Book notice: texts European Private International Law

The first edition of the book 'European Private International Law' (Ars Aequi,2012), edited by Prof. Katharina Boele-Woelki (Utrecht University, the Netherlands) was recently published. It contains a collection of international and European instruments which primarily contain Private International Law rules for jurisdiction, the applicable law and the recognition and enforcement of foreign decisions.

For further information, please click here.

Sciences Po PILAGG Workshop Series, Final Conference

The Law School of the Paris Institute of Political Science (*Sciences Po*) will hold the final meeting of its workshop series for this academic year on Private International Law as Global Governance on May 11th, 2012.

This day long conference will include three round tables and two lectures.

9:00 – 10:00: TABLE I: THEORY: Function, Foundations and Ambit of PIL
1. How would you describe the function of PIL today?
2. What are the global issues for which you feel that its tools could be developed? (What are their limits?)
3. Is the distinction between public and private international law still valid?

- Sabine CORNELOUP, Université de Bourgogne
- Gilles CUNIBERTI, Université de Luxembourg
- Alex MILLS, University College London (to be confirmed)

Chair: Horatia MUIR WATT, Sciences Po Law School

10:15 – 11:15: Conference: Access of individuals to international justice
Antônio Augusto CANÇADO TRINDADE, International Court of Justice

11:30 – 12:30: TABLE II: METHODS: Impotence, Decline or Renewal?
1. Is there room for proportionality in conflicts methodology?
2. Is there room for Human Rights?
3. How should non-state actors and norms be dealt with?

- Jeremy HEYMANN, Université Paris I (Panthéon-Sorbonne)
- Yannick RADI, Leiden University
- Geneviève SAUMIER, McGill University
  Chair: Mathias AUDIT, Université Paris-Ouest (Nanterre-La Défense)

12h45 -14h15 LUNCH with David KENNEDY, Harvard Law School

14:30 – 15:30: TABLE III: INSTITUTIONS: Method, Policy and Governance?
1. What are the most significant methodological changes induced by policy choices?
2. How are the topics selected and developed? (Who, how, why?)
3. Is there a role for non-state actors in international law-making?

- Hans VAN LOON, Hague Conference on Private International Law
- Frédérique MESTRE, UNIDROIT
- Corinne MONTINERI, UNCITRAL
  Chair: Diego P. FERNÁNDEZ ARROYO, Sciences Po Law School

15:30 – 16:00: Final Comments

More information is available on the PILAGG website.

Spanish Law on Mediation

The Spanish Real Decreto-Ley (Royal Decree-Law) 5/2012, of March, the 5fh, on Civil and Commercial Mediation is already in force. This provision incorporates

into Spanish law the Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (just for the record, deadline for transposition expired on 5/20/2011). Following aspects are of interest for PIL (arts. 2, 3, 27):

The Royal Decree-Law applies to mediation in civil or commercial cases, including cross-border disputes provided they do not affect rights and obligations that are non-disposable under the applicable law. “Cross-border conflict” implies that at least one party is domiciled or habitually resident in a State other than that of the domicile/habitual residence of any of the other parties. For parties residing in different Member States of the European Union, domicile will be determined in accordance with Articles 59 and 60 of Regulation (EC). No 44/2001 of 22 December 2000 concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Parties may decide to expressly or tacitly submit to the Royal Decree-Law; in the absence of submission, it shall apply when at least one party is domiciled in Spain and the mediation is also to be conducted in Spain.

A mediation agreement that has already become enforceable in another State shall be enforced in Spain when such enforceability results from the intervention of a foreign authority developing functions equivalent to those played by Spanish authorities.

A mediation agreement that has not yet been declared enforceable abroad shall not be executed in Spain until a public deed by a Spanish notary has been drawn up, upon request of both parties, or of one of them with the express consent of the other.

The foreign document shall not be enforced if manifestly contrary to Spanish public order.

Supreme Court of Canada Affirms Importance of Jurisdiction Agreements

In *Momentous.ca Corp v Canadian American Assn of Professional Baseball Ltd*, 2012 SCC 9 (available here) the court has affirmed its willingness to give effect to exclusive jurisdiction agreements in favour of a foreign forum.

The decision is brief (12 paragraphs) and was released only just over a month after the case was argued. It is a unanimous decision by the seven judges.

