origin. It is necessary to make clear whether the defendant is obliged to do so even if the decision pronounced against it was served on it for the first time in exequatur proceedings.
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> Finally, the dispute in this case also relates to the public-policy clause in Article 34(1) of Regulation No 44/2001. The referring court would like to know in this connection whether it is compatible with the defendant's right to fair legal process embodied in Article 47 of the Charter of Fundamental Rights of the European Union for the court of the State of origin to neither examine the substance of a claim before pronouncing judgment in default nor to give further reasons for the default judgment."

Judgment is expected next Thursday.

ECJ Rules on Separate Proceedings and Interim Relief

The European Court of Justice (Third Chamber) delivered its judgment in *Solvay v. Honeywell* on July 12 (Case C 616/10).

The facts of the case were the following:

> *12 On 6 March 2009, Solvay, the proprietor of European patent EP 0 858 440, brought an action in the Rechtbank 's-Gravenhage for infringement of the national parts of that patent, as in force in Denmark, Ireland, Greece, Luxembourg, Austria, Portugal, Finland, Sweden, Liechtenstein and Switzerland, against the Honeywell companies for marketing a product HFC-245 fa, manufactured by Honeywell International Inc. and identical to the*

product covered by that patent.

13 Specifically, Solvay accuses Honeywell Flourine Products Europe BV and Honeywell Europe NV of performing the reserved actions in the whole of Europe and Honeywell Belgium NV of performing the reserved actions in Northern and Central Europe.

14 In the course of its action for infringement, on 9 December 2009 Solvay also lodged an interim claim against the Honeywell companies, seeking provisional relief in the form of a cross-border prohibition against infringement until a decision had been made in the main proceedings.

15 In the interim proceedings, the Honeywell companies raised the defence of invalidity of the national parts of the patent concerned without, however, having brought or even declared their intention of bringing proceedings for the annulment of the national parts of that patent, and without contesting the competence of the Dutch court to hear both the main proceedings and the interim proceedings.

The national court wondered, inter alia, whether this was a case where there was a risk of irreconcilable judgments in the meaning of Article 6 of the Regulation, and whether

Article 22(4) of [Regulation No 44/2001] [is] applicable in proceedings seeking provisional relief on the basis of a foreign patent (such as a provisional cross-border prohibition against infringement), if the defendant argues by way of defence that the patent invoked is invalid, taking into account that the court in that case does not make a final decision on the validity of the patent invoked but makes an assessment as to how the court having jurisdiction under Article 22(4) of [that] Regulation would rule in that regard, and that the application for interim relief in the form of a prohibition against infringement shall be refused if, in the opinion of the court, a reasonable, non-negligible possibility exists that the patent invoked would be declared invalid by the competent court?

The Court answered:

1. Article 6(1) 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 situation where two or more companies established in different Member States, in proceedings pending before a court of one of those Member States, are each separately accused of committing an infringement of the same national part of a European patent which is in force in yet another Member State by virtue of their performance of reserved actions with regard to the same product, is capable of leading to 'irreconcilable judgments' resulting from separate proceedings as referred to in that provision. It is for the referring court to assess whether such a risk exists, taking into account all the relevant information in the file.

2. Article 22(4) of Regulation No 44/2001 must be interpreted as not precluding, in circumstances such as those at issue in the main proceedings, the application of Article 31 of that regulation.

Belgian Book on International and European Procedural Law

A new book has been published dealing with European procedural law. Entitled '*Droit judiciaire européen et international*', it offers a compilation of the most important case law dealing with the European Regulations in the field.

This book provides an overview of the case law dealing with the European Regulations in the field of civil procedure. For each provision of the annotated Regulations, a summary is given of the case law of the ECJ. Reference is also made to the relevant case law of the various Member States, with a focus on the decisions of the highest courts. A summary of the main findings of each case is presented, together with critical comments and reference to literature.

This is a useful companion to other in-depth commentaries of the Regulations. The book, which has been written in French by a team of ten authors, will be updated every three years. It has been edited by Professor van Drooghenbroeck and is published in a series devoted to the practice of civil procedure in Belgium.

Interested readers will find an extract on the publisher's website.

Commentary on the Common European Sales Law

The first commentary on the (Proposal for a) Common European Sales has just been released. Edited by Reiner Schulze from the University of Munster it provides an article by article-analysis of the envisioned optional instrument. More information is available on the publisher's website. The official announcement reads as follows.

> *The landscape of European Contract Law is rapidly taking shape. In October 2011, the European Commission proposed a Common European Sales Law (CESL) to facilitate cross-border transactions between businesses and between businesses and consumers. It contains a complete sales law and provisions for the supply of digital content and purchase of related services.*
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> *The Commentary analyses all 202 articles of the CESL, explains their function and doctrinal context and indicates the possible problems of their application. In doing so it offers a critical contribution to the legislative procedure and prepares practising lawyers, legal scholars and students for the use of the new European case law. Each article is dealt with in the same structure:*
>
> - *Function and underlying principles*
> - *Systematical context*
> - *Analysis and interpretation, including references to potential problems in practice*
> - *Criticism and possible improvements*
> - *The authors are renowned jurists from numerous European countries and with great experience in European and international contract law*

Zaremby on the Restatements (First and Second) of Conflict of Laws

Justin Zaremby has posted “Restating the Restatement of Conflicts: Approaching the Legitimacy Question in Choice-of-Law Theory” on SSRN. The paper can be downloaded here. The abstract reads as follows:

> *Since the so-called conflicts revolution, choice-of-law theory continues to reject the vested rights approach of the First Restatement of Conflicts without fully criticizing the failures of the governmental interest theory in the Second Restatement of Conflicts. At the same time, neither approach adequately examines the question of what constitutes a legitimate resolution to a conflict between states. This Article suggests that the choice between the rights language of the First Restatement and the governmental interest language of the Second Restatement is actually a debate between legal formalism and legal realism. Both choices lead to a legitimacy deficit for theorists and judges who attempt to resolve conflicts. This Article applies liberal and republican political theory to the debate between vested rights and governmental interest, suggesting an approach to resolving conflicts that is grounded in the legitimate exercise of judicial discretion.*

Harvey and Schilling on the

(Consequences of an Ineffective) Choice of the CESL

Caroline Harvey, University of Oxford, and Michael Schilling, King's College London, have published a paper dealing with the (consequences of an ineffective) choice of the Common European Sales Law (CESL). The paper can be downloaded here. The abstract reads as follows:

In order to opt in to the proposed Common European Sales Law, the parties must utilise the mechanism set out in the Regulation, in accordance with which they 'agree to use the CESL' and thus subject their contract to the CESL. This article examines an issue that has so far received little attention: the question of how the agreement to use CESL and the contract under CESL interact. Given the formal requirements that the agreement to use CESL is subject to, the agreement to use the CESL may easily suffer from a defect. The parties may then purport to conclude a contract governed by the CESL, but without a fully effective agreement that the CESL applies to it. In such circumstances the question arises whether that contract may still be effective under the CESL or under national law, in particular where the parties have performed their (perceived) obligations.