Common European Sales Law and Third State Sellers

In October 2011, the European Commission published its Proposal for a Regulation on a Common European Sales Law.

From a choice of law perspective, two important features of the Proposal are that the Common European Sales Law (CESL) would be optional, and that it would not be a 28th regime, but rather a second regime in the substantive law of each Member State. As a consequence, the CESL would only apply if the parties agree on its application, and if the law of a Member state is otherwise applicable. The CESL will, as such, never govern a contract; the law of a Member state will and, as the case may be, within this law, the CESL.

Choosing CESL when a Third State Law Governs

The problem with this regime, and more specifically with the doctrine that CESL may not apply autonomously is that it is easy to conceive many situations in which parties may want to provide for the application of CESL while the contract is otherwise governed by the law of a third state. In the European conflict of laws, the law of the seller governs (Rome I Regulation, art. 4, 1955 Hague Convention, art. 4). This means that each time the sale will involve a third state seller, the applicable law will, in all likelihood, be the law of that third state. And Europe does buy alot from third states. The factory of the world is China, not Greece.

Of course, in theory, the parties could, and indeed should, choose the law of a Member state as the governing law. Let’s face it, however: there are many reasons to believe that they often will not. CESL is designed for small and medium businesses. For many, if not the majority, of these commercial people, it will be very hard to understand why choosing the CESL is not enough, and why the law of a member state must also be chosen. Indeed, at first sight, this does not look quite logical to choose the law of a particular member state after choosing European law.

If I am correct that expecting a high level of legal sophistication from small and medium businesses is unrealistic, then the result will often be a contract governed by Chinese law, with a clause providing for the application of European

law.

Implicit Choice of Law?

What will happen in such cases? In theory, the answer is clear: if the law of a member state does not apply, choosing CESL is not permissible. Thus, the law of the third state will govern. Quite clearly, this will come as a big surprise for the parties.

Is there a way out of this absurd outcome? One could argue that the choice of CESL is an implicit choice for the law of a EU state. But which one? And would it be satisfactory for the Regulation to be silent on the issue?

A more responsible answer to the problem would be to provide an express solution. It could be designed either as an objective subsidiary choice of law rule, or as a presumption of the will of the parties. If the European lawmaker wanted to remain consistent with its claim that the CESL Regulation leaves the Rome I Regulation untouched, I guess that the latter solution would appear as more appealing.

The problem that I have identified will occur when the seller will have its habitual residence outside of the EU. By definition, one of the parties must have its habitual residence in the EU for the CESL to be available. The Regulation could thus provide that parties providing for the application of CESL will be presumed to have implicitly chosen the law of the habitual residence of the buyer.

An additional paragraph could be added to Article 11 of the draft Regulation along the following lines:

> *(a) Where the parties have validly agreed to use the Common European Sales Law for a contract, but have not chosen the applicable law, they are presumed to have chosen the law of a Member state.*
>
> *(b) This law shall be the law designated by Article 4 of the Rome I Regulation or any other applicable choice of law rule.*
>
> *(c) If the law referred to in (b) is not the law of a Member state, this law shall be the law of the habitual residence of the buyer.*

~~This proposal does not distinguish between B2B and B2C contracts, but I am not sure that's necessary.~~ I am limiting for the timebeing my analysis to B2B contracts and will discuss B2C contracts in a later post.

In any case, all comments welcome !

De Brabandere on P.R.I.M.E. Finance

Eric De Brabandere, who is an associate professor of law at Leiden University, has written an Insight at the American Society of International Law website on P.R.I.M.E. Finance: The Role and Function of the New Arbitral Institution for the Settlement of Financial Disputes in The Hague.

Fallon – Lagarde – Poillot Peruzzetto (Eds.), Quelle architecture pour un code européen de droit international privé?

On 17 and 18 March 2011 **the University of Toulouse (IRDEIC) hosted a colloquium on the codification of European PIL** ("Quelle architecture pour un code européen de droit international privé?"), follow-up to the conference organised in 2008 on "La matière civile et commerciale, socle d'un code européen

de droit international privé?" (see the related volume). On the 2011 colloquium, see the report by *Jurgen Basedow* published in *RabelsZ*, 2011/3, p. 671 ff., and the one by *Pedro de Miguel Asensio* on his blog.

In his closing remarks, *Paul Lagarde* offered as a starting point for discussion **a preliminary draft of 24 articles dealing with the general provisions of a future European PIL code** ("Embryon de Règlement portant Code europeén de droit international privé"): the draft is published in *RabelsZ*, 2011/3, p. 673 ff.