Academic commentary about the decision has been quite mixed. I am not aware that anyone thinks the decision is wrong. There is much consensus that the court reached the correct result: the defendant should have been able to rely on the jurisdiction agreement in favour of North Carolina to resist proceedings in Ontario. But there is much disagreement about the quality of the brief reasons.

One problem I have with the reasons is that I think the court confuses a dismissal of proceedings based on a lack of jurisdiction with a stay of proceedings. Despite the words used, my sense is that what the defendants were seeking was a stay, not a dismissal. The court's repeated references to discretion (paras 9 and 10) are because what the court is really considering is a stay. There is no discretion in the assessment of jurisdiction: the court either has it or does not have it as a matter of law. Yet the court repeatedly refers to the remedy as a dismissal rather than a stay. This is a mixing of two fundamentally different concepts. If we take the court at its word, there is now the discretion to hold a court lacks jurisdiction.

The court relies on Rule 21.01(3)(a) which deals with challenges based on the court's lack of subject matter jurisdiction. In my view, that is not the basis for motions seeking to enforce jurisdiction clauses. Such clauses do not deprive a court of jurisdiction over subject matter. Absent the clause the court clearly had jurisdiction over the subject matter of the dispute. If no one had invoked the clause the litigation would have carried on in Ontario. And is there any doubt that a jurisdiction clause in favour of Ontario, rather than a foreign forum, is a matter of territorial jurisdiction and not subject matter jurisdiction? Parties cannot confer subject matter jurisdiction on a court by contract. Yet in the wake

of this decision, we now have to grapple with the notion that jurisdiction clauses are about subject matter jurisdiction, not territorial jurisdiction.

There are many other interesting issues left unresolved by the court, so the brevity of the decision is a disappointment.

A comment on the Latin American Model Law

An article co-authored by several Spanish academics on the Latin American Model Law (International Protection of Human Rights) has just been published. It introduces and analyzes the Dahl Model Law, drafted by the Argentinian jurist Henry S. Dahl, intended to help and stimulate Latin American countries in order to improve their resources in the field of Transnational Human Rights Litigation. There is a careful analysis of the Recitals of the law and its seven sections: jurisdiction (forum of necessity), application to physical and legal persons, the nonexistence of a statute of limitation, admissibility of the evidence found abroad, damages according to foreign law, appeals and notifications by certified mail. This note also describes the present state of Transnational Human Rights Litigation, making reference to the US, European and United Nations perspective.

Click here for the whole text.

Pribetic on Service by Mail from New York

Antonin Pribetic (Steinberg Morton Hope & Israel LLP) has posted The Postman

Always Rings Twice: New York Appeals Court Validates Service of Process by Mail on Canadian Defendants on SSRN.

> *The recent decision of the New York Appeals Division in New York State Thruway Auth. v Fenech represents an American revolution in conflict of laws with fundamental implications to cross-border litigation.The Fenech decision overturns prior precedent against foreign service of process by mail under Article 10(a) of the Hague Service Convention. If the Fenech decision stands, it will put many process servers out of work and render service through the official diplomatic channels of the Central Authority moot.*
>
> *Canada should formally withdraw its Declaration under Article 10(a) of the Hague Service Convention that it does not object to service by postal channels. Otherwise, Canadian defendants in foreign proceedings are at a marked disadvantage, both in terms of challenging a foreign court's assertion of personal jurisdiction and subject-matter jurisdiction. Personal service should remain the cornerstone of jurisdiction, bounded by the pillars of comity, reciprocity, good faith and order and fairness.*

European Parliament Adopts Succession Proposal at First Reading

The European Parliament adopted today a legislative resolution at first reading on the regulation on successions (see the Declaration by the Danish Presidency of the Council and the background note).

Amendments to the initial Commission's Proposal were drafted and discussed in the EP's JURI Committee (rapporteur: *Kurt Lechner*), that adopted a report on the regulation in its meeting of 1st March 2012, reflecting the agreement reached by the Parliament and the Council. Latest available document in the Council's

register is doc. n. 6925/12 of 24 February 2012 (consolidated text confirmed by Coreper).

The text adopted by the EP will be available soon on this page (UPDATE: provisional edition). According to current information, **the final vote on the Regulation by the Council should be scheduled before the end of the Danish Presidency (30 June 2012)**.

