Belgian Empirical Study on Cross Border Family Law

A book version of a PhD recently defended at the University of Ghent (Belgium) has just been published. The author, Ms Jinske Verhellen, has endeavored to examine how well the Code of Private International law, adopted in Belgium in 2004, has fared in practice. More precisely, the research sought to find out whether the objectives set out by the Belgian legislator when codifying its private international law, have been met in practice. The PhD research was supervised by Johan Erauw and Marie-Claire Foblets.

Although the PhD focuses on the practice in Belgium of cross-border family law, with scant attention to comparative law, the research carried out by Ms Verhellen is remarkable because she applied an empirical methodology : far from relying on the works of learned authors and scholars, Ms Verhellen has attempted to study the actual practice of cross-border family law in Belgium. In order to do so, she has relied mainly on a very impressive database of the KMI, a first and second line helpdesk providing advice to lawyers, courts, social workers and city authorities in the field of cross-border family law. This database bundles more than 3.000 files, going from very simple questions put to the helpdesk to more elaborate advice given by the lawyers working at the KMI. Ms Verhellen has also conducted semi-structured interviews with people in the field – mainly judges with a proven track record in cross-border family cases. Finally, she had access to a wealth of cases, many of which unpublished, which allowed her to get a very good grasp of how the rules are applied by courts and administrations alike.

The results of this research are very interesting. Ms Verhellen whose previous publications also touched upon cross-border family law, shows for example how little use has been made of the possibility offered by the Code to spouses who may select the applicable law in case of divorce. This does not bode well for the party autonomy under Rome III. Another finding is that courts and practitioners have been struggling with name issues in mixed families. Although the Garcia Avello ruling should have made it easier for dual nationals to obtain the same name in the two countries they are nationals of, the research shows that children born in

Belgium out of parents with different nationalities, are still frequently treated as if they were only Belgian nationals. This may explain why the Commission recently instituted infringement proceedings against Belgium.

Building upon these findings and many other, the book concludes with an impressive list of policy recommendations. Although its focus is rather narrow, as it almost exclusively deals with conflict of laws rules adopted by the Belgian legislator, this PhD could nonetheless be inspiring as it allows the reader to sense the added value of an empirical methodology for private international law research.

Second edition of Einhorn's PIL in Israel

A few weeks ago the second edition of Talia Einhorn's Private International Law in Israel was published by Wolters Kluwer Law & Business (www.kluwerlaw.com; ISBN 9789041145888). The second edition is a wholly updated and expanded version of the first, which appeared in 2009. While the first edition comprised of 393 pages, the second edition runs to 552, as to make provision for additional topics and for the many changes in Israeli private international law since 2009. The author provides the reader with a restatement of positive conflicts law in Israel, of which the most sources are only available in Hebrew, be it case law or legislation. She not only "untangles the web of Israeli sources of law affecting foreign legal relationships" (publisher's website), but also provides guidance on the further development of the law on the basis of comparative research.

New Article on Monism and Dualism in International Commercial Arbitration

If you are in need of some holiday reading, Professor Stacie I. Strong has an interesting new piece out entitled "Monism and Dualism in International Commercial Arbitration: Overcoming Barrier to Consistent Application of Principles of Public International Law." Here is the abstract:

"Although monism and dualism are central tenets of public international law, these two principles are seldom, if ever, considered in the context of international commercial arbitration. This oversight is likely due to the longstanding assumption that international commercial arbitration belongs primarily, if not exclusively, to the realm of private international law. However, international commercial arbitration relies heavily on the effective and consistent application of the New York Convention and other international treaties, and must therefore be considered as a type of public international law.

This chapter considers the principles of monism and dualism in international commercial arbitration and identifies a number of ways in which international commercial arbitration can overcome some of the practical and theoretical problems associated with improper or ineffective incorporation of international law into the domestic realm. In so doing, this chapter provides some useful insights not only regarding the operation of the international arbitral regime but also regarding other areas of public international law."

Happy Holidays and Happy New Year to all our readers!

A Framework for European Private International Law

Under the leadership of our co-editor Xandra Kramer a group of European experts (consisting of Michiel de Rooij, Vesna Lasic, Lisette Frohn, Richard Blauwhoff, all from the Netherlands; Paul Beaumont, United Kingdom; Agnieszka Frackowiak-Adamska, Poland; Franciso Garcimartin, Spain; Jan von Hein, Germany; Miklos Kiraly, Hungary; Ulla Liukkunen, Finland) has carried out a study for the European Parliament on "A framework for European private international law: current gaps and future perspectives".

The full study can be downloaded here. The abstract reads as follows:

> *This report identifies the gaps that exist in the current European framework of private international law and suggests a road map towards a more comprehensive codification of EU private international law. For the time being, legislative efforts should be directed at creating separate instruments for well-defined problems of private international law. The fruits of these efforts could in the long-term be combined in a code of EU private international law.*

A short briefing note, authored by Xandra Kramer, is available here.