The papers presented at the 2011 colloquium have now been published by Peter Lang, under the editorship of *Marc Fallon*, *Paul Lagarde* and *Sylvaine Poillot Peruzzetto*: "Quelle architecture pour un code européen de droit international privé?".

Here's the table of contents (.pdf):

- Avant-propos;
- *Marc Fallon* : Rapport introductif;

Première Partie. La forme et l'instrument de la codification.

- *Aude Mac Eleavy Fiorini* : Qu'y a-t-il en un nom ? Un vrai code pour le droit international privé européen;

Deuxième Partie. Les fondements de la codification.

- *Sylvaine Poillot-Peruzzetto* : La priorité de l'Espace de Liberté, de Sécurité et de Justice et l'élaboration d'un code européen de droit international privé;
- *Johan Meeusen* : La priorité de l'Espace de Liberté, de Sécurité et de Justice et l'élaboration d'un code européen de droit international privé. Réponse à la contribution du professeur Sylvaine Poillot-Peruzzetto;
- *Miguel Gardeñes Santiago* : Les exigences du marché intérieur dans la construction d'un code européen de droit international privé, en particulier la place de la confiance et de la reconnaissance mutuelle;
- *Catherine Kessedjian* : Un code européen au regard des objectifs du droit international privé;

Troisième Partie. Le domaine de la codification.

- *Laurence Idot* : Introduction;
- *Marc Fallon* : Le domaine spatial d'un code européen de droit international privé. Émergence et modalités de règles de caractère universel;
- *Pedro A. de Miguel Asensio/Jean-Sylvestre Bergé*: The Place of International Agreements and European Law in a European Code of Private International Law;
- *Horatia Muir Watt* : La nécessité de la division tripartite. Conflit de lois, de juridiction, règles de reconnaissance et d'exécution ?;
- *Isabelle Rueda* : La place de la matière administrative et des immunités au sein d'un code européen de droit international privé;
- *Blanca Vilà/Michel Attal* : La place de la procédure et de la coopération entre juges et acteurs nationaux. Le périmètre de la codification;

Quatrième Partie. La structure et la teneur d'une codification.

- *Michael Bogdan*: Some Nordic Reflections on the Desirability of an EU Code of Private International Law;
- *Sabine Corneloup/Cyril Nourissat* : Quelle structure pour un code européen de droit international privé ?;
- *Marie-Laure Niboyet* : Les règles de procédure : l'acquis et les propositions. Les interactions entre les règles nationales de procédure et les « règles judiciaires européennes »;
- *Michael Wilderspin* : Règles de compétence et de reconnaissance et d'exécution. L'acquis et les propositions;
- *Anne Marmisse-d'Abbadie d'Arrast/Marc-Philippe Weller* : Définitions autonomes et rattachements. Propos introductifs;
- *Anne Marmisse-d'Abbadie d'Arrast* : Qualification et concepts autonomes dans l'élaboration d'un code européen de droit international privé;
- *Marc-Philippe Weller* : Les rattachements dans les conflits des lois;

Cinquième Partie. Les éléments d'une partie générale.

- *Stefania Bariatti/Étienne Pataut* : Codification et théorie générale du droit international privé;

En guise de synthèse

- *Paul Lagarde* : En guise de synthèse;

Annexe

- *Eugénie Fabriès-Lecea* : Quelle codification pour le droit international privé européen des procédures d'insolvabilité ?

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Title: Quelle architecture pour un code européen de droit international privé?, edited by *M. Fallon, P. Lagarde* and *S. Poillot Peruzzetto*, Peter Lang (Series: Euroclio – Volume 62), Bruxelles – Bern – Berlin – Frankfurt am Main – New York – Oxford – Wien, 2011, 388 pages.

ISBN 978-90-5201-823-2 br. Price: EUR 38.

Fukuoka conference: Regulatory Hybridization in the Transnational Sphere

Professor Toshiyuki Kono of the Kyushu University is organising a two-day international conference titled "**Regulatory Hybridization in the Transnational Sphere**". Motivation for choosing this particular topic and the features of the conference are described by the organiser as follows:

> *[N]ational laws and public international law are no longer the exclusive regulatory authorities today. Instead, regulatory initiatives are shared by a complex network of nation States, international organizations and transnational private communities as a result of processes such as globalization, privatization, outsourcing, and self-regulation. Accordingly, national domestic laws, public international norms, and the newly proliferating private regulations co-exist in the current condition of transnational law. Furthermore, indirect connections between these three regulatory forms have increasingly developed, resulting in the proliferation of innovative hybrid forms of regulation. […]*

The purpose of this conference is to explore various issues relating to hybrid normative structures in the transnational sphere. For this purpose, the conference underscores inter alia the following questions:

1. If regulatory hybridization does not simply consist of a reintegration of norms, and if it is not simply the delegation of the rule-making authority to self-regulatory institutions, what precisely does the contemporary hybridization of norms refer to?
2. What are the primary merits & de-merits of hybrid forms of governance?
3. Can the proliferation of hybrid forms of governance be explained solely by reference to efficiency or is it being driven by other factors?
4. What conceptual tools are most helpful in clarifying the precise form of regulatory hybridization?

