Hague Conference Family Law Briefings

The Permanent Bureau of the Hague Conference on Private International Law has announced that the *HCCH International Family Law Briefings* are now available on the HCCH website. The Briefings are quarterly updates provided by the Permanent Bureau to *International Family Law*, regarding the work of the Hague Conference in this field.

Download the full Briefing for June 2012 (extract from *International Family Law*, June 2012, pp. 230-235).

Previous Briefings are available here.

Mills and Trapp on Germany v. Italy

Alex Mills and Kimberley Natasha Trapp (Cambridge University) have posted Smooth Runs the Water Where the Brook is Deep: The Obscured Complexities of Germany v. Italy on SSRN.

> *This article examines and critiques the February 2012 decision of the International Court of Justice in the case of Jurisdictional Immunities of the State (Germany v Italy: Greece intervening). The focus is on three issues: first, the Court's analysis of the 'territorial tort' exception to immunity, and dismissal of its applicability to the conduct of armed forces in the context of an armed conflict; second, Italy's arguments based on the ius cogens status of the norms which had been violated by Germany and the lack of alternative means of enforcing those norms, rejected by the Court through its assertion of a decisive substance/procedure distinction; and third, the perhaps curious absence (in either the Court's judgment or Italian pleadings) of the argument that any*

violation of immunity might be justified as a lawful countermeasure. The Court found in favour of Germany on all counts, and by a clear majority. The decision was widely anticipated, and on first read the conclusions and reasoning of the Court appear inevitable, obvious, and even banal. But the apparent simplicity of the issues presented to and analysed by the Court is deceptive.

The paper was published in the first issue of the *Cambridge Journal of International and Comparative Law*.

Second Issue of 2012's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains two articles and several casenotes. A full table of contents can be found here.

In the first article, Catalina Avasilencei, a PhD candidate at the university Paris I, offers a survey of the new Romanian legislation on choice of law included in the new Romanian civil code (*La codification des conflits de lois dans le Nouveau code civil roumain : une nouvelle forme en attente d'un contentieux*). The English

abstract reads:

> *The Romanian New Civil Code, in force starting with 1st October 2011, includes from now on the conflicts of laws regime, reforming the older regulation in this field. The amendments concern equally the general rules and the specific conflict rules. A general intervention of overriding mandatory provisions is expressly stated for the first time in Romanian law; however its articulation with the European regime in contractual and non-contractual matters is likely to raise issues. Parties' autonomy is attributed a wider field of application, and the connecting factor of the habitual residence becomes more relevant compared to the nationality of the parties in conflicts of laws concerning personal matters, anticipating the new regulations at European level.*

In the second article, Marie Nioche, who lectures at Nanterre University and practices at Castaldi Mourre, explores whether orders authorizing provisional attachments can be recognized in Europe and produce a *res judicata* effect (*La reconnaissance de l'autorité de chose jugée d'une décision provisoire relative à une saisie conservatoire : conséquence de sa nature « décisionnelle »*).

The *Revue* can be downloaded here.

Payan on the European Law of Debt Recovery

Guillaume Payan, who is a lecturer at Le Mans University, has published Droit européen de l'exécution en matière civile et commerciale.

The book, which is based on the doctoral thesis of Dr. Payan, explores how the European law of debt recovery could evolve in the coming years and proposes a strategy for the European lawmaker. Although the book discusses the main private international law instruments already adopted, its essential focus is on substantive law rather than private international law.

The French abstract reads:

> *Depuis une quinzaine d'années environ, la doctrine européenne et la Commission européenne soulignent l'opportunité d'une action de l'Union européenne dans le domaine de l'exécution proprement dite des titres exécutoires. Pourtant, ce domaine est encore aujourd'hui pour l'essentiel abandonné aux droits nationaux. Cette situation devrait évoluer prochainement.*
>
> *La présente étude a pour objet d'anticiper les premières réalisations concrètes de l'action du législateur européen dans ce domaine, en suggérant la création d'un droit européen de l'exécution en matière civile et commerciale. L'objectif est de garantir la cohérence entre les futurs instruments européens de l'exécution. À cette fin, une stratégie législative à deux échelons est proposée. Le premier échelon se caractérise par l'adoption d'une approche globale de la problématique de l'exécution proprement dite des titres exécutoires au sein de l'Union européenne. À ce stade, il est question de définir les principales notions juridiques s'attachant à l'exécution, de délimiter le champ d'application de l'action de l'Union européenne et de définir les principes directeurs de cette action. Le second échelon de la stratégie législative proposée se caractérise, en revanche, par une approche « sectorielle ». À ce stade, sont visés les premiers instruments européens qui pourraient être adoptés dans le cadre de ce droit. Par souci de réalisme, cette seconde étape de la création d'un droit européen de l'exécution devrait se matérialiser par une série d'interventions ponctuelles, adaptées aux difficultés et aux besoins rencontrés. Différents chantiers prioritaires sont définis, dont la création d'une procédure européenne de saisie conservatoire des avoirs bancaires.*

A full table of contents can be found here. The foreword of Professor Jacques Normand is available here.

