Optional Common European Sales Law, Private International Law and Uniform Sales Law (article)

Maud Piers (Professor at the Civil Law department, Ghent University), and Cedric Vanleenhove (Assistant and Ph.D Researcher at the Private International Law department, Ghent University), have published *Another Step Towards Harmonization in EU Contract Law: the Common European Sales Law* on SSRN. The article has also been published in *Contratto e Impresa / Europa* (Italy) 2012/1, 427-453 and the *Revista Trimestral de Direito Civil* (Brazil) 2012, 191-218. The abstract reads as follows:

> A Common European Contract Law has been in the pipeline for some time now and recently, another step in that direction was taken. On 11 October 2011, the European Commission issued a proposal for a Regulation that would establish such a European instrument. This Regulation aims to remedy a series of legal impediments that sellers and buyers face in their cross-border trade. With the 'Optional Common European Sales Law', the European Commission opts for a secondary regime that the Member States should adopt as part of their national law. This Common European Sales Law will not replace the existing national sales laws, but will exist autonomously, together with and next to the 27 national contract law systems already in place. This is the solution the Commission selected from the seven options listed in its Green Paper of 2010. In the 'Explanatory Memorandum' to the Proposal for a Regulation, the Commission explains that this was considered the most optimal route to achieve the intended objectives while still respecting the principles of subsidiarity and proportionality.
>
> The goal of this article is three-fold. First, to inform the reader of the Proposal for a Regulation on a Common European Sales Law and introduce its objective and applicability. Second, to examine whether the Optional Common European Sales Law, and the regime that the Proposal for a Regulation introduces, would create a legal environment that stimulates the intra-

Community, cross-border trade in the most adequate manner. Third, to assess the position of the Optional Common European Sales Law vis-à-vis the existing framework of private international law and uniform sales law.

This article consists of six parts. Under Title 1, the authors provide a brief introduction on the background and operation of the Common European Sales Law.

The authors then scrutinize this instrument more critically by raising a number of questions. A first question relates to the scope of this instrument (Title 2). A second question deals with the way in which parties may or should express their choice for the application of the Common European Sales Law (Title 3). A third question they briefly touch upon concerns the way in which the uniform application of the instrument will be safeguarded (Title 4).

The authors also examine how this new and unique instrument may coexist with the already established framework of private international law and uniform sales law. Under Title 5, they will more specifically reflect upon the position of the Common European Sales Law in relation to the regime of the Rome I Regulation. Under Title 6, they also look at how the proposed instrument corresponds with the rules of the CISG.

The authors conclude with a number of observations and recommendations with which they hope and intend to facilitate the drafting proceedings of the European legislators.

Download here.

Foreign State Immunity in

Australia

The High Court of Australia has rejected Garuda's appeal against the finding that it was not immune from Australian jurisdiction as a "separate entity" of a foreign state, namely Indonesia. The case arose from a proceeding brought by the Australian competition regulator (the ACCC) over alleged price-fixing in the air freight market to and from Australia. Our earlier posts on the case are here and here.

The decision turned on the meaning of the "commercial transaction" exception to state immunity in s 11 of the Foreign States Immunities Act 1985 (Cth), which may be of interest to British readers given the similar (but not identical) wording of s 3 of the State Immunity Act 1978 (UK).

Garuda argued that it did not fall within the "commercial transaction" exception either because the proceedings were not brought against it by a party to the transaction seeking private law relief; or because the transaction (the alleged price-fixing) was not contractual in nature.

The High Court rejected those arguments. The joint judgment of French CJ, Gummow, Hayne and Crennan JJ held that:

> *"The definition of "commercial transaction" fixes upon entry and engagement by the foreign State. It does not have any limiting terms which would restrict the immunity conferred by s 9 and s 22 to a proceeding instituted against the foreign State by a party to the commercial transaction in question. Further, it should be emphasised that the definition does not require that the activity be of a nature which the common law of Australia would characterise as contractual. The arrangements and understandings into which the ACCC alleges Garuda entered were dealings of a commercial, trading and business character, respecting the conduct of commercial airline freight services to Australia. The definition of a "commercial transaction" is satisfied." [at [42]]*

Heydon J agreed, and emphasised that the individual contracts with air freight clients were sufficient to engage the "commercial transaction" exception. "If a contract in contravention of [competition law] is capable of being a commercial transaction, non-contractual arrangements or understandings are capable of

being "a commercial, trading … transaction … or a like activity"' within the meaning of s 11 [at [74].

