Schooling in Cuba, Payment from Spain and the Helms Burton Act

The schooling of two children in the *École Française* of La Habana, Cuba, costs $ 1054 every three months; an amount that the father of the kids was willing to pay. However, the amount never reached destination. In September 2011, a Spanish national ordered payment by means of bank transfer from Novagalicia Banco in La Coruña (Spain), to an office in Paris, Crédit Mutuel-CIC. Unfortunately the operation was performed in dollars rather than euros: this caused the intervention of the Novagalicia Banco correspondent bank in the U.S., JPMorgan Chase Bank; and thereafter, of the US Treasury Department through the Office of Foreign Assets Control (OFAC). The OFAC is responsible for enforcing economic and trade sanctions of U.S. foreign policy, such as those prescribed by the Helms Burton Act of 1996.

The short term solution for the kids to remain enrolled was … paying again. This time in euros.

No Power to Issue Anti-Enforcement Injunctions in New York

On 26 January 2012, the U.S. Court of Appeals for the Second Circuit has issued its long-awaited opinion in the *Chevron* case on the power to issue anti-enforcement injunctions.

The judgment offers an interesting analysis of the power of U.S. Courts to issue such novel and radical injunctions. The Court finds that the issue is controlled by its (New York) *Uniform Foreign Country Money-Judgments Recognition Act*, and not by its precedents on anti-suit injunctions. The Court also discusses briefly

comity, and declines Chevron's invitation to be "*a transnational arbiter to dictate to the entire world which judgments are entitled to respect and which countries' courts are to be treated as international pariahs*".

Recognition Act

> *Whatever the merits of Chevron's complaints about the Ecuadorian courts, however, the procedural device it has chosen to present those claims is simply unavailable: The Recognition Act nowhere authorizes a court to declare a foreign judgment unenforceable on the preemptive suit of a putative judgment-debtor. The structure of the Act is clear. The sections on which Chevron relies provide exceptions from the circumstances in which a holder of a foreign judgment can obtain enforcement of that judgment in New York; they do not create an affirmative cause of action to declare foreign judgments void and enjoin their enforcement. (…)*
>
> *These procedural requirements exist for good reason. The Recognition Act and the common-law principles it encapsulates are motivated by an interest to provide for the enforcement of foreign judgments, not to prevent them. The Act "was designed to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement" in New York. The exceptions to that rule – such as the mandatory nonrecognition of judgments procured without due process or personal jurisdiction – serve the same purpose: to facilitate trust among nations and their judicial systems by preventing one jurisdiction from using the trappings of sovereignty to engage in a sort of seignorage by which easy judgments are minted and sold to any plaintiff willing to pay for them. Accordingly, a jurisdiction such as New York that requires foreign judgments to comport with certain basic requirements of fairness and legitimacy instills trust in the overall enforcement-facilitation framework.*
>
> *Chevron would turn that framework on its head and render a law designed to facilitate "generous" judgment enforcement into a regime by which such enforcement could be preemptively avoided.*

Comity

> *Considerations of international comity provide additional reasons to conclude*

that the Recognition Act cannot support the broad injunctive remedy granted by the district court. As noted above, the New York legislature, in enacting the Recognition Act, sought to provide a ready means for foreign judgment-creditors to secure routine enforcement of their rights in the New York courts, while reserving New York's right to decline to participate in the enforcement of fraudulent "judgments" obtained in corrupt legal systems whose courts failed to provide the basic rudiments of fair adjudication. In doing so, New York undertook to act as a responsible participant in an international system of justice – not to set up its courts as a transnational arbiter to dictate to the entire world which judgments are entitled to respect and which countries' courts are to be treated as international pariahs. The exceptions to New York's general policy of enforcing foreign judgments are exactly that: exceptions that permit New York courts, under specified
circumstances, to decline efforts to take advantage of New York's policy of liberally enforcing such judgments. Nothing in the language, history, or purposes of the Act suggests that it creates causes of action by which disappointed litigants in foreign cases can ask a New York court to restrain efforts to enforce those foreign judgments against them, or to preempt the courts of other countries from making their own decisions about the enforceability of such judgments. (…)

We need not address here whether and how international comity concerns would affect a hypothetical effort by a state to vest its courts with the authority to issue so radical an injunction. There is no such statutory authorization, for New York has authorized no such relief. To resolve the dispute before us, we need only address whether the statutory scheme announced by New York's Recognition Act allows the district court to declare the Ecuadorian judgment non-recognizable, or to enjoin plaintiffs from seeking to enforce that judgment. Because we find that it does not, the injunction collapses before we reach issues of international comity.

Centre for Private International Law at the University of Aberdeen

On 1 January 2012, the Law School of the University of Aberdeen launched the Centre for Private International Law. The Centre has grown out of a long and distinguished tradition of private international law scholarship at the Law School and is led by Professor Paul Beaumont FRSE. It seeks to promote the development of private international law, and to provide a platform for discussion of current issues in private international law. The Centre advances this mission through high quality research and publications, teaching (excellent undergraduate courses and a specialised masters programme in private international law), research, and through events such as conferences, workshops and seminars aimed at fostering scholarship and encouraging international networking. The Centre prides itself on a well-established track record in private international law reform. The Centre has a close working relationship with Hart Publishing. Professor Beaumont is one of two editors who created and still run the Journal of Private International Law that is the leading English language journal on the subject. He is also one of two Series Editors for Hart publishing's Studies in Private International Law.