The conference will take place on 11 and 12 February 2012 at the Kyushu University, Nishijin Plaza, Fukuoka (Japan). Additional information is available at the conference website, including the program.

Multiple defendants and territorial intellectual property rights: Painer revisits Roche through Freeport

Our colleague Dr. Mireille van Eechoud, currently of double affiliation as an Associate Professor at the Institute for Information Law, Universiteit van Amsterdam and a Visiting Scholar at the University of Cambridge Centre for Intellectual Property and Information Law, was kind to share with us her views on the Painer case (Case C-145/10) and its relation to the preceding EU Court of Justice case law on the matter. Here is her full opinion:

Could the CJEU's new stance on art. 6(1) Brussels Regulation 44/2001 be explained by the fact that the Court is very activist of late in shaping areas of

copyright law which were not considered harmonized – of which the Painer case is itself an example? Or has the Court taken to heart the criticism unleashed by its Roche judgment on multiple defendants jurisdiction? The Advocate General certainly seemed to, citing among others the position of the European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP). Whatever the reason, the Painer judgment from 1 December 2011 (Case C-145/10) signals a departure from the strict formalist-territorial approach to jurisdiction in intellectual property matters. The Court says that joining defendants under art. 6(1) Brussels Regulation is not precluded 'solely because actions against several defendants for substantially identical copyright infringements are brought on national legal grounds which vary according to the Member States concerned'.

In the case at hand, a freelance photographer from Austria claimed infringement of her copyright in portrait photos. She had made a series of portrait photos of a 6 year old girl at a nursery. The girl was later abducted and spent 8 unspeakably horrible years in captivity. The photographer gave prints of the portrait photos to the parents and police. Some of them were subsequently released by Austrian authorities in the context of the search. The girl's eventual escape was a major news item across Europe. Lacking current photos, the defendant newspapers published the old portrait photos. The photographer had not been asked for permission, nor credited.

The photographer brought various actions in Austrian courts. In these disputes the question whether there was copyright in the photos, or some other right, and what the scope of such protection is under German and Austrian law was hotly debated. The proceedings which led to a preliminary reference were against five newspapers: one established in Austria, the other four in Germany. The Austrian newspaper was only distributed in Austria; the German newspapers had primary distribution in Germany with additional distribution in Austria.

So could the Austrian court assume jurisdiction for the infringements in Germany and Austria, with the Austrian newspaper as anchor-defendant under article 6 Brussels Regulation? The provision allows a plaintiff to consolidate actions against different defendants resident in the EU in one domestic court, 'provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting

from separate proceedings'. Previously, in the much criticized case C-539/03 – Roche Nederland v. Primus, the Court ruled that a close connection requires a same situation of law and of fact. When claims concern the infringement of territorially distinct patent rights (as granted under the European Patent Convention), for that reason alone there can be no risk of irreconcilable judgments because there is no 'same situation of law'.

In Painer, the Court seems to abandon that reading. The fact that the claims against the defendants concern infringement of the territorially distinct copyrights for Germany and Austria does not of itself preclude the possibility of consolidating them on the basis of article 6 Brussels Regulation. This is the more so, the Court adds, if the applicable laws in question are very similar. The referring Austrian court had concluded that was the case: German and Austrian copyright and related rights law share essentially the regimes for photographs (which is partly due to EU harmonization).

Oddly enough, and unlike the Advocate General, the Court does not refer to its Roche judgment. Rather, it builds its reasoning primarily on Freeport (case C 98/06). There the Court stated that the fact that claims against defendants have different legal bases (e.g. in contract and tort) does not preclude application of art. 6 per se. The more obvious parallel in intellectual property matters isof course in situations where say the claim against one defendant is based in copyright infringement, and the claim against the co-defendant in contract (breach of a distribution agreement for example). I am not so sure that Freeport is easily applied to cases where infringement of copyright in different countries is at stake.

