New Book: "Substance and Procedure in Private International Law"

The latest title in the Oxford Private International Law Series has just been published: *Substance and Procedure in Private International Law* by Professor Richard Garnett.

The OUP abstract reads:

> *When the law of a foreign country is selected or pleaded by a claimant or defendant, a question arises as to whether the issue pertains to substance, in which case it may be resolved by foreign law, or procedure, in which case it will be governed by the law of forum. This book examines the distinction between substance and procedure questions in private international law, and analyses where and whether each is appropriate. To do so, it examines previous attempts to define the scope of procedure in private international law, considers alternative choice of law methods for referring matters to the law of forum, and examines the influence of the doctrine of characterization on procedure.*
>
> *Substance and Procedure in Private International Law also provides detailed analysis of the decisional law in which the substance-procedure distinction has been employed, creating a clear assessment of its application in various practical situations and providing valuable guidance for practitioners on how the distinction should be applied. The book also considers 'procedural' topics such as service of process and the taking of evidence abroad, in order to show how the application of forum law may further be limited by foreign laws.*

The book:

- Examines the rules governing substance and procedure in private international law to provide a clear and precise delimitation of their function
- Outlines the procedural classification and its importance as a tool within forum law

- Discusses important areas of legal doctrine, such as damages, evidence, and statutes of limitation, to demonstrate the distinctions used
- Provides practical guidance on how the substance-procedure distinction might be applied in future cases

As introductory topics, the book covers the origins, rationale and definition of the substance and procedure distinction, and characterisation, alternative methods of forum reference and harmonization. It then considers specific areas which raise the substance/procedure distinction: service and jurisdiction; parties to litigation; judicial administration; evidence, both general principles and specific issues concerning taking evidence abroad and privilege; statutes of limitation; and remedies, dealing with general principles, non-monetary relief, statutory restrictions, and damages and statutory compensation.

Throughout, the book refers to cases from a variety of jurisdictions, including England, the EU, the USA, Canada, Hong Kong, Singapore, New Zealand and Australia. It is comprehensive in scope, exhaustively researched and clearly written. The book will be of great assistance to any practitioner in the private international law field but is also an academic work of the highest quality. As Sir Anthony Mason, former Chief Justice of the High Court of Australia, concludes in his forward to the book:

> *This work is not just an admirable statement of the law as it currently stands; it identifies and engages with deeper underlying issues and offers persuasive solutions to them. In addition, it presents a penetrating analysis of the existing rules and the decided cases.*

The first chapter is available for free download here.

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.