Two Wins for Chevron

Here.

Volume on "International Antitrust Litigation"

Jürgen Basedow, Director of the Max-Planck-Institute for Comparative and Private International Law in Hamburg, ***Stéphanie Francq***, Professor of European Law at the Université catholique de Louvain, and ***Laurence Idot***, Professor at the University of Paris 2 Panthéon-Assas have edited a volume on international antitrust ligitation. It has been published by Hart Publishing (Oxford) and covers a variety of topics, including jurisdiction and applicable law, in EU and US law.

The official summary reads as follows:

> *"The decentralisation of competition law enforcement and the stimulation of private damages actions in the European Union have led to an increasing internationalisation of competition law proceedings. As a consequence, there is an ever-growing need for clear and workable rules to coordinate such cross-border actions. The background of this in-depth publication is a European Commission sponsored research project which brought together European and US experts from the areas of academia, legal practice and policy-making to critically examine the most important international antitrust provisions, to analyse them in relation to EU conflict of laws provisions and to formulate proposals for the improvement and consolidation of cross-border actions.*
>
> *The findings have been compiled in 16 chapters which cover not only the relevant provisions of EU private international law, but also key issues of US procedural law which are highly relevant for transatlantic damages actions. The work additionally considers thus far neglected topics such as questions regarding jurisdictional competence and the applicable law as well as rules on*

the sharing of evidence and the protection of business secrets."

More information, including a table of content, can be found on the publisher's website.

European PIL Conference Series at the Cour de cassation

The French supreme court for private and criminal matters (*Cour de cassation*) will host three conferences on European private international law in the coming months.

The first conference will take place on June 14th and will focus on the law applicable to obligations (Rome I and Rome II). The speakers will be Professor Paul Lagarde and Justice Jean-Pierre Ancel (former president of the division of the *Cour de cassation* specialised in PIL matters).

The second conference will take place on September 27th and focus on Jurisdiction and Judgments in Civil and Commercial Matters (Brussels I). The speakers will be Professor Catherine Kessedjian and Michael Wilderspin (European Commission).

The third conference will be held on October 25th and will focus on family law (*le couple et l'enfant*). The speakers will be Professor Marc Fallon and Justice (formerly professor) Françoise Monéger (Division of the *Cour de cassation* specialised in PIL matters).

All conferences will be held in French, from 6 to 8 pm on Thursdays. Admission will likely be free.

Hague Academy Sixth Newsletter

The sixth Newsletter of the Hague Academy of International Law can be found here.

Bermann on the Gateway Problem in International Commercial Arbitration

George A. Bermann, who is the Gellhorn Professor of Law & Jean Monnet Professor of European Union Law at Columbia University School of Law, has published The "Gateway" Problem in International Commercial Arbitration in the last issue of the *Yale Journal of International Law*.

> *Participants in international commercial arbitration have long recognized the need to maintain arbitration as an effective and therefore attractive alternative to litigation, while still ensuring that its use is predicated on the consent of the parties and that the resulting awards command respect. A priori, at least, all participants—parties, counsel, arbitrators, arbitral institutions—have an interest in ensuring that arbitration delivers the various advantages associated with it, notably speed, economy, informality, technical expertise, and avoidance of national fora, while producing awards that withstand judicial challenge and otherwise enjoy legitimacy.*
>
> *National courts play a potentially important policing role in this regard. Most jurisdictions have committed their courts to do all that is reasonably necessary to support the arbitral process. Among the ways courts do so is by ensuring that arbitral proceedings are initiated and pursued in a timely and effective manner. But those same courts are commonly asked by a party resisting arbitration to intervene at the very outset to declare that a prospective arbitration lacks an adequate basis in party consent. No legal system that permits the arbitration of*

at least some disputes (and most do) is immune to the possibility that its courts will become engaged in an inquiry of that sort at the very threshold of arbitration. Each must decide how, at this early stage, to promote arbitration as an effective alternative to litigation, while at the same time ensuring that any order issued by a court compelling arbitration is supported by a valid and enforceable agreement to arbitrate. The challenge consists of identifying those issues that courts—in the interest of striking the proper balance between these two objectives—properly address at what is increasingly known, in common U.S. parlance, as the "gateway" of arbitration. This "gateway" problem is the focus of the present Article.