In Roche, A European Patent had been granted through the European Patent Office, which resulted in a bundle of patents for the plaintiff, each equivalent to a national patent for each of the countries applied for. The subsistence and scope of these national patents is very similar across European Patent Convention states. The criticism of (among others) CLIP is that in cases where national intellectual property rights have been unified or harmonized to a great degree, it is artificial to bar a plaintiff from joining claims merely because formally speaking different territorial rights are involved (see the CLIP position).

The defendants in Roche were all part of the same parent company, and

basically sold the same allegedly infringing products in their respective local markets. Yet because each defendant acted locally (albeit under the direction of the parent), allegedly infringing the local patent, the Court did not accept there was a same situation of law and fact. In Painer, it is not clear whether there is any connection between the defendants. They may have acted similarly from the perspective of the plaintiff: each published photographs she made, over a similar period and as illustration of news about roughly the same matter. But I don't see how that qualifies as a 'same situation of fact' for art. 6 purposes. Surely, the fact that persons behave in similar ways with respect to a (potentially) copyrighted image does not make the claims closely connected?

The answer to that question is in the Court's observation that 'It is, in addition, for the referring court to assess, in the light of all the elements of the case, whether there is a connection between the different claims brought before it, that is to say a risk of irreconcilable judgments if those claims were determined separately. For that purpose, the fact that defendants against whom a copyright holder alleges substantially identical infringements of his copyright did or did not act independently may be relevant [my italics].' I would argue that whether or not the co-defendants acted independently is in cases like these not a potentially relevant factor, but a crucial factor. If not, in this case our Austrian photographer could sue before Austrian courts any of the German publishers for distributing newspapers with the photos in Germany, because a completely different unrelated paper based in Austria happened to have printed the same photo. There has to be some relationship between the defendants, or at least between the anchor-defendant and the co-defendants. If not, all that is left is the foreseeability escape the Court articulated in Freeport.

Festschrift for Bernd von

Hoffmann has been released

On the occasion of *Bernd von Hoffmann's* 70th birthday *Herbert Kronke* and *Karsten Thorn* have edited a Festschrift entitled **"Grenzen überwinden – Prinzipien bewahren"** (Overcoming Borders – Preserving Principles). It has been published by *Ernst und Werner Gieseking* and contains contributions relating to Private International Law, International Civil Procedure, Comparative Law and International Commercial Arbitration.

The table of contents reads as follows (in brackets: first page of the contribution):

I. Internationales Privatrecht

- *Marianne Andrae*, Wertungswidersprüche und internationales Erbrecht (3)
- *Christian Armbrüster*, Das IPR der Versicherungsverträge in der Rom I-Verordnung (23)
- *Gregor Bachmann*, Das auf die insolvente Societas Europaea (SE) anwendbare Recht (36)
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- *Katharina Boele-Woelki*, Property Relations of International Couples in Europe: The Interaction between Unifying and Harmonizing Instruments (63)
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II. Internationales Zivilverfahrensrecht

III. Rechtsvergleichung – Internationalisierung – Transnationales Recht

IV. Schiedsgerichtsbarkeit (Arbitration)

Franzina (Ed.), Commentary on Rome III Regulation

The Italian journal *Le Nuove Leggi Civili Commentate* has published in its latest issue (no. 6/2011) an **extensive commentary of the Rome III Regulation** (Council Regulation (EU) No 1259/2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation). The same journal had published, back in 2009, the first article-by-article comment of the Rome I Reg. (see our previous post here).

The commentary has been written, under the editorship of *Pietro Franzina* (Univ. of Ferrara), by a team of Italian scholars: *Giacomo Biagioni* (Univ. of Cagliari), *Zeno Crespi Reghizzi* (Univ. of Milano)*, Antonio Leandro* (Univ. of Bari) and *Giulia Rossolillo* (Univ. of Pavia). Here's the comments' list:

> *Introductory remarks: P. Franzina, Z. Crespi Reghizzi; Art. 1: G. Rossolillo; Arts. 2-3: P. Franzina; Art. 4: A. Leandro; Arts. 5-7: G. Biagioni; Art. 8: Z. Crespi Reghizzi; Art. 9: G. Rossolillo; Arts. 10-13: A. Leandro; Arts. 14-15: P. Franzina; Art. 16: G. Rossolillo; Art. 17: G. Biagioni; Art. 18: Z. Crespi Reghizzi; Art. 19: G. Biagioni; Art. 20: G. Rossolillo; Art. 21: Z. Crespi Reghizzi.*

A detailed table of contents is available here.

