A Principled Approach to Choice of Law in Contract?

On 16 November, a Special Commission of the Hague Conference on Private International Law approved the text of the Hague Principles on the Choice of Law in International Contracts.

The Principles, an amended version of the draft text produced by the Conference's working group, are intended to be used (among other functions) as a model for national, regional, supranational or international instruments. They deal with the effectiveness and effect of a choice of law in cross-border trade/business contracts, but not consumer or employment contracts (Art. 1). They allow not only a choice of national law (Art. 2) but also (albeit subject to conditions that are riddled with uncertainty, obfuscation and self-serving terminology) a choice of non-national rules of law (Art. 3).

The remaining Principles address other aspects of the choice of law (express and tacit choice, formal validity, law to be applied in determining choice, severability, renvoi, scope of chosen law, assignment, mandatory provisions and public policy).

The text of the Principles (which will, in due course, be accompanied by a Commentary) is as follows:

> *The Preamble*
>
> *1. This instrument sets forth general principles concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions.*
>
> *2. They may be used as a model for national, regional, supranational or international instruments.*
>
> *3. They may be used to interpret, supplement and develop rules of private international law.*
>
> *4. They may be applied by courts and by arbitral tribunals.*
>
> *Article 1 – Scope of the Principles*

1. These Principles apply to choice of law in international contracts where each party is acting in the exercise of its trade or profession. They do not apply to consumer or employment contracts.

2. For the purposes of these Principles, a contract is international unless the parties have their establishments in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State.

3. These Principles do not address the law governing – a) the capacity of natural persons; b) arbitration agreements and agreements on choice of court; c) companies or other collective bodies and trusts; d) insolvency; e) the proprietary effects of contracts; f) the issue of whether an agent is able to bind a principal to a third party.

Article 2 – Freedom of choice

1. A contract is governed by the law chosen by the parties.

2. The parties may choose (i) the law applicable to the whole contract or to only part of it and (ii) different laws for different parts of the contract.

3. The choice may be made or modified at any time. A choice or modification made after the contract has been concluded shall not prejudice its formal validity or the rights of third parties.

4. No connection is required between the law chosen and the parties or their transaction.

Article 3 – Rules of law

In these Principles, a reference to law includes rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.

Article 4 – Express and tacit choice

A choice of law, or any modification of a choice of law, must be made expressly or appear clearly from the provisions of the contract or the circumstances. An agreement between the parties to confer jurisdiction on a court or an arbitral

tribunal to determine disputes under the contract is not in itself equivalent to a choice of law. Article 5 – Formal validity of the choice of law

A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties.

Article 6 – Agreement on the choice of law

1. Subject to paragraph 2, a) whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to; b) if the parties have used standard terms designating different laws and under both of these laws the same standard terms prevail, the law designated in those terms applies; if under these laws different standard terms prevail, or if no standard terms prevail, there is no choice of law.

2. The law of the State in which a party has its establishment determines whether that party has consented to the choice of law if, under the circumstances, it would not be reasonable to make that determination under the law specified in paragraph 1.

Article 7 – Severability

A choice of law cannot be contested solely on the ground that the contract to which it applies is not valid.

Article 8 – Exclusion of renvoi A choice of law does not refer to rules of private international law of the law chosen by the parties unless the parties expressly provide otherwise.

Article 9 – Scope of the chosen law

1. The law chosen by the parties shall govern all aspects of the contract between the parties, including but not limited to – a) interpretation; b) rights and obligations arising from the contract; c) performance and the consequences of non-performance, including the assessment of damages; d) the various ways of extinguishing obligations, and prescription and limitation periods; e) validity and the consequences of invalidity of the contract; f) burden of proof and legal presumptions; g) pre-contractual obligations.

2. Paragraph 1 e) does not preclude the application of any other governing law

supporting the formal validity of the contract.

Article 10 – Assignment In the case of contractual assignment of a creditor's rights against a debtor arising from a contract between the debtor and creditor – a) if the parties to the contract of assignment have chosen the law governing that contract, the law chosen governs the mutual rights and obligations of the creditor and the assignee arising from their contract; b) if the parties to the contract between the debtor and creditor have chosen the law governing that contract, the law chosen governs (i) whether the assignment can be invoked against the debtor, (ii) the rights of the assignee against the debtor, and (iii) whether the obligations of the debtor have been discharged.

Article 11 – Overriding mandatory rules and public policy (ordre public)

1. These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.

2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.

3. A court may only exclude application of a provision of the law chosen by the parties if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (ordre public) of the forum.