P.T. Garuda Indonesia Ltd v Australian Competition & Consumer Commission [2012] HCA 33 (7 September 2012)

Teaching Private International Law On-Line: The Millenium Platform

The so-called Bologna Process has brought important adjustments to the Spanish universities (for the better?). Among the most visible changes we find a dramatic increase in the number of teaching hours, to the clear detriment of research; and the requirement to introduce methodological developments in the way we teach. We are witnessing a widespread use of "virtual classrooms", reconverting classroom teaching in on-line teaching. For those who have been trained, both as students and as teachers, in lectures with physical class attendance, managing the virtual resources and new technologies is not always evident. In the specific field of Private International Law guidance may be found in the teaching platform *Millenium*, an initiative originating in coordinated teaching innovation projects of the Universities of Zaragoza and Murcia. The platform has been designed exclusively for teaching Private International Law as a pioneering project in legal education, led and coordinated by professors Javier Carrascosa (University of Murcia) and Mª Pilar Diago (University of Zaragoza). *Millennium* is offered in open source in levels one and two, and it also has coverage in social networks like Twitter and Facebook. All those interested to participate in the fascinating world of legal education in private international law through new technologies are invited; the activities for this academic year (2012-2013) have already started.

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10th Jubilee PIL Conference in the Southeast Europe

The series of regional Southeast European private international law conferences is celebrating its 10th jubilee this year. There are four topics under the general conference title "**A Decade in the Development of Private International Law: 2003-2012**":

> *1. Private International Law of the European Union (rapporteur: Prof. Dr. Michael Bogdan, Faculty of Law Lund, Sweden);*
>
> *2. National Systems of Private International Law and Regional Cooperation (rapporteur: Prof. Dr. Christa Jessel-Holst, Max-Planck Institute of Comparative and International Private Law, Hamburg, Germany);*
>
> *3. The Hague Conventions on Private International Law (rapporteur: Mr. Hans van Loon, Secretary General of the Hague Conference on Private International Law, Netherlands);*
>
> *4. Comparative Private International Law (rapporteur: Prof. Dr. Kurt Siehr, Professor Emeritus at the Faculty of Law, Zürich, Switzerland, Free Research Associate at the Max-Planck Institute of Comparative and International Private Law, Hamburg, Germany).*

The conference will take place on 4th and 5th October 2012. Appropriately so, the hosting institution is the same one which hosted the first conference in the series, the Faculty of Law of the University of Nis in Serbia. Further details concerning the conference are accessible at the official conference website.

The conference preceding this one was announced here.

Deemed Service and the Hague Service Convention under German Law

See this post of Peter Bert on The Hague Service Convention, Default Judgments, and Deemed Service under German Law over at *Letters Blogatory*.

> *In a series of* judgments *on July 3 and July 17, 2012, the Federal Supreme Court (Bundesgerichtshof) has ruled on the compatibility of deemed service under German law with the Hague Service Convention. The Court held that only the first court document in a dispute must be served pursuant to the Hague Service Convention. Any subsequent service of court documents can be by post, in accordance with the provisions of domestic German law.* Section 184 of the German Civil Code *(ZPO), according to which "two weeks after it has been mailed, the document shall be deemed served," applies to service of such documents. In the cases before the Federal Supreme Court, default judgments were served by post, and the time period for filing a protest (Einspruch) was determined on the basis of deemed service.*

The rest of the post is here, including references to US cases and opinions on the issue.

ACT now?

The Attorney-General's Department of the Australian Government is currently advertising a number of vacancies for Legal Officers and Policy Officers, based in Canberra. These include one post at Legal Officer level in the Access to Justice Division, responsible for legal and policy advice on family law, administrative law and civil procedure.

It is understood that the successful candidate will work in the Private International Law Section of the Division. The Section acts as the Central Authority for certain of the Hague Conventions, and carries out policy and case work in relation to cross-border family and civil law matters. Current projects include an assessment of the need for further harmonisation and development of rules of jurisdiction and applicable law in Australia, aimed at reducing the complexities of cross-border transactions and disputes . (Further details on this, and a link to the project website, will shortly be posted here.)

The closing date for applications is 28 September 2012.

Recognition of Chinese Arbitral Award in Finland

I've read this morning the post I reproduce below. I was wondering, do Finnish practitioners agree with the last comment?