Fleischer on Optional Instruments in European Private Law

Holger Fleischer, Director at the Max Planck Institute for Comparative and International Private Law in Hamburg, has posted a (German) article on optional instruments in European Private Law on SSRN. It is forthcoming in Rabels Zeitschrift für ausländisches und internationales Privatrecht and can be downloaded here. The abstract reads as follows:

> *"This paper explores the 'optional instrument' as a regulatory tool in European private law. The term 'optional instrument' or '28th Regime' refers to supranational corporate forms, legal titles or legal instruments which provide an alternative model for doing business throughout the European Union while leaving national laws untouched. After distinguishing different modes of optional law, the paper provides an overview of optional instruments that already exist or are proposed in European company law, intellectual property law, insurance contract law and sales law. It then identifies common features and problems of the 28th Regime, from its appropriate legal basis and the need for an optional instrument to its scope of application, its interface with national law and its relationship to private international law. Finally, the paper addresses the under-researched question of vertical regulatory competition triggered by optional instruments in European private law."*

Article 14 Code Civil Comports with the French Constitution

In a judgment of February 29th, 2012, the French supreme court for civil and commercial matters (*Cour de cassation*) held that Article 14 of the French Civil Code raises no serious constitutional issue, and thus that the question would not be referred to the French Constitutional Council.

France only introduced recently a proper judicial review mechanism. The new mechanism, however, does not enable parties to petition directly the French constitutional court. Instead, parties arguing that a given statute is unconstitutional must obtain leave of the *Cour de cassation* to do so.

Article 14 of the Civil Code grants jurisdiction to French court on the sole ground that the plaintiff is a French national. This is widely regarded as an exorbitant head of jurisdiction, except in family matters.

In this case, it was argued that Article 14 violated the principle of equality before the law, and the right to a fair trial. The *Cour de cassation* rules that no such argument could seriously be made for a series of reasons which all amount to one single argument: the scope of Article 14 is not so wide, and some disputes do not fall within it.

Reasons of the Court

Article 14 neither bars recognition of foreign judgments, nor excludes lis pendens

Although this reason is the last given by the court, it is useful to begin with it. It is true that it used to be the case that Article 14 would not only grant jurisdiction to French courts on the sole ground that a party was a French national, but also bar recognition of foreign judgments. The rule was abandonned by the court in the *Prieur* case, and it is widely believed that an important incentive for the *Prieur* courtwas the fear that the European Court of Human Rights would find that the

rule was contrary to Article 6.

Now, the only question is whether retaining jurisdiction on the sole ground of the nationality of the parties is acceptable.

Article 14 does not grant exclusive, but rather subsidiary jurisdiction to French courts, and is optional for the parties.

That Article 14 granted exclusive jurisdiction meant that it was a bar to the recognition of foreign judgments. It is not anymore. Today, it is a subsidiary ground of jurisdiction, which means that it only applies when French courts do not have otherwise jurisdiction over a given dispute. Of course, in such cases, the jurisdiction of French courts does not raise any issue, since there is another connecting factor designating France. The problem with Article 14 is precisely when Article 14 is the only ground for jurisdiction.

Article 14 is optional "for the parties". This statement seems to stem out of a misunderstanding. The French beneficiary from Article 14 may waive his right (see below). But no foreign party was ever asked to agree with jurisdiction arising out of Article 14. As the Court ruled as recently as in 2009, Article 14 is optional *for French plaintiffs*, not "for the parties"! And this is the right to a fair trial of non French parties which is at stake!

French nationals can waive their right to benefit from it

They certainly can, but we are (and foreign defendants are) really concerned with cases where they have not.

Article 14 does not apply when an international treaty governs the international jurisdiction of French courts

Again, who will ever complain in cases where Article 14 does not apply?

Question

It would be interesting to know whether famous American and German cases on the constitutionality of jurisdictional rules were brought to the attention of the *Cour de cassation.*

Many thanks to Patrick Kinsch for the tip-off.