4. The law of the forum determines when a court may or must apply or take into account the public policy (ordre public) of a State the law of which would be applicable in the absence of a choice of law.

5. These Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (ordre public), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.

Article 12 – Establishment If a party has more than one establishment, the relevant establishment for the purpose of these Principles is the one which has the closest relationship to the contract at the time of its conclusion of the contract.

Regulation (EU) No 1259/2010 in Lithuania

The participation of Lithuania in enhanced cooperation in the area of the law applicable to divorce and legal separation has been confirmed by the Commission (see Decision of 21 November 2012, OJ L, 323, 22 .11.2012). The Regulation, which will enter into force in Lithuania as from tomorrow, shall apply from 22 May 2014.

European Parliament Votes to Recast the Brussels I Regulation

Yesterday (20 November 2012) the European Parliament voted, in plenary session, to adopt the report of the Legal Affairs (JURI) Committee (rapporteur: Tadeusz Zwiefka) on the Commission's Proposal (COM (2010) 748) to recast the Brussels I Regulation. A substantial majority (567-28, 6 absentions) expressed support for the Proposal, subject to the JURI Committee's amendments. As followers of the process will be aware, the result is a mixed one for the Commission. Although its primary objective of abolishing (procedural) *exequatur* is supported by the Parliament, other features of the Proposal (most notably, the recommendations to restrict the substantive grounds for opposing enforcement and to harmonise rules of jurisdiction for defendants not domiciled in a Member State) have been ejected.

The focus now moves to the Council, which is due to meet next month to consider its own position on the Proposal and on the amendments put forward by the European Parliament. The changes will not likely enter into force for another 24 months.

The wheels of European private international law keep turning.

Immunity of Warships: Argentina Initiates Proceedings against Ghana under UNCLOS

Matthew Happold is Professor of Public International Law at the University of Luxembourg and an associate tenant at 3 Hare Court, London.

Cross posted at EJILTalk!

Another chapter has begun in the saga of NML Capital Ltd's attempts to collect on its holdings of Argentinean bonds (see here for earlier reporting on this blog and here for earlier reporting on *EJILTalk!*) with the initiation of inter-State proceedings by Argentina against Ghana under the 1982 UN Convention of the Law of the Sea.

It will be recalled that on 2 October 2012, whilst on an official visit, the Argentinean naval training vessel the *ARA Libertad* was arrested in the Ghanaian port of Tema. Its arrest was ordered by Justice Richard Adjei Frimpong, sitting in the Commercial Division of the Accra High Court, on an application by NML to enforce a judgment against Argentina obtained in the US courts (see here for the decision of the US Court of Appeals for the 2nd Circuit). The judge considered that the waiver of immunity contained in the bond documents, which provided that:

> *To the extent the Republic [of Argentina] or any of its revenues, assets or properties shall be entitled … to any immunity from suit, … from attachment prior to judgment, … from execution of a judgment or from any other legal or judicial process or remedy, … the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment).*

extended to lift the vessel's immunity from execution. Argentina has strongly resisted this assertion of jurisdiction, claiming that it violates the immunity enjoyed by public vessels, which cannot be impliedly waived. It appears that the vessel remains under the control of a skeleton crew, who have prevented any efforts by the Ghanaian authorities to move the vessel, whilst being preventing themselves from leaving port.

Both States being parties to UNCLOs, on 29 October 2012 Argentina instituted arbitration proceedings against Ghana under Annex VII UNCLOS (Ghana not having made a declaration under Article 287 UNCLOS: see Article 287(3)). On 14 November 2012 Argentina applied to the International Tribunal for the Law of the Sea for the prescription of provisional measures prior to the constitution of the Annex VII tribunal (see ITLOS press release here).

The prescription of provisional measures by ITLOs is covered by Article 290(5), which provides that:

> *Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea … may prescribe … provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.*

However, even given the rather low hurdle to be vaulted, it is perhaps doubtful whether the first criterion ('that *prima* facie the tribunal which is to be constituted would have jurisdiction') can be satisfied. Article 287(1) UNCLOS

provides that such a tribunal 'shall have jurisdiction over any dispute concerning the interpretation or application of this Convention', and it is unclear whether the dispute falls within the provisions of UNCLOS. Argentina may well have the law on its side as regards State immunity for warships. It may be, however, that ITLOs and an UNCLOS Annex VII arbitral tribunal are not the right fora for the settlement of its dispute with Ghana.