> ## Background
>
> A Chinese construction company and a Finnish governmental entity were involved in arbitral proceedings in China. The proceedings were held under the applicable CIETAC rules in the Chinese language and the case was tried in accordance with the material laws of China as set forth in the contract between the parties. The award was rendered in December 2010 in favour of

the Chinese company. However, the Finnish party refused to adhere to the award and the Chinese company was forced to commence a recognition and enforcement process in Finland. The Chinese company filed its application for recognition and enforcement of the arbitral award in October 2011 with the competent Finnish court. The Finnish party disputed the application and demanded its dismissal.

Helsinki District Court rendered a decision concerning the recognition and enforcement of the arbitral award in June 2012. The arbitral award was ordered to be recognised and enforced in Finland as requested by the Chinese company. As a result, the Finnish party was also found liable to compensate the Chinese company for all of its legal costs accrued in the Finnish recognition process.

The Finnish law concerning recognition and enforcement of arbitral awards is based on the New York Convention of 1958. Article V(2)(b) of the Convention concerning public policy as a ground for refusal of recognition has been implemented with only minor amendments in the Finnish Arbitration Act. Other impediments for recognition listed in the Convention are also adopted in the Finnish Act with only some slight differences. Therefore, international case law can be used as guidance in Finland and any Finnish cases can be exploited internationally.

Grounds for Objecting the Recognition and Enforcement

In the proceedings, the Finnish party pleaded that the arbitral tribunal was partial and neglected the Finnish entity's procedural rights. The Finnish party claimed that the arbitrators had unfairly advised the Chinese company during the proceedings and that the Finnish party's right and chance to present both oral and written evidence were, in certain respect, completely ignored. Furthermore, it was claimed that the award was based on wrong application of the Chinese law, both in material and procedural respect.

Accordingly, the Finnish party claimed that its right to due process was violated and therefore the arbitral award, was against the Finnish ordre public.
The Finnish party demanded an oral hearing at the Finnish court in order to

prove its claims and appointed several witnesses to witness about the arbitral proceedings.

The Court Decision

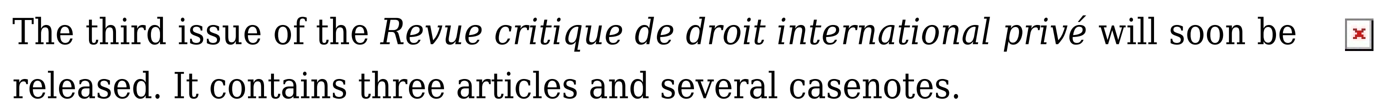
The District Court of Helsinki dismissed the Finnish party’s request for an oral hearing and rendered its decision in written proceedings. The court reasoned that the award rendered by the arbitral tribunal was final and it would be inappropriate as well as against the Finnish Arbitration Act, CIETAC rules and the Convention of New York to organise an oral hearing. The court reasoned that an oral hearing would mean that the case would be retried in practice although there already was a final decision.

The court also reasoned that Article 8 of CIETAC rules (2005) requires a party to submit its objection promptly when it holds that the CIETAC rules have not been complied with or the party shall be deemed to have waived its right to object. As the Finnish party had not submitted any objections during the arbitral proceedings, the court reasoned that it had waived its right to do so later. The court also stated that an arbitral award can be deemed invalid only extraordinarily.

After rejecting the Finnish party’s request for an oral hearing, the court briefly ruled that no grounds had been presented not to recognise and enforce the arbitral award in Finland. Therefore the court decided to accept the Chinese company’s application and ordered the arbitral award to be recognised and enforced in Finland.

In conclusion, the recognition process of arbitral awards in Finland is very summary and despite a party’s request, the courts are reluctant to organise any oral hearings. As a result, challenging an arbitral award in Finland is at least for the moment quite difficult.

Third Issue of 2012's Revue Critique de Droit International Prive



The third issue of the *Revue critique de droit international privé* will soon be released. It contains three articles and several casenotes.

In the first article, Matthias Lehmann, who is a professor of law at Halle University, discusses the proposal of the German Council for Private International Law on financial torts (*Proposition d'une règle spéciale dans le Règlement Rome II pour les délits financiers*)

> *This article explores conflicts of laws relating to financial torts, such as insider dealing or the publication of a prospectus containing incorrect information. The problem is of particular relevance given that in interconnected financial markets, tortious behavior often has repercussions in different countries. The law that applies to the responsibility of the tortfeasor must be determined in conformity with the Rome II Regulation. Yet the latter does not contain any specific conflicts rule for financial torts. Its general provision, article 4(1), leads to the applicability of a multitude of different laws for the same behaviour, which in addition cannot be foreseen. The economic consequences are potentially disastrous. The German Council for Private International Law therefore suggests amending the Rome II Regulation. This contribution analyses the reasons for the proposal and its content.*

In the second article, Javier Carrascosa González, who is a professor of law at the University of Murcia, offers an economic reading of the principle of proximity (*Règle de conflit et théorie économique*).