SSRN: New Papers on the Proposed Common European Sales Law

Several papers dealing with various aspects of the Common European Sales Law (CESL) have recently been published on SSRN:

A Numbers Game – The Legal Basis for an Optional Instrument in European Contract Law, Maastricht Faculty of Law Working Paper No. 2012/02, by *Gary Low,* University of Maastricht

The paper can be downloaded here. The abstract reads as follows:

> *"Despite the fact that it is an optional instrument, the proposed Common European Sales Law (CESL) is based on Art 114 TFEU. This article considers whether the measure approximates the contract laws of Member States, such that the continued use of Art 114 TFEU is justifiable. One possibility, using the lens of regulatory competition, is to suggest that CESL is an intermediate step towards harmonisation. However, it is questionable whether regulatory competition will lead to the required degree of harmonisation, and whether CESL's features demonstrate that is contributes within a wider context to that process of harmonisation. Another possibility is to distinguish CESL from other optional instruments on the basis that it is a second national regime. This is to say that since the regulation makes all second national contractual regimes the same, the contract laws of Member States are harmonised. The problem with this argument is that CESL leaves purely national contract laws unmolested.*
>
> *Clearly, either justification for the use of Art 114 TFEU is plausible, just as they are open to debate. This is precisely the dilemma that must face the Commission if it is to defend its current choice of legal basis. If the issue is brought before the CJEU, CESL might end up as the Commission's Tobacco Advertising III, forcing it to re-experience tremors of competence anxiety. On the other hand, if it risks litigation and obtains a favourable judgment, one can*

surmise the future of positive integration to be one of unitas via diversitas."

The Common European Sales Law and the CISG – Complicating or Simplifying the Legal Environment?, Maastricht Faculty of Law Working Paper No. 2012/4, by *Nicole Kornet*, University of Maastricht

The paper can be downloaded here. The abstract reads as follows:

"Businesses would undoubtedly prefer a legal environment with less complexity. In the European Commission's view, the legal diversity resulting from the 27 different national contract laws of the Member States creates unnecessary legal complexity and constitutes an impediment to the proper functioning of the internal market. While existing European contract law instruments mainly focus on harmonizing aspects of consumer law, with the proposed Common European Sales Law (CESL), the Commission has now firmly extended the scope of European contract law to also cover commercial sales contracts. However, the CESL is not the first instrument to create a set of uniform rules for cross-border commercial sales contracts. At the international level, there is already the United Nations Convention on Contracts for the International Sale of Goods (CISG). The current proposal consequently raises a number of pertinent questions concerning the relationship between the two instruments, as well as the necessity, desirability, choice for legal base and likely success of the European instrument. The introduction of a European instrument for cross-border commercial sales contracts essentially inserts a new, regional instrument between the divergent national laws of the Member States and the international sales convention. Rather than simplifying the legal environment, such a step adds to its complexity. This would only make sense if diversity of national contract laws is a serious problem for business that needs to be tackled by creating uniform (European) rules; the existing uniform rules (CISG) have significant shortcomings, and the new instrument has added value. This article examines the proposed CESL on this basis."

The Proposal for a Regulation on a Common European Sales Law: Shortcomings of the Most Recent Textual Layer of European Contract Law, by *Horst Eidenmueller,* University of Munich/University of Oxford, *Nils Jansen,* University of Muenster, *Eva-Maria Kieninger,* University of Wuerzburg, *Gerhard Wagner,*University of Bonn; Erasmus School of Law;

University of Chicago Law School, and *Reinhard Zimmermann,* Max Planck Institute for Comparative and International Private Law

The paper can be downloaded here. The abstract reads as follows:

> *"On 11 October 2011, the European Commission published a Proposal for a Regulation on an optional Common European Sales Law (CESL). This text represents a milestone for the further development of European contract law. Our essay critically examines and evaluates the Commission's proposal. It outlines the Commission's draft as well as its background and deals with some of the most pressing doctrinal and policy issues raised by it. We show that the suggested range of application and the technical mode for opting into the CESL are flawed. Further, the CESL incorporates many elements and doctrines of the current acquis communautaire, such as unduly extensive information duties and withdrawal rights as well as a policing of standard contract terms, without reconsidering their proper purposes and uses. With respect to the rules on sales law, it is particularly the mandatory character of most of them that poses grave problems. We also demonstrate that the CESL's optional character does not eliminate the quality concerns raised in this essay: The CESL might become a 'success' despite its shortcomings. Hence, notwithstanding its optional character, the proposed text should not be enacted. What is needed is a broad and thorough debate on the scope, forms and contents of contract law harmonization in Europe rather than the speedy legislative enactment of a flawed product."*