It may well be, as argued by Argentina in its request for the indication of provisional measures (see here), that the *Libertad* is a warship for the purposes of Art 29 UNCLOs. However, Article 32 then states:

> *With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.*

Subsection A of Section 3 of Part II of UNCLOs deals with the rules applying to all ships concerning innocent passage in the territorial sea. Articles 30 and 31 respectively cover non-compliance with warships of the laws and regulations of a coastal State concerning passage through the territorial sea, and flag State responsibility for any loss or damage to a coastal State resulting from the non-compliance by warships with the laws and regulations of the coastal State concerning passage through the territorial sea. Put simply, therefore, the Convention states that it says nothing about the immunities of warships in the territorial sea (Article 32 falling within Part II of UNCLOs dealing with the legal regime of the territorial sea – despite the provision's blanket terms another provision does exist (Article 95) concerning the immunities of warships on the high seas), still less about the immunities of warships in internal waters (which no provision of UNCLOs covers), leaving the matter to be dealt with elsewhere.

In addition to relaying on Article 32, Argentina also refers to the right of innocent passage and freedom of navigation (Articles 18(1)(b), 87(1)(a) and 90). However, the Libertad was arrested whilst in port, within Ghanaian internal waters (Article 11 UNCLOS), so that it does not seem apt to see its seizure as impeding its right of innocent passage, still less its freedom of navigation. If so, any arrest pursuant to judicial proceedings would be a similar violation. It is also difficult to see the *Libertad's* official visit to Tema as an incident of innocent passage. Indeed, Argentina, in its request for provisional measures (paragraph 4), argues that the

visit was specifically governed by an agreement between the two States, which would seem unnecessary were the vessel simply exercising an already-existing right. Moreover, Article 28 UNCLOs provides that although a coastal State can only levy execution against or arrest a ship for the purpose of civil proceedings in respect of obligations or liabilities assumed or incurred by the ship herself in the course or for the purpose of her voyage through the waters of the coastal State, this limitation is without prejudice to the right of a coastal State:

> *in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters*

which strongly suggests that the limitation itself only applies to vessels exercising their right of innocent passage within the coast State's territorial sea, not those within its internal waters (as does the location of Article 28 within Part II of UNCLOS). It is not Ghana's assertion of a general jurisdiction to arrest ships within its ports and harbours that Argentina objects to, but its exercise of that jurisdiction with regard to a vessel which Argentina argues is immune from it. In reality, the dispute revolves around whether, as a matter of international law, Ghana should accord State immunity to the *ARA Libertad*. Argentina's request, by spending 18 out of its 22 paragraphs of legal grounds on the matter, makes this point clearly.

The other criterion for the prescription of provisional measures set out in Article 290(5) ('urgency') might be thought less problematic. The provisional measures sought by Argentina, however, are that Ghana 'unconditionally enables' the *Libertad* to leave Tema and Ghana's jurisdictional waters, and to be resupplied to that end (paragraph 72bis, Argentina's request for provisional measures). Provisional measures are intended 'to preserve the respective rights of the parties to the dispute … pending the final decision' (Article 290(1)). It cannot be said that the measures requested by Argentina do anything to preserve any rights Ghana might have. Indeed, it prescribed, they would seem essentially to settle the dispute. A case can be made for the release of the vessel, not least because NML has already made it clear that it would permit it on payment of US$20 million, but not, at this stage, unconditionally.

Interestingly, on 26 October 2012, just prior to commencing arbitration

proceedings against Ghana, Argentina withdrew, 'with immediate effect' its declaration under Article 298 UNCLOs exempting disputes falling within Article 298(1)(a), (b) and (c) from the compulsory procedures entailing binding decisions provided for in section 2 of Part XV of UNCLOS insofar as it concerned 'military activities by government vessels and aircraft engaged in noncommercial service'. Article 298(1)(b), which covers: 'Disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service …' This may have been *ex abundanti cautela*. Although the training of naval cadets could be seen as a military activity, a goodwill visit to Tema perhaps could not, still less the arrest, following a court order, of a vessel on such a visit.

As yet, Ghana's attitude to the proceedings has not been revealed. Argentina's request for provisional measures (paragraph 39) indicates that the Ghanaian Government did argue before Justice Frimpong that the *Libertad* was immune from the jurisdiction of the Ghanaian courts. However, acts of the Ghanaian courts are equally acts of the Ghanaian State and it is the court's opinions which have prevailed and which Argentina complains about. In general, it would seem that the Government is between a rock and a hard place. It cannot overrule its court's decisions without breaching domestic law. Indeed, it might even be, given NML's penchant for litigation, that any interference with the judicial process leading to the *Libertad's* release could give rise to a claim for denial of justice by NML under the UK-Ghana BIT.

Fourth issue of 2012's Journal du Droit International

The fourth 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 accessible here.