Finally, in the third article, Horatia Muir Watt, who is a professor at Sciences Po Law School, offers a critical appraisal of the International Court of Justice's decision on sovereign immunity in Germany v. Italy, Greece intervening, of 3rd Feb. 2012 (*Les droits fondamentaux devant les juges nationaux à l'épreuve des immunités juridictionnelles*).

French Court Issues Injunction over Kate Topless Photos

Couvrez ce sein que je ne saurais voir
Par de pareils objets les âmes sont blessées …

A French court in Nanterrre has issued an injunction earlier today over Kate Middleton topless photos in the interim proceedings initiated by Mr Mounbatten-Windsor and his wife.

French tabloid *Closer* published last week photos of Kate Middleton appearing topless on the terrasse of a Chateau in Provence this summer. While the English press refused to publish the photos, Italian and Irish tabloids already have.

The Nanterre court ordered *Closer* to "hand over all digital forms of the pictures" to the plaintiffs and enjoined the defendant from assigning or forwarding them to any third party. Any breach of the injunction would be sanctioned by a Euro 10,000 civil penalty, payable to the plaintiffs. Finally, the plaintiffs were awarded a generous Euro 2,000 towards their legal costs.

By contrast, the Court ruled that it did not have the power to enjoin *Closer* from publishing the photos again, as there was no evidence that the tabloid intended to do so.

It is interesting to see that the consequence of the judgment is to create a distinction between photos published on the internet and photos published in the hard copy of the magazine. The international dimension of the case lies essentially in the potential for these photos to circulate on the internet, and to be assigned electronically to other tabloids. The mere publication in France is arguably much less of an issue.

Of course, it remains to be seen whether the fine distinction of the court will lead to the desired outcome, and whether the penalty will deter *Closer* from selling the pictures.

Conference on EU Class Actions at European Parliament

Registration is now open for a conference on E.U. class actions: 'Increasing Access to Justice Through Class Actions: A Conference for Litigators & Policy Makers'. It will take place in Brussels within the committee rooms of the European Parliament on November 12 – 13, 2012. Seating within the European Parliament is limited so spaces should be reserved now.

The list of speakers is extraordinary and includes a lawyer who drafted Poland's law on opt-in class actions; the former Minister of Justice and Attorney General of Ireland Michael McDowell; former vice president of the European Parliament Diana Wallis; Boston lawyer Jan Schlichtmann who was portrayed by John Travolta in the film "A Civil Action"; Prof. Rachael Mulheron of Queen Mary University, London; Prof. Laura Carballo of Spain; Michele Carpagnano, co-author of a recent report on class actions for the European Parliament's Economic & Monetary Affairs Committee; and many others.

The location is the European Parliament with a few of its committee rooms, graciously hosted by Members of European Parliament McGuinness, Gallagher, Harkin, and Van der Stoep.

The topics that will be discussed include Access to Justice as a Human Right; How to Prosecute a Class Action; How to Defend a Class Action; The New Paternalism in Europe: Why Some Prefer Governments and NGOs Over Private Plaintiffs; the Opt-Out Mechanism versus the Opt-in Mechanism; and numerous other topics. The conference will provide a balanced look at some of the critical issues that Brussels is thinking about in deciding whether to design a system of collective redress for the entire E.U. The speakers will discuss class action mechanisms that already exist in certain Member States such as Sweden and Italy as well as any lessons to be learned form the United States experience with class actions.

To register, please go to this link as soon as possible to save your space, since seating in the European Parliament is limited. You can book a room at the nearby

Renaissance Hotel at a reduced rate.

Numerous organizations are jointly presenting the conference including the Netherlands Bar Association, the French-speaking Brussels Bar Association, Union Internationale des Avocats, AIJA (International Association of Young Lawyers); National University of Ireland Maynooth Department of Law; New York State Bar Association International Section; Catholic University of Lyon Department of Law; PEOPIL (Pan-European Organisation of Personal Injury Lawyers); American Bar Association Section of International Law; and others. You can view the complete list of cooperating entities at this link.

For more information, please check the link above or feel free to contact Robert J. Gaudet, Jr.

Thanks to Laura Carballo Piñeiro (University of Santiago de Compostela) for providing this announcement.