New Book on Court Jurisdiction and Proceedings Transfer Act

Thomson Reuters Carswell has just published *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* by Vaughan Black, Stephen G.A. Pitel and Michael Sobkin. More information is available here.

The *Court Jurisdiction and Proceedings Transfer Act* puts the important topic of the jurisdiction of Canadian provincial courts in civil and commercial cases on a clearer statutory footing. It is in force in British Columbia, Saskatchewan and Nova Scotia. The approach to jurisdiction adopted under the CJPTA is different in several respects from the common law approach, and so provinces that have adopted it are undergoing a period of transition. One of the key issues for courts in applying the CJPTA is interpreting its provisions and explaining how they operate. *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* examines the growing body of cases and provides a comprehensive account of how the CJPTA is being interpreted and applied by the courts.

The Supreme Court of Canada has, in its April 2012 decisions on jurisdiction, indicated a willingness to develop the common law in a way that is highly mindful of the approach taken under the CJPTA. As a result, the analysis of the CJPTA will also be of use to those in Canadian common law provinces and territories that have not enacted the CJPTA.

The book may also appeal as a comparative law resource on conflict of laws, especially to those interested in how traditional rules can be affected, directly and indirectly, by statutory reform.

Nioche on Provisional Orders in

European PIL

Marie Nioche, who lectures at Nanterre University and practices at Castaldi Mourre, has published La décision provisoire en droit international privé.

The book, which is based on the doctorate of Dr. Nioche, explores the legal regime of provisional orders in civil and commercial matters in European private international law.

One essential idea that it advances is that the language of the Brussels I Regulation and of many scholars is misleading. Article 31 refers to provisional *measures*. Dr. Nioche's claim is that it is critical to distinguish between provisional *orders* and provisional *measures*. Orders are court decisions and judicial in nature. Measures are carried out by other state officials, often after a court gave its leave by issuing a provisional order. They do not raise comparable issues. For instance, while it is correct to wonder whether measures could be extra-territorial (state officials carrying them ought to remain on the territory of their state), there is no reason to challenge the recognition of court orders. Conceptual clarity would help asking the right questions.

Another goal of the book is to challenge the idea that provisonal orders are so peculiar that they should not be able to circulate in Europe as any other judgments. Dr. Nioche offers a thorough analysis of the concept of provisional order and demonstrates that it shares all the features of judicial decisions, and should thus be treated likewise.

These are only a couple of ideas developed by the book. A full table of contents is available here. The French abstract reads:

> *Les difficultés rencontrées pour définir le régime applicable au contentieux provisoire dans le cadre du Règlement n°44/2001 ont pour origine le caractère hétéroclite de la catégorie « mesures provisoires et conservatoires ». L'unité de la catégorie peut néanmoins être atteinte en changeant de perspective. L'auteur propose une distinction transversale entre la « décision provisoire » et les mesures qu'elle ordonne. La notion de « décision provisoire », dont le caractère juridictionnel – et « décisionnel » au sens du Règlement – est démontré, constitue une catégorie de droit international privé plus homogène et plus pertinente.*

Ce travail de définition et de qualification clarifie l'ensemble des questions qui se posent en matière de contentieux provisoire européen. Internationalement compétent, le juge du fond doit pouvoir prononcer l'ensemble des décisions provisoires, quel que soit le lieu où elles ont vocation à produire leurs effets. Toutefois, certaines d'entre elles – que l'auteur propose d'appeler les décisions provisoires per partes – produisent leurs effets hors du territoire du for plus facilement et plus vite que d'autres – que l'auteur nomme les décisions provisoires per officium. Génératrice de forum shopping et de conflits de procédures et de décisions, la compétence locale d'un juge d'appoint, fondée sur l'article 31 du Règlement, doit être essentiellement limitée aux décisions provisoires per officium.

L'ouvrage intègre les derniers développements relatifs au contentieux provisoire européen, en particulier la Proposition de révision du Règlement n°44/2001 du 14 décembre 2010 et la Proposition de règlement portant création d'une ordonnance européenne de saisie conservatoire des comptes bancaires du 25 juillet 2011.

More details can be found here.

Spanish Law on Mediation (Again)

The Spanish Law on Mediation in Civil and Commercial Matters (Ley 5/2012, BOE 7.7.2012), repealing the Royal Decree-Law of 5 March 2012, has been adopted on July 6; it will come into effect this week.

According to Article 2, the Act applies to mediation in civil or commercial cases, including cross border disputes, provided they do not affect rights and obligations which are not at the parties' disposal under the relevant applicable law. In the absence of express or tacit submission to the Act, it shall apply when at least one party is domiciled in Spain and the mediation is to be conducted in Spain. As for the material scope, the Act is not applicable to mediation in criminal, labor or consumer matters; mediation with the Public Administration is also excluded.

Article 3 deals with cross-border disputes, i.e., disputes where at least one party is domiciled or habitually resident in a State other than that of any other party at the time they agreed to use mediation or the obligation to use mediation arose according to the applicable law. Disputes are also considered to be “cross-border” when mediation is foreseen, or the conflict has been solved through mediation, regardless of the place of the agreement to use mediation when, following the transfer of residence of any of the parties, the enforcement of the agreement or its consequences is sought in the territory of a different State. In cross-border disputes between parties residing in different EU Member States, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001.

Enforceability of agreements resulting from mediation is to be found in Articles 25 and 27. According to Article 25, paragraph 3, when the mediation agreement is to be executed in another State compliance with the requirements, if any, of the international conventions to which Spain is party and with the European Union rules is compulsory, in addition to notarization of the agreement. Pursuant to paragraph 4, when an agreement in mediation has been reached after the beginning of court proceedings, the parties may request the court approval following the Civil Procedure Act 2000 (*Ley de Enjuiciamiento Civil*).

Article 27 states that notwithstanding the rules of the European Union and international conventions in force in Spain, a mediation agreement that had already become enforceable in another State will be enforced in Spain where enforceability results from the intervention of a competent authority developing functions equivalent to those of the Spanish authorities. A mediation agreement that has not been declared enforceable by a foreign authority may only be enforced in Spain after being converted into public deed by a Spanish notary upon request of both parties, or of one with the express consent of the other. The foreign document shall not be enforced if it is manifestly contrary to the Spanish ordre public.

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.*
>
> *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).