For purposes of this Article, I consider an arbitral regime to be effective to the extent that it operates to promote the procedural advantages I posited earlier—speed, economy, informality, technical expertise, and avoidance of national fora. While legitimacy might be defined in many different ways, I consider an arbitral regime to be legitimate (or to enjoy legitimacy) to the extent that the parties who were compelled to arbitrate rather than litigate, and will be bound by the resulting arbitral award, consented to step outside the ordinary court system in favor of an arbitral tribunal as their dispute resolution forum.

Legal systems differ in their responses to the challenge of reconciling efficacy and legitimacy in arbitration, and even in the extent to which they acknowledge that the challenge exists and try to articulate a framework of analysis for addressing it. This Article proceeds on the premise that legal systems have a serious enough interest in properly reconciling the values of efficacy and legitimacy to warrant their developing an adequate framework of analysis, as well as articulating that framework in a clear, coherent, and workable fashion.

In the United States, Congress has largely ignored the challenge of reconciling efficacy and legitimacy in arbitration, as have the states even when establishing statutory regimes to govern arbitration conducted in their territory. The matter has accordingly fallen to the courts. In this Article, I reexamine the jurisprudence that American courts have developed, increasingly under the leadership of the U.S. Supreme Court, to address the fundamental tension between arbitration's efficacy and legitimacy interests that exists at the very threshold of arbitration. The exercise has come to consist largely of demarcating "gateway" issues (i.e., issues that a court entertains at the

threshold to ensure that the entire process has a foundation in party consent) from "non-gateway" issues (i.e., issues that arbitral tribunals, not courts, must be allowed to address initially, if arbitration is to be an effective mode of dispute resolution).

This Article proceeds as follows. Part II briefly sketches the settings in which courts may be asked to conduct the early policing with which this Article is concerned. Part III identifies the terminological confusion that has hampered clear thinking on the subject, and proposes a coherent vocabulary for overcoming it. Part IV then explores critically the conceptual devices that courts and commentators have traditionally employed in sorting through the issues. In so doing, it demonstrates that the two notions most widely relied upon for this purpose—Kompetenz-Kompetenz and separability—are unequal to the task, and explains why. A critical understanding of U.S. law in this regard is aided by comparing it to models—the French and German—that claim to have devised simple and workable formulae for reconciling efficacy and legitimacy interests at the outset of the arbitral process. That discussion will show how the often proclaimed universality of Kompetenz-Kompetenz and separability is in fact misleading.

Against this background, Part V traces how recent U.S. case law has progressively pursued a more nuanced balance between efficacy and legitimacy than the traditional conceptual tools tended to yield. The courts have achieved this result, not by erecting a single comprehensive framework of analysis, but rather through a series of pragmatic adjustments to the received wisdom associated with Kompetenz-Kompetenz and separability. I conclude that they have developed a suitably complex body of case law that ordinarily reaches sound results. But I am equally certain that, in doing so, they have failed adequately to rationalize the case law. The disparate strands of analysis—each of which is basically sound—have combined to produce a needlessly confusing case law to the detriment of clarity, coherence, and workability. I suggest that the case law can and should be recast, and that the central feature of that recasting must be a serious and frank confrontation of the underlying tradeoff between arbitration's efficacy and legitimacy interests. This Article is thus both descriptive and normative in outlook.

Swiss Institute of Comparative Law: 24e Journée de DIP on International Family Law

On Friday, 16th March 2012, the Swiss Institute of Comparative Law (ISDC) will host the **24th *Journée de droit international privé***, organised in collaboration with the University of Lausanne (Center of Comparative Law, European Law and International Law – CDCEI). The conference will analyse the latest developments in international family law, under a Swiss and an EU perspective : "**Derniers développements suisses et européens en droit international privé de la famille**". Here's the programme:

Mot de bienvenue par les organisateurs (09h00 – 09h10):

- *Christina Schmid* (Directrice à l'Institut suisse de droit comparé);
- *Andrea Bonomi* (Directeur CDCEI de l'Université de Lausanne).