In the first article, Walid Ben Hamida, who lectures at Evry University, discusses

the application of the UNIDROIT Principles in arbitration proceedings involving states or international organizations (*Les principes d'UNIDROIT et l'arbitrage transnational : L'expansion des principes d'UNIDROIT aux arbitrages opposant des États ou des organisations internationales à des personnes privées*).

> *Originally destined to international commercial contracts, UNIDROIT principles are now experiencing a remarkable growth in transnational relationships. Due to their neutrality, universality and quality, they have been well received by the arbitrators and the parties in many arbitrations opposing private parties to States or international organizations. In this article, the author makes an inventory of the references to UNIDROIT principles in transnational arbitral jurisprudence and analyzes the reasons of their application. He analyses both traditional transnational arbitration based on classical arbitration clauses and unilateral transnational arbitration resulting from the acceptance by the private party of an offer of arbitration expressed by a State or by an international organization.*

In the second article, Olivier Dubos, who is a professor of public law at the University of Bordeaux, explores the issues raised by the different interpretations of Article 33 of the Montreal Convention adopted by French and American courts (*Juridictions américaines et juridictions françaises face à l'article 33 de la Convention de Montréal : un dialogue de sourds ?*).

> *Article 33 of the Montréal Convention « for the Unification of certain rules for International Carriage by air », gives the victims of an air transport accident an « option » to bring their action for damages before different fora that the aforementioned article designates. The French Supreme Court (Cour de cassation) recently considered that this freedom of option took on an imperative character and accordingly considers that the French jurisdictions are not available if the plaintiff first chose a jurisdiction of another State (the USA in the latter case). On the other hand, for some American jurisdictions, article 33 can be combined with the theory of « 'forum non conveniens » which allows them to refuse to adjudicate a claim grounded on the Montreal convention. However, such an interpretation of article 33 does not win unanimous support amongst American judges. The victims who, in accordance with article 33, have chosen to take their case before the American jurisdiction could find themselves in a deadlock…*

A New Title on Mediation: Civil and Commercial Mediation in Europe

Mediation is becoming an increasingly important tool for resolving civil and commercial disputes. Although it has been long since known in many legal systems, in recent years it has received an important boost and is currently one of the most topical issues in the field of dispute resolution. The European Directive 2008/52/EC of the European Parliament and of the Council of 21.5.2008 on certain aspects of mediation in civil and commercial matters, with an implementation date of 21.5.2011, prescribes a set of minimum common rules on mediation for all EU Member States with the exception of Denmark. This book, published by Intersetia (November 2012 | ISBN 978-1-78068-077-4), studies in depth the current legal framework in every EU Member State as regards mediation in civil and commercial matters, as well as the way in which the Directive has been, or is expected to be, implemented in the near future. Every chapter on national law analyses both out-of-court and court-annexed mediation in the existing legal framework; the areas of law covered by mediation; the value and formal requirements of the agreement to submit any dispute to mediation; personal features and requirements for mediators; procedural requirements in the mediation procedure; the relationship between the mediator and public authorities; the outcome of the mediation procedure; and, in the scenario in which a mediation settlement is reached, its requirements and effects. The book is written by renowned specialists on mediation in Europe and aims to provide an exhaustive account for both scholars and practitioners in Europe and outside the continent.

El Velo Integral y su Respuesta Jurídica en Democracias Avanzadas Europeas (Monograph)

This monograph written by Dr. Victoria Camarero Suárez and published by Tirant lo Blanch deals with one of the key issues of the modern conflict of laws: the multicultural society. The main thesis of the author is that the use of the full veil should not be considered as a challenge for the values and principles of democratic societies, particularly of the Spanish society, but as an ideal opportunity to demonstrate a real commitment with those principles and values. The extensive use of the comparative law method and the thorough review of the most relevant bibliography must be highlighted; also, the exhaustive analysis of the case law of different European states' courts and of the European Court of Human Rights. Particular attention has been paid to crucial concepts such as public policy and the so-called "margin of appreciation"; in addition, other significant topics related to nationality and migration are dealt with, again through remarkable cases, like the controversial decision made by the Council of State of France (*Conseil d'état*) as regards the *Silmi* case. The balance and technical rigor with which the author has developed her research make of the monograph a pioneer study in the Spanish doctrine and abroad, at a time when the usual answers to sensitive legal issues having a great impact on minorities are based on ideological grounds and dogmatism.

Click here to access the table of contents.

Dr. Victoria Camarero is professor in the University Jaume I, Castellón (Spain).

