Recent Canadian Conflicts Articles

The following articles about conflict of laws in Canada were published over the past year or so:

Elizabeth Edinger, “Is Duke v Andler Still Good Law in Common Law Canada?” (2011) 51 Can Bus LJ 52-75

Matthew E Castel, “The Impact of the Canadian Apology Legislation when Determining Civil Liability in Canadian Private International Law” (2012) 39 Adv Q 440-451

Nicholas Pengelley, “This Pig Won’t Fly: Death Threats as Grounds for Refusing Enforcement of an Arbitral Award” (2010) 37 Adv Q 386-402

Tanya Monestier, “Is Canada the New ‘Shangri-La’ of Global Securities Class Actions?” (2012) 32 Northwestern Journal of International Law and Business _.

Electronic access to these articles depends on the nature of the subscriptions. Some journals are available immediately through aggregate providers like HeinOnline while others delay access for a period of months or years.

Declaration of Committee of Ministers on Libel Tourism

The Committee of Ministers of the Council of Europe has adopted on July 4th a Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, “Libel Tourism”, to Ensure Freedom of Expression.

> *1. The full respect for the right of all individuals to receive and impart information, ideas and opinions, without interference by public authorities and*

regardless of frontiers constitutes one of the fundamental principles upon which a democratic society is based. This is enshrined in the provisions of Article 10 of the European Convention on Human Rights ("the Convention", ETS No. 5). Freedom of expression and information in the media is an essential requirement of democracy. Public participation in the democratic decision-making process requires the public to be well informed and to have the possibility of freely discussing different opinions.

2. Article 10 of the Convention also states that the right to freedom of expression "carries with it duties and responsibilities". However, States may only limit the exercise of this right to protect the reputation or rights of others, as long as these limitations are "prescribed by law and are necessary in a democratic society". In this respect, in its reply to Parliamentary Assembly Recommendation 1814 (2007) "Towards decriminalisation of defamation", adopted on 7 October 2009, the Committee of Ministers endorsed the Parliamentary Assembly's views and called on member States to take a proactive approach in respect of defamation by examining domestic legislation against the case law of the European Court of Human Rights ("the Court") and, where appropriate, aligning criminal, administrative and civil legislation with those standards. Furthermore, the Committee of Ministers recalled Parliamentary Assembly Recommendation 1589 (2003) on "Freedom of expression in the media in Europe".

3. The European Commission of Human Rights and the Court have, in several cases, reaffirmed a number of principles that stem from paragraphs 1 and 2 of Article 10. The media play an essential role in democratic societies, providing the public with information and acting as a watchdog,1 exposing wrongdoing and inspiring political debate, and therefore have specific rights. The media's purpose is to impart information and ideas on all matters of public interest.2 Their impact and ability to put certain issues on the public agenda entails responsibilities and obligations. Among these is to respect the reputation and rights of others and their right to a private life. Furthermore, "subject to paragraph 2 of Article 10 (art. 10-2), [freedom of expression] is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population".3

4. In defamation cases, a fine balance must be struck between guaranteeing the

fundamental right to freedom of expression and protecting a person's honour and reputation. The proportionality of this balance is judged differently in different member States within the Council of Europe. This has led to substantial variations in the stringency of defamation law or case law, for example different degrees of attributed damages and procedural costs, varying definitions of first publication and the related statute of limitations or the reversal of the burden of proof in some jurisdictions. The Court has established case law in this respect: "In determining the length of any limitation period, the protection of the right to freedom of expression enjoyed by the press should be balanced against the rights of individuals to protect their reputations and, where necessary, to have access to a court in order to do so. It is, in principle, for Contracting States, in the exercise of their margin of appreciation, to set a limitation period which is appropriate and to provide for any cases in which an exception to the prescribed limitation period may be permitted".4

Libel tourism and its risks

5. The existing differences between national defamation laws and the special jurisdiction rules in tort and criminal cases have given rise to the phenomenon known as "libel tourism". Libel tourism is a form of "forum shopping" when a complainant files a complaint with the court thought most likely to provide a favourable judgment (including in default cases) and where it is easy to sue. In some cases a jurisdiction is chosen by a complainant because the legal fees of the applicant are contingent on the outcome ("no win, no fee") and/or because the mere cost of the procedure could have a dissuasive effect on the defendant. The risk of forum shopping in cases of defamation has been exacerbated as a consequence of increased globalisation and the persistent accessibility of content and archives on the Internet.5

6. Anti-defamation laws can pursue legitimate aims when applied in line with the case law of the Court, including as far as criminal defamation is concerned. However, disproportionate application of these laws may have a chilling effect and restrict freedom of expression and information. The improper use of these laws affects all those who wish to avail themselves of the freedom of expression, especially journalists, other media professionals and academics. It can also have a detrimental effect, for example on the preservation of information, if content is withdrawn from the Internet due to threats of defamation procedures. In some cases libel tourism may be seen as the attempt to

intimidate and silence critical or investigative media purely on the basis of the financial strength of the complainant ("inequality of arms"). In other cases the very existence of small media providers has been affected by the deliberate use of disproportionate damages by claimants through libel tourism. This shows that libel tourism can even have detrimental effects on media pluralism and diversity. Ultimately, the whole of society suffers the consequences of the pressure that may be placed on journalists and media service providers. The Court has developed a body of case law that advocates respect for the principle of proportionality in the use of fines payable in respect of damages and considers that a disproportionately large award constitutes a violation of Article 10 of the Convention.6 The Committee of Ministers also stated this in its Declaration on Freedom of Political Debate in the Media of 12 February 2004.7

7. Libel tourism is an issue of growing concern for Council of Europe member States as it challenges a number of essential rights protected by the Convention such as Article 10 (freedom of expression), Article 6 (right to a fair trial) and Article 8 (right to respect for private and family life).