German Society of International Law: 2011 Conference Proceedings Published

The proceedings of the 32nd conference of the German Society of International Law (Deutsche Gesellschaft für Internationales Recht, formely the Deutsche Gesellschaft für Völkerrecht) held in Cologne in spring 2011 have recently be released. Devoted to paradigms in international law as well as the implications of the financial crisis on international law the volume contains four contributions (in German) relating to conflict of laws:

- *Schools of Thought in Private International Law*, pp. 33-61, by Christiane Wendehorst, University of Vienna
- *Roles and Role Perception in Transnational Private Law*, pp. 175-242, by Ralf Michaels, Duke Law School
- *Implications of the Global Financial Crisis for International Law: Corporate and Securities Law Control Mechanisms*, pp.283-314, by Hanno Merkt, University of Freiburg
- *Financial Crisis and the Conflict of Laws*, pp.369-427, by Jan von Hein, University of Trier

The English-language summaries are available here.

ECJ Judgment in Case C-378/10, VALE Építési Kft

The Italian company VALE COSTRUZIONI S.r.l. was incorporated and added to the commercial register in Rome in 2000. On 3 February 2006, that company

applied to be deleted from that register as it wished to transfer its seat and business to Hungary, and to discontinue business in Italy. On 13 February 2006, the company was removed from the Italian commercial register, in which it was noted that 'the company had moved to Hungary'.

Once the company had been removed from the register, the director of VALE COSTRUZIONI and another natural person incorporated VALE Építési Kft. The representative of VALE Építési Kft. requested a Hungarian commercial court to register the company in the Hungarian commercial register, together with an entry stating that VALE COSTRUZIONI was the predecessor in law of VALE Építési kft. However, that application was rejected by the commercial court on the ground that a company which was incorporated and registered in Italy could not transfer its seat to Hungary and could not be registered in the Hungarian commercial register as the predecessor in law of a Hungarian company.

The Legfelsobb Bíróság (Supreme Court, Hungary), which has to adjudicate on the application to register VALE Építési Kft., asks the Court of Justice whether Hungarian legislation which enables Hungarian companies to convert but prohibits companies established in another Member State from converting to Hungarian companies is compatible with the principle of the freedom of establishment. In that regard, the Hungarian court seeks to determine whether, when registering a company in the commercial register, a Member State may refuse to register the predecessor of that company which originates in another Member State.

In its judgment delivered on 12 July, the Court notes, first of all, that, in the absence of a uniform definition of companies in EU law, companies exist only by virtue of the national legislation which determines their incorporation and functioning. Thus, in the context of cross-border company conversions, the host Member State may determine the national law applicable to such operations and apply the provisions of its national law on the conversion of national companies that govern the incorporation and functioning of companies.

However, the Court of Justice points out that national legislation in this area cannot escape the principle of the freedom of establishment from the outset and, as a result, national provisions which prohibit companies from another Member State from converting, while authorising national companies to do so, must be examined in light of that principle.

In that regard, the Court finds that, by providing only for conversion of companies which already have their seat in Hungary, the Hungarian national legislation at issue, **treats**, in a general manner, **companies differently according to whether the conversion is domestic or of a cross-border nature. However, since such a difference in treatment is likely to deter companies which have their seat in another Member State from exercising the freedom of establishment, it amounts to an unjustified restriction on the exercise of that freedom.** In other words, EU law precludes the authorities of a Member State from refusing to record in its commercial register, in the case of cross-border conversions, the company of the Member State of origin as the predecessor in law of the converted company, if such a record is made of the predecessor company in the case of domestic conversions.

Source and further developments: Press release

Drahozal on the Economics of Comity

Christopher Drahozal (University of Kansas Law School) has posted Some Observations on the Economics of Comity on SSRN.

> *Comity is the deference one State shows to the decisions of another State. Comity is manifested in an array of judicial doctrines, such as the presumption against the extraterritorial application of statutes and the presumption in favor of recognition of foreign judgments. Comity does not require a State to defer in every case (it is not "a matter of absolute obligation"), but determining when comity requires deference poses difficult doctrinal and theoretical issues.*
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> *This paper offers some observations on the economics of comity in an attempt to provide insights into those issues. It first describes the (largely unsatisfactory) attempts to define comity and identifies the various judicial doctrines that are based on comity. Generalizing from the existing literature, which uses game theory (most commonly the prisoners' dilemma game) to*

analyze legal doctrines based on comity, the paper then sets out a basic and tentative economic analysis of comity. Comity often serves a cooperative function: courts rely on comity as the basis for doctrines that enhance cooperation with other States. In such cases, refusing to grant comity to a decision of another State constitutes defection from the cooperative solution. But if the original decision itself constitutes defection — such as a State opportunistically entering a judgment against a foreign citizen — refusing to grant comity would not be defection but would instead be an attempt to sanction the other State's defection. Thus, the central inquiry when a court decides whether to grant comity can be framed as whether the State decision being examined constitutes cooperation or defection. Further, given the uncertainty courts face in making such a determination, comity itself then can be seen as establishing a default presumption that a particular type of State decision constitutes cooperation (or, in cases in which courts refuse to grant comity, as a default presumption of defection).