Katia Fach on Arbitration

Dr. Katia Fach (Universidad of Zaragoza) is author of “Rethinking the Role of Amicus Curiae in International Investment Arbitration”, to be found in 35 *Fordham International Law Journal 510,* and also here (SSRN)

> The intervention of amicus curiae in investment arbitration is a matter of great interest and it will continue generate a legal debate in the future. In the wake of multiple courts and some tribunals, several rules on investment arbitration have increasingly recognized the possibility that the general interest is protected through amicus submissions. The fact that a party of the investment arbitration is a state and problems transcend the interests of the specific parties involved in the arbitration justify the progressive implementation of the principle of transparency, which has been traditionally rejected in commercial arbitration, in the field of investment arbitration.The acceptance of the institution of amicus curiae in BITs and arbitration rules has resulted recently in various NGOs submitting amicus briefs in relevant international arbitrations. Additionally, UNCITRAL and ICC are currently developing two projects in the field of investment arbitration that are going to address the issue of amicus briefs. Taking all of this data as reference, this Note reflects on the most appropriate regulation of the institution of amicus curiae. This means taking into account a multiplicity of factors, both internal -concerning the content and the submission process- and external -referring to the relationship of these non-parties with other participants in investment arbitration-. The approach taken regarding this regulation is multiple, since the institution of amicus curiae is controversial. Against the multiple benefits preached mainly by NGOs, investors believe that the acceptance of amicus curiae brings various injustices. The proposal advocated by this Note is twofold. On the one hand, the acceptance of unsolicited amicus briefs should be governed by a set of criteria able to block any submission that do not benefit the outcome of arbitration and are excessively detrimental to the parties and arbitrators of the investment dispute. On the other hand, institutions managing investment arbitrations could establish a new institution exclusively and permanently dedicated to defending the collective interest. This proposal, although suggestive, would imply a major change in the system and therefore their perspectives of success would possibly materialize in the

medium to long term.

Also from Katia Fach, see "Ecuator's Atteinment of the Sumak Kawsay and the Role Assigned to International Arbitration", the *Yearbook of International Investment Law and Policy*, 2010-2011, pp. 451-487:

> Article 422 of the 2008 Ecuadorian Constitution prevents the Ecuadorian State from ceding its sovereign jurisdiction to international arbitration entities through entering into Treaties or international instruments. This provision is a clear manifestation of the rejection generated in Ecuador by an *ex ante* and general submission to international tribunals. This chapter discusses in detail the wording of Article 422, highlighting the doubts and difficulties of interpretation posed by this constitutional provision. It also reflects on two events derived from the approval of Article 422: the denunciation of the ICSID Convention and the denunciation of a number of Bilateral Treaties on the Promotion and Guarantee of Investments signed by Ecuador. The chapter also studies some recent judgments of the Ecuadorian Constitutional Court, which have declared many BITs as unconstitutional. A detailed review of these decisions will lead us to make a critical assessment. Finally, it analyzes the most recent manifestations of the Ecuadorian government regarding international investments. These latest contractual and legislative developments force us to reconsider the real impact that Article 422 of the Constitution is having on Ecuadorian economic life.

Cuniberti on the Efficiency of Exequatur

I have posted Some Remarks on the Efficiency of Exequatur on SSRN. The abstract reads:

> *After the European Council announced that it wanted to suppress intermediate measures in the enforcement of foreign judgments within the European Union, the European Commission has proposed to abolish the procedure whereby*

courts of the Member states may verify whether foreign judgments meet some basic requirements of the forum (exequatur).

The project of abolishing exequatur has attracted strong criticism among European scholars. It has been pointed out that the most important function of exequatur is to verify whether the foreign court did not violate human rights, and that suppressing it would entail dramatically reducing human rights protection in the European Union.

Most of these scholars have dismissed the economic argument made by the European lawmaker to justify its project that the existing procedure, which delays and increases the costs of cross-border debt recovery, is simply too costly. This short paper offers some preliminary thoughts on the efficiency of the exequatur procedure. It argues that as human rights violations are, in practice, almost exclusively violations of procedural rights, the impact of human rights violations is essentially to decrease the chances to win on the merits in cases where the symbolic dimension of the right to a fair trial is negligible. The paper thus distinguishes between two categories of cases and argues that, in commercial and consumer cases, exequatur is clearly too costly and should be abolished, while the situation might be different in tort and labor cases.

The paper is forthcoming in the *Festschrift für Bernd von Hoffmann.*

Stephan on Germany v. Italy

Paul Stephan, who is the John C. Jeffries, Jr. Distinguished Professor of Law at the University of Virginia, comments on the recent judgment of the International Court of Justice in *Jurisdictional Immunities of the State* over at the lawfareblog.