8. Given the wide variety of defamation standards, court practices, freedom of speech standards and a readiness of courts to accept jurisdiction in libel cases, it is often impossible to predict where a defamation/libel claim will be filed. This is especially true for web-based publications. Libel tourism thereby also demonstrates elements of unfairness. There is a general need for increased predictability of jurisdiction, especially for journalists, academics and the media.

9. The situation described in the previous paragraph has been criticised in many instances. Further, in a 2011 Joint Declaration, the United Nations (UN) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Organisation for Security and Co-operation in Europe (OSCE) Representative on freedom of the media, the Organisation of American States (OAS) Special Rapporteur on freedom of expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on freedom of expression and access to information in Africa stated that jurisdiction in legal cases relating to Internet content should be restricted to States to which those cases have a real and substantial connection.

10. Procedural costs may discourage defendants from presenting a defence

thus leading to default judgments. Compensations may be considered disproportionate in the member State where the claim is being enforced due to the failure to strike an appropriate balance between freedom of expression and protection of the honour and reputation of persons.

Measures to prevent libel tourism

11. The prevention of libel tourism should be part of the reform of the legislation on libel/defamation in member States in order to ensure better protection of the freedom of expression and information within a system that strikes a balance between competing human rights.

12. With a view to further strengthening the freedom of expression and information in member States, an "inventory" of the Court's case law in respect of defamation could be established with a view to suggesting new action if need be. Further, if there is a lack of clear rules as to the applicable law and indicators for the determination of the personal and subject matter jurisdiction, such rules should be created to enhance legal predictability and certainty, in line with the requirements set out in the case law of the Court. Finally, clear rules as to the proportionality of damages in defamation cases are highly desirable.

13. Against this background, the Committee of Ministers:

– alerts member States to the fact that libel tourism constitutes a serious threat to the freedom of expression and information;

– acknowledges the necessity to provide appropriate legal guarantees against awards for damages and interest that are disproportionate to the actual injury, and to align national law provisions with the case law of the Court;

– undertakes to pursue further standard-setting work with a view to providing guidance to member States.

1 Goodwin v. United Kingdom, European Court of Human Rights, 27 March 1996, paragraph 39.

2 De Haes and Gijsels v. Belgium, European Court of Human Rights, 24 February 1997, paragraph 37.

3 Handyside v. United Kingdom, European Court of Human Rights, 7 December 1976, paragraph 49.

4 Times Newspapers Ltd. (Nos. 1 and 2) v. United Kingdom, European Court of Human Rights, 10 March 2009, paragraph 46.

5 Times Newspapers Ltd. (Nos. 1 and 2) v. United Kingdom, European Court of Human Rights, paragraph 45.

6 Tolstoy Miloslavsky v. United Kingdom, European Court of Human Rights, 13 July 1995, paragraph 51.

7 "Damages and fines for defamation or insult must bear a reasonable relationship of proportionality to the violation of the rights or reputation of others, taking into consideration any possible effective and adequate voluntary remedies that have been granted by the media and accepted by the persons concerned."

The Future of the European Insolvency Law (Conference)

A conference under the title *The Future of the European Insolvency Law – Reforming the European Insolvency Regulation,* organized by the Institut für ausländisches und internationales Privat- und Wirtschatftsrecht (Ruprecht-Karls Universität, Heidelberg) and the Institut für Zivilverfahrensrecht (Universität Wien) will take place in Heidelberg on Friday 27th and Saturday 28th. Attendance is by invitation only. Here is the programme:

Friday 27th July, from 2 p.m.:

(Welcome)

14.15-14.30 Jérôme Carriat, DG Justice – European Commission, Principal Administrator : *Current developments in European insolvency law – A brief report from Brussels*

14.30-16 Chair: *Prof. Dr. Burkhard Hess* / Mr Christopher Seagon*: Scope of the insolvency regulation (Listed proceedings in the Annexes – Recognition and enforcement of foreign insolvency proceedings*)

16.30- 18 Chair: *Prof. Dr. Burkhard Hess* / Prof. Dr. Paul Oberhammer: *The concept of COMI*

Saturday 28th July, from 9 a.m.

9-10.30 Chair: *Prof. Dr. Burkhard Hess* / Prof. Dr. Paul Oberhammer: *Main and secondary insolvency proceedings*

11-12.30 Chair: *Prof. Dr. Thomas Pfeiffer* / Prof. Dr. Paul Oberhammer: *Insolvency within multinational enterprise groups*

14-16.30 Chair: *Prof. Dr. Thomas Pfeiffer*/ Prof. Dr. Andreas Piekenbrock: *Applicable law*

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.