The paper then argues that any rule a court adopts on the basis of comity should be treated as a default rule rather than a mandatory rule. The argument in favor of default rules over mandatory rules is a familiar one, and seems to apply well here. Thus, as U.S. and U.K. courts have held — but contrary to decisions of the European Court of Justice — comity concerns should not preclude a court specified in an exclusive forum selection clause from entering an anti-suit injunction against foreign court litigation. An arbitration clause, by comparison, provides a much weaker case for finding that the parties contracted around the comity-based default. Finally, the paper suggests possible avenues for future research: in particular, examining the importance of rent-seeking and judicial incentives in the economics of comity.

The paper is forthcoming in *The Economic Analysis of International Law* (Eger & Voigt eds, 2013).

Alien Tort Statute

For those interested in current thinking on the United States Supreme Court's consideration of the Alien Tort Statute in *Kiobel v. Royal Dutch Petroleum*, SCOTUSBlog has a fascinating online symposium available here.

Eidenmüller on the Optional Common European Sales Law as a Regulatory Tool

Horst Eidenmüller, Professor at the University of Munich and the University of Oxford, has posted "**What Can Be Wrong with an Option? An Optional Common European Sales Law as a Regulatory Tool"** on SSRN. The paper can be downloaded here. The abstract reads as follows:

> *This paper analyses the proposed optional Common European Sales Law (CESL) as a regulatory tool. In principle, an optional CESL can be a sensible means to achieve some level of harmonization and the associated transaction costs savings plus network benefits and at the same time subject the CESL to a market test. However, whether these goals will actually be achieved depends on the design conditions and the content of the option. The CESL option which is currently on the table is harmful. The Draft CESL (DCESL) is a defective product. It might nevertheless become a success on the European market for contract laws or be at least highly influential as a reference text.*

Regulation on the Mutual Recognition of Protection Measures in Civil Matters

In June 2011 the European Council adopted a Resolution entitled "Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings", immediately published (OJ *C* 187, June 2011, 28th). I might of course be mistaken, but it seems to me that both the Resolution and its immediate consequences in the civil realm have gone largely unnoticed . Let's fill (if only a bit) the gap.

The document starts reminding that in the Stockholm programme "An open and secure Europe serving the citizen", the European Council had stressed the importance to provide special support and legal protection to those who are most vulnerable, such as persons subjected to repeated violence in close relationships, victims of gender-based violence, or persons who fall victim to other types of crimes in a Member State of which they are not nationals or residents. In the same vein, responding to the Stockholm programme, the European Commission has proposed a package of measures on victims of crime including a Regulation on the mutual recognition of protection measures in civil matters [Com(2011) 276 *final*, May 2011, 18]. The Regulation intends to help preventing harm and violence and ensure that victims who benefit from a protection measure taken in one Member State are provided with the same level of protection in other Member States, should they move or travel there; and that protection be awarded without the victim having to go through additional procedures. In order to ensure a quick, cheap and efficient mechanism of circulation of protection measures in the European Union, the *rationale* of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ('Brussels II-bis'), and in particular Articles 41 and 42 (therefore automatic recognition and the abolition on intermediate procedures such as exequatur) thereof, has been followed.

The fact that the proposal follows the *rationale* of existing EU instruments on judicial cooperation in civil and commercial matters implies that many provisions

are similar or equal to the correspondent articles in the mentioned legislation. This is not a problem in itself; it might be, nevertheless, as certain protection measures are already covered by the Brussels I and Brussels II-bis Regulations. It is therefore important to clarify the articulation of the proposal with these regulations. According to the Commission, as the new Regulation establishes special rules in relation to protection measures, following a general principal of law it shall supersede the general rules set out by Brussels I. As for the Regulation Brussels II-bis, the aim of which is to centralise all proceedings relating to a given divorce or legal separation the situation is different: the proposal must not jeopardise rules governing jurisdiction and the recognition of judgments contained in the Brussels II-bis Regulation by offering the possibility to seize the jurisdiction of another Member State as regards the protection measures taken in the context of the ongoing proceedings. For this reasons, all protection measures entering into the scope of Brussels II-bis shall continue to be governed by this instrument. Examples of measures that do not fall under the application of Brussels II-bis are protection measures which would concern a couple which has not been married, same sex partners or neighbours.

The proposal provides for a speedy and efficient mechanism to ensure that the Member State to which the person at risk moves will recognise the protection measure issued by the Member State of origin without any intermediate formalities. A standardised certificate issued by the competent authority of this Member State, either ex-officio or on request of the protected person, will contain all information relevant for the recognition. The beneficiary of the measure will contact the competent authorities in the second Member State and provide them with the certificate. The competent authorities of the second Member State will notify the person causing the risk about the geographical extension of the foreign protection measure, the sanctions applicable in case of its violation and, where applicable, ensure its enforcement.