Issue 2012.3 Nederlands Internationaal Privaatrecht

The third issue of 2012 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* includes three interesting articles based upon contributions to commemorate the 100th anniversary of T.M.C. Asser's receipt of the Nobel Peace Prize, as well as articles on Brussels I and internet; conflict of laws, the acquired rights directives and transfer of seagoing vessels;

the Kiobel v Shell case.

Hans van Loon, The Hague Conference on Private International Law: Asser's vision and an evolving mission, p. 358-361. The abstract reads:

Tobias Asser, a preeminent Dutch legal scholar comparable to the ranks of Hugo Grotius, received his Nobel Peace Prize 1911 for his ground laying work on the unification of private international law. He foresaw that in a world consisting of a variety of legal systems, international law would acquire a critically important new role: that of ordering the diversity of civil and commercial laws, not by making them all uniform, but by providing uniform rules on the conflicts of laws. Asser's vision, the international forum he envisaged, his methodology and his programme of work continue to flourish through the Hague Conference on Private International Law, an entity for which Asser laid the groundwork and which continues to provide inspiration more than 100 years after Asser received the Nobel Peace Prize for his work.

Aukje A.H. van Hoek, Managing legal diversity – new challenges for private international law, p. 362-370. The abstract reads:

In this contribution the author describes how the structural presence of private international law cases in modern society poses new challenges to private international law as a legal discipline. The literature on legal pluralism and multilevel governance is used both to provide a better understanding of the challenges and to point to possible lines of investigation. The key issues are: the difficulty of integrating non-national standard-setting in the choice of law model, the changing content of legitimate expectations and their effect on the choice of law, the need for a systemic adaptation of national legal systems to the growing presence of foreign elements within the legal order and the role of transnational legal infrastructure in the management of legal diversity.

Alex Mills, Rediscovering the public dimension of private international law, p. 371-373. The abstract reads:

This article, which considers aspects of T.M.C. Asser's legacy in private international law, was presented as part of the Commemorative Conference celebrating the 100th anniversary of his receipt of the Nobel Peace Prize, held on 9th December 2011 at the Peace Palace in The Hague, the Netherlands. The article begins by discussing the history of private international law, presenting

and contextualising Asser's public international perspective, highlighted by his foundational role in the Hague Conferences on Private International Law. It then turns to analyse the subsequent fragmentation of private international law into discrete national approaches, which have often emphasised private rights. The article then discusses recent changes in private international law in the European Union, Canada and Australia, and characterises them as a revival of a more public perspective, which presents fresh challenges for private international law. It argues that these modern developments should be understood and welcomed as at least a partial rediscovery of the 'public' dimension of private international law, and thus as signposts of a return to Asser's globalist vision.

K.C. Henckel, Conflict of laws and the Acquired Rights Directive: the cross-border transfer of seagoing vessels, p. 376-389. The abstract reads:

The exclusion of the maritime sector from six European social directives is currently under review. Among these is the Acquired Rights Directive, a directive which aims to protect employees upon a transfer of undertaking. With a primary focus on the conflict of laws, this article aims to discuss the impact of a possible repeal of a provision which excludes seagoing vessels from the Acquired Rights Directive. It is examined whether this repeal warrants a revision of the conflict of laws rules currently being employed for transfer of undertakings. The application of 'the place from which the vessel is operated and controlled' is advocated as a connecting factor for the transfer of seagoing vessels. In addition, the effects of the repeal on maritime practice are addressed.

Jan-Jaap Kuipers, Het internet en de Brussel I Verordening: een kwestie van Luxemburgse wispelturigheid?, p. 390-395. The English abstract reads:

In three different preliminary references the European Court of Justice (ECJ) was recently given the opportunity to shed more light on the interpretation of the Brussels I Regulation in the light of the emergence of the internet. The ECJ held first in Pammer & Hotel Alpenhof that Article 15 should be interpreted in a similar manner, regardless of whether a consumer contract was concluded online. In eDate Advertising & Martinez the ECJ departed from this principle of technical neutrality, however. Article 5(3) should be interpreted differently if the alleged infringement of a personality right occurred via an internet site. Six months later, in Wintersteiger, a case relating to the infringement of a trademark, the ECJ adhered to a technologically-neutral interpretation of Article 5(3). The present

contribution aims to analyse to what extent the three decisions can be reconciled.

Fourth Issue of 2012's Flemish PIL E-Journal

The fourth issue of the Belgian e-journal on private international law *Tijdschrift@ipr.be / Revue@dipr.be* for 2012 was just released.

The journal is meant to be bilingual (French/Dutch), but this issue is exclusively in Dutch, except for one article in English.

The issue includes two articles. The first seems to be presenting Belgian new statute on nationality. The second presents the new rules of arbitration of Belgian arbitral center CEPANI.

- Jinske Verhellen – Nieuwe nationaliteitswet wijzigt het Wetboek IPR
- Herman Verbist – New CEPANI rules of Arbitration in force as from 1 january 2013

In Memoriam Russell J. Weintraub

Here.