Première Session (09h10 – 11h00)
Le divorce et ses conséquences:

- La révision du droit international privé du divorce et de la prévoyance professionnelle, *Gian Paolo Romano* (Professeur, Université de Genève);
- Le droit applicable en matière de divorce selon le règlement européen Rome III, *Cristina Gonzalez Beilfuss* (Professeure, Université de Barcelone);
- Le droit applicable aux conséquences patrimoniales du divorce dans les Etats de l'Union européenne, *Andrea Bonomi* (Professeur, Université de Lausanne)
- Discussion et questions.

11h00 – 11h30 Café offert par l'Association des Alumni et Amis de l'ISDC (AiSDC)

Deuxième Session (11h30 – 13h00)
Le mariage et les actes d'état civil:

- IPR Aspekte der Zwangsheiraten, *Lukas Bopp* (Dr. iur., Avocat à Bâle);
- Le droit du nom entre réformes législatives et évolution du contexte européen, *Michel Montini* (Avocat à Neuchâtel, Maître de conférence à l'Université de Fribourg);
- Discussion et questions.

13h00 – 14h30 Déjeuner

Troisième Session (14h30 – 16h30)
La protection des mineurs:

- Nouvelles de La Haye : la Sixième réunion de la Commission spéciale sur les Conventions de 1980 et 1996, *Joëlle Küng* (Collaboratrice juridique, Conférence de La Haye de droit international privé);
- La jurisprudence relative au règlement européen Bruxelles II bis, *Bea Verschraegen* (Professeure, Université de Vienne);
- La réforme du règlement européen Bruxelles II bis, *Daria Solenik* (Collaboratrice scientifique à l'ISDC);
- Discussion et questions.

The conference will be held in French and German (no translation is provided). For further information (including fees) see the conference's programme and the registration form.

(Many thanks to Prof. Andrea Bonomi)

New Italian Private International Law Blog

A new blog on private international law was recently launched in Italy. It is called Aldricus, after the name of a glossator who explored private international law issues in the middle of the 12th century.

The general editor of the blog is Pietro Franzina, who teaches at the university of Ferrara. The posts are written in Italian.

Conflictoflaws.net wishes all the best to this new blog.

Van Den Eeckhout on Choice of Law in Employment Contracts

Veerle Van Den Eeckhout, who is professor of private international law at Leiden university (the Netherlands) and the University of Antwerp (Belgium), has posted Some Reflections on Recent European and Dutch Case-Law in Issues of International Labour Law (Koelzsch, Voogsgeerd, Vicoplus, Nuon-Case and Case FNV/De Mooij). Which (New) Possibilities for Argumentation for Employees to Claim (a Higher Level of) Labour Protection in International Situations? on SSRN.

The article, which is written in Dutch, offers an analysis of recent European and Dutch case-law dealing with issues of applicable law of international labour contracts.

The Dutch asbtract reads:

> *Recent hebben zowel het Hof van Justitie als meerdere Nederlandse rechters zich in enkele opmerkelijke zaken uitgesproken over het op een internationale arbeidsovereenkomst toepasselijke arbeidsrecht: in de zaken Koelzsch en Voogsgeerd heeft het Hof van Justitie voor het eerst artikel 6 EVO-verdrag uitgelegd en door Nederlandse rechters zijn ophefmakende uitspraken gedaan inzake toepasselijkheid van artikel 6 Buitengewoon Besluit Arbeidsverhoudingen enerzijds, inzake een door FNV tegen ” de Mooij” ingespannen zaak anderzijds. Bovendien heeft het Hof van Justitie zich in de zaak Vicoplus uitgesproken over een zaak die zich afspeelde in een context van internationale detachering en die mogelijk consequenties inhoudt voor het internationaal arbeidsecht. In deze bijdrage worden deze onderscheiden uitspraken geanalysee rd vanuit volgende invalshoek: welke*

argumentatiemogelijkheden kunnen deze uitspraken bieden aan werknemers die pogen (meer) arbeidsbescherming op te eisen indien hun rechtsverhouding zich in internationale context afspeelt? In deze analyse wordt ook aanda cht gegeven aan de mate waarin de uitspraken kunnen worden begrepen als zouden zij iets hebben veranderd aan de vermeende ” status quo” van het internationaal arbeidsrecht na de ophefmakende zaken Viking, Laval, Rü ffert en C./Luxemburg.

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.