The Proposed Common European Sales Law: Legal Framework and the Agreement of the Parties, Oxford Legal Studies Research Paper No. 10/2012, by *Simon Whittaker,* University of Oxford

The paper can be downloaded here. The abstract reads as follows:

> *"Economic integration remains at the heart of the European Union, and it is not surprising, therefore, that contract law has increasingly formed the object of European legislative initiatives. During the 1980s and 1990s, the resulting legislation was particular in its scope, targeted in its aims, and its main technique was the harmonization by directive of aspects of the national contract laws of Member States. Over the last decade, increasing dissatisfaction with this technique prompted a move towards 'full harmonization' in EU consumer*

law, seen first as regards the Unfair Commercial Practices Directive 2005, and later as regards the reshaped versions of the Timeshare Directive and Consumer Credit Directive. However, when in 2008 the Commission sought in its Consumer Rights Directive Proposal to extend 'full harmonization' to four of the most important directives in the consumer acquis, the proposal met with very considerable opposition. The Consumer Rights Directive as promulgated in late 2011 is therefore much reduced in scope, its provisions leaving aside almost entirely change to earlier (minimum harmonization) directives on unfair terms and consumer guarantees in sale. However, a second legislative development of importance for the present discussion was the new competence established by the Amsterdam Treaty, which allowed the EU to bring existing European private international law instruments on jurisdiction and on applicable law in contract within the framework of EU law and to add to them new instruments on applicable law. As a result, EU law now possesses uniform laws governing the law applicable to cross-border contracts and cross-border torts, whose justification was again the needs of the internal market. It is in this somewhat crowded legislative arena which we must place the recent Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Broadly, the proposal would set up an optional contract law instrument (the 'Common European Sales Law' or 'CESL') governing sales of goods, the supply of digital content and certain related services for contracts between traders (where one is a small or medium size business (SME)) and contracts between traders and consumers. This note will outline the purposes and the scope of this initiative and then examine two of its central features: its technical legal framework, particularly as regards its relationship with private international law, and its approach to the agreement required of the parties to use the CESL to govern their contract."

The Commission Proposal for a 'Regulation on a Common European Sales Law (CESL)' – Too Broad or Not Broad Enough?, EUI Working Papers LAW No. 2012/04, by *Hans-W. Micklitz*, European University Institute, *Norbert Reich*, University of Bremen

The paper can be downloaded here. The abstract reads as follows:

"The paper which was commissioned by the Austrian Ministry of Consumer Affairs but written under the exclusive responsibility of the authors consists of

three parts: The first part written jointly by the authors gives an analysis of the so-called "chapeau" of the Commission proposal on a Regulation (EU) for a "Common European Sales Law" (CESL), published as COM (2011) 635 final of 11.10.2011. The chapeau, that is the legal instrument putting into effect the eventual CESL, concerns such fundamental questions as legal basis, namely Art. 114 TFEU on the internal market, importance of the subsidiarity and proportionality principles, personal, territorial and substantive scope of the proposal, the mechanism of "opting-in" in cross-border B2C (business to consumer) transactions, its relation to the "acquis", in particular the recently adopted "Consumer Rights Directive" (CRD) 2011/83/EU of 25.10.2011, to existing Member State law under conflict-of-law provisions of Art. 6 on consumer protection of Regulation (EU) 593/2008, and to options left to them. The second part, written by Hans Micklitz, analyses the substantive provisions of the so-called Annex I, namely the text of the CESL itself which with some modifications took over over the results of the EU expert group on a "feasibility study on an optional instrument" of 3.5.2011. It is concerned with B2C provisions on so-called "off-premises" and distance contracts with respect to information obligations of traders and withdrawal rights of consumers which are particularly relevant in e-commerce. Also the new proposals on unfair terms are discussed which go beyond the existing acquis of Dir. 93/13/EEC. The third part, written by Norbert Reich, is concerned with provisions on consumer sales and related service transactions, also based on the feasibility study with an extension to "digital content". Some of them go beyond the existing acquis of Dir. 99/44/EC, while the concept of "related service contracts" remains rather obscure and controversial."