Kruger on Rome III and Parties' Choice

Thalia Kruger (University of Antwerp) has posted Rome III and Parties' Choice on SSRN.

> *This paper focusses on the possibility spouses have under the new Rome III Regulation (EC Regulation 1259/2010) to choose the law applicable to their divorce. It discusses the limits and exceptions of this freedom to choose.*

Canberra Calling – update

Following my earlier post about the Commonwealth Attorney-General's review of Australian private international law rule (text reproduced below, for ease of reference), two consultation papers have now been released on the project website. The first contains a general overview of the issues covered by the project, and the second considers the possible harmonisation of the tests for staying proceedings which apply in intra-Australian and Trans-Tasman Proceedings. All those with an interest in the subject are invited to submit comments via the website or by e-mail to pil@ag.gov.au.

> *Australia has often been described as the "lucky country". Blessed with spectacular coastlines and landscapes as well as bountiful natural resources, Australia's international prominence has grown throughout the past century as her products and people have become increasingly mobile.*
>
> *During this period, the development of private international law rules has been left, principally, to the Courts and to the legislatures of the States and Territories that make up the Commonwealth of Australia and the focus, until very recently, has been on the regulation of internal situations involving two or*

more States/Territories. As a result, private international law in Australia is an interesting, but erratic, patchwork of common law rules (e.g. law applicable to contract and tort), local legislation (e.g. jurisdiction over non-local defendants) and unified Commonwealth-level regimes (e.g. enforcement of some foreign judgments).

In 2011, the Standing Committee of Law and Justice (comprising the Attorneys-General of the Commonwealth Government and of each of the States and Territories, as well as the Minister of Justice of New Zealand) recognised the need to assess the suitability of Australia's private international law rules in modern conditions. In April 2012, the SCLJ agreed to the establishment of a working group to commence consultations with key stakeholders to determine whether further reform in this area would deliver worthwhile micro-economic benefits for the community.

Having established its working group, the Commonwealth Attorney-General has now launched a public consultation on its newly created Private International Law website, and in parallel on Twitter (@agd_pil), Linked In (AGD – Private International Law) and on Facebook (Private International Law). Online discussions have been launched on jurisdiction, applicable law and other private international law issues and all contributions are welcomed. In particular, and without wishing to exclude the contributions of experts in the field, the organisers of the consultation would like to solicit the views of businesses and individuals with practical experience of the operation of the Australian rules which currently apply to cross-border transactions and events.

There is no need to hop on a plane – follow the link now.

Third Issue of 2012's Rivista di

diritto internazionale privato e processuale

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

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

In the first article, *Claudio Consolo*, Professor of Law at the University of Padua, discusses the new proceedings for interim relief (with full cognizance) for the ascertainment of the effectiveness of foreign judgments in Italy after Legislative Decree No. 150/2011 ("Il nuovo rito sommario (a cognizione piena) per il giudizio di accertamento dell'efficacia delle sentenze straniere in Italia dopo il d.lgs. n. 150/2011"; in Italian).

In the second article, *Costanza Honorati*, Professor of Law at the University of Milano-Bicocca, offers a critical appraisal of provisional measures under the proposal for a recast of the Brussels I Regulation ("Provisional Measures and the Recast of Brussels I Regulation: A Missed Opportunity for a Better Ruling"; in English).

In the third article, *Theodor Schilling*, Professor of Law at the Humboldt University of Berlin, discusses the enforcement of foreign judgments in the case-law of the European Court of Human Rights ("The Enforcement of Foreign Judgments in the Jurisprudence of the European Court of Human Rights"; in English).

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

- *Lorenzo Ascanio* (Adjunct Professor at the University of Macerata), "Equivoci linguistici e insidie interpretative sul ripudio in Marocco" (Linguistic Ambiguities and Interpretative Pitfalls on Repudiation in Morocco; in Italian);
- *Lidia Sandrini* (Researcher at the University of Milan), "La tutela del creditore in pendenza del procedimento di exequatur nel regolamento

Bruxelles I" (Creditor's Protection Pending the Exequatur Proceedings under the Brussels I Regulation; in Italian);

- *Giuseppe Serranò* (Research Fellow at the University of Milano-Bicocca), "Considerazioni in merito alla sentenza della Corte internazionale di giustizia nel caso relativo alle immunità giurisdizionali dello Stato" (Remarks on the Judgment of the International Court of Justice on Jurisdictional Immunities of the State; in Italian);
- *Cristina M. Mariottini* (Senior Researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law), "Statutory Ceilings on Damages under the Rome II Regulation: Shifting Boundaries in the Traditional Dichotomy between Substance and Procedure?" (in English).

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