Little on Internet Defamation in the US Conflict of Laws

Laura E. Little, who is a professor of law at Temple University, has posted Internet Defamation, Freedom of Expression, and the Lessons of Private International Law for the United States on SSRN.

This article reviews current developments in U.S. conflict of laws doctrine pertaining to transnational internet defamation cases, including personal jurisdiction, choice of law, and recognition of judgments. To resolve personal jurisdiction and choice of law issues in internet defamation cases, U.S. courts have adapted rules from the non-internet context with relative ease. Reported cases tend to concern domestic internet disputes between U.S. entities, with few plaintiffs attracted to U.S. courts for the purpose of litigating cross-border defamation claims. Although the U.S. serves as a magnet jurisdiction for many types of litigation, two liability-defeating laws render the country inhospitable to defamation claims: (1) the U.S. Constitution's First Amendment speech protections and (2) a statute affording immunity to internet "providers or users" for information "provided by another content provider." Perhaps because of these provisions litigants are largely inspired to go elsewhere. The resulting libel tourism has prompted important U.S. developments pertaining to enforcement and recognition of foreign defamation judgments. Thus, for conflict of laws matters pertaining to internet defamation, it is judgments law that reflects the greatest activity and most profound change.

After reviewing personal jurisdiction and choice of law trends, this article describes legal developments pertaining to internet defamation judgments. The article critiques lawmakers' adherence to First Amendment exceptionalism in regulating internet defamation judgments and identifies flaws reflected in state libel tourism statutes and the federal libel tourism statute, the SPEECH act of 2010.

The paper is forthcoming in the *Yearbook of Private International Law* (vol. 14).

ITLOS Orders Release of Argentine Ship

On December 15, 2012, one phase of the dispute between the Argentine Republic and the Republic of Ghana over the "seizure" of the Argentine frigate *ARA Libertad* while in a Ghanaian port came to an end, when the International Tribunal for the Law of the Sea (ITLOS) in Hamburg, Germany ordered Ghana to "forthwith and unconditionally release the frigate *ARA Libertad*" and to "ensure that the frigate *ARA Libertad*, its Commander and crew are able to leave the port of Tema and the maritime areas under the jurisdiction of Ghana, and … that the frigate *ARA Libertad* is resupplied to that end." (See Order of 15 December 2012).

See the posts of

- Craig H. Allen at *Opiniojuris*
- Ted Folkman at *Lettersblogatory*
- Michael Waibel at *EJIL:Talk*!

ERA-Conference on Cross-Border Insolvency Proceedings

On 18 and 19 March 2013 the Academy of European Law (ERA) will host a conference on Cross-border insolvency proceedings. The conference will shed light on the Commission's recent Proposal for a reform of the Insolvency Regulation of 12 December 2013 (see our post).

The programme reads as follows:

Monday, 18 March 2013

- 08:30 **Arrival and registration**
- 09:00 **Welcome and introduction**, *Angelika Fuchs* and *Daniel Staehelin*

Moderator: *Stefania Bariatti*

- 09:15 **The Commission's proposal for a revision of the Insolvency Regulation**, *Katja Lenzing*
- 10:00 **Discussion**

- 10:15 **Scope of the Regulation and definition of "insolvency",** *Jean-Luc Vallens*
- 11.00 **Discussion**
- 11:15 **Coffee break**

- 11:45 **Concept of COMI: case law and revision**, *Robert van Galen*
- 12:30 **Discussion**
- 13:00 **Lunch**

Moderator: *Burkhard Hess*

- 14:00 **Best practices for cross-border court-to-court communication**, *Bob Wessels*
- 14:30 **Round table: Coordination and communication between liquidators, between liquidators and courts, and court-to-court communication:** *Robert van Galen, Jennifer Marshall, Elise Latify, Jean-Luc Vallens, Bob Wessels*
- 15:45 **Coffee break**

- 16:15 **Recognition of foreign judgments and pre-insolvency proceedings**, *Reinhard Dammann*
- 16:45 **Discussion**

- 17:00 **Applicable law and the impact of insolvency on cross-border security and rights in rem**, *Jennifer Marshall*
- 17:30 **Discussion**
- 17:45 **End of the first conference day**
- 19:00 **Evening programme and dinner**

Tuesday, 19 March 2013

Moderator: *Paul Omar*

- 09:15 **Recent CJEU case law on related actions and the interplay with the Brussels I Regulation**, *Burkhard Hess*
- 09:45 **Discussion**
- 10:00 **Relationship between main and territorial proceedings in the light of Bank Handlowy**, *Gabriel Moss*
- 10:30 **Discussion**
- 10:45 **Coffee break**
- 11:15 **The EU Insolvency Regulation and the relationship to third countries**, *Michael Veder*
- 11:45 **Discussion**
- 12:00 **Round table: Insolvency within multinational enterprise groups,** *Reinhard Dammann, Gabriel Moss, Michael Veder*
- 13:00 **Concluding remarks and open issues**, *Stefania Bariatti*
- 13:15 **Lunch and end of the conference**

More information is available on ERA's website.