For more information see: http://www.abdn.ac.uk/law/private-international-law

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Issue 2011.4 Nederlands Internationaal Privaatrecht

The fourth issue of 2011 of the Dutch journal on Private International Law, Nederlands Internationaal Privaatrecht includes the following articles on Brussels I and abolition of exequatur, the proposal European Arrest Preservation Order, Service of Documents and Intercountry surrogacy:

Xandra Kramer, Abolition of exequatur under the Brussels I Regulation: effecting and protecting rights in the European judicial area, p. 633-641. The abstract reads:

As a consequence of the policy to gradually abolish the exequatur in the EU, the Commission proposal on the Recast of Brussels I envisages the abolition of intermediate proceedings. In line with previous instruments that abolish the exequatur for specific matters or in relation to specific proceedings, the proposal at the same time intends to abolish most grounds to challenge the enforcement. It is submitted that recent instruments and proposals in the area of European civil procedure, including the Brussels I proposal, primarily focus on obtaining and effecting rights by the claimant, sometimes at the expense of the protection of the right to effectively defend oneself. As a way forward, it is viable to abolish the formality of the ex ante declaration of enforceability, while retaining the grounds to challenge the enforcement in the Member State of enforcement.

Bart-Jan van het Kaar, Het Europees bankbeslag en het Nederlands conservatoire derdenbeslag in Europees verband, p. 642-651. The English abstract reads:

This article deals with the international scope of a Dutch third party garnishment order. The scope of a third party garnishment order is in the current situation limited to the territory of the court granting this order (territorial effect). It is not possible to recognise and enforce such an order in accordance with the rules of the Brussels I Regulation. The judgment of the European Court of Justice in the Denilauler case (ECJ 21 May 1980, C-125/79) is a barrier against enforcement. It prevents granting any cross-border effect to a judgment delivered in ex parte proceedings, without the defendant being summoned to appear and the opportunity to be heard on the merits of the case. In most cases garnishment orders are given on a purely ex parte basis, and therefore are barred from enforcement in another member state. There are two recent developments that might change this current situation. Firstly, the European Commission published a Proposal for a European Account Preservation Order ('EAPO') to facilitate cross-border debt recovery in civil and commercial matters (COM (2011) 445 final). This proposal introduces harmonised European proceedings through which a claimant can request the issuance of an EAPO with the aim of preserving and attaching bank accounts held in other member states. Secondly, there is the proposal by the European Commission to change or revise the Brussels I Regulation. In this proposal the Denilauler restriction is removed for ex parte

decisions. This is the case for decisions granted by a court having jurisdiction on the substance of the matter (Arts. 2 and 5-23). Both developments put the international scope of a Dutch third party garnishment order into a different light. This paper discusses both proposals in depth and investigates if and to which extent this new set of rules will result in the future possibility for a Dutch court to grant cross-border effect to a garnishment order.

Chr.F. Kroes, Deformalisering van de internationale betekening in een drieslag. The English abstract reads:

In less than two years, the Dutch Supreme Court has handed down four decisions on the service of documents abroad in civil and commercial matters. The first decision concerns the Service Regulation. The Supreme Court finds that the Service Regulation does not apply if, under local rules, service may take place at the offices of the lawyer who was most recently instructed by the defendant. Such service is allowed in the case of opposition and an appeal, both to the Court of Appeal and the Supreme Court. In its second and third judgment, the Supreme Court extended this rule to the Hague Convention on Service. In its fourth judgment, the Supreme Court found that, in the case of service on a foreign defendant at the offices of his (former) lawyer, only the short-term service needs to be observed that applies to domestic service and which is a week, instead of the four weeks that must be observed in case of the application of the Service Regulation or the Hague Convention. These decisions of the Supreme Court certainly make the practitioner's life somewhat easier, but they are not entirely free of any risks. It remains to be seen whether the judgments of the Supreme Court will stand up to the scrutiny of the European Court of Justice if recognition and enforcement pursuant to the Brussels Regulation would be challenged in a judgment by default against a foreign defendant where service has only taken place in accordance with local rules.

Jinske Verhellen, Intercountry surrogacy: a comment on recent Belgian cases. The abstract reads:

This article has the modest goal of examining five recent Belgian judgments on cross-border surrogacy. In four cases Belgian commissioning parents approached a surrogate mother abroad (California, India and Ukraine) and subsequently asked for recognition of the foreign birth certificates in Belgium. The other case concerned a child that was born in Belgium and thereafter transferred to the

Netherlands. On the basis of these cases the article elaborates on the Belgian rules of private international law and the current case-by-case approach of the Belgian judges. It becomes clear that cross-border surrogacy raises complex issues of private international law and child protection. Therefore, there is a pressing need for a more global approach.

Fourth Issue of 2011's Belgian PIL E-Journal

The fourth issue of the Belgian bilingual (French/Dutch) e-journal on private international law *Tijdschrift@ipr.be / Revue@dipr.be* for 2011 was just released.

The journal essentially reports on European and Belgian cases addressing issues of private international law. This issue does not include articles.

Rühl on Choice of Law by the Parties in European PIL

Giesela Rühl (Jena University) has posted Choice of Law by the Parties in European Private International Law on SSRN.

> *The article provides an overview of choice of law in European Private International Law. It explores the function, the historical development as well as the current scope and design of party choice under the pertaining European Union provisions.*

The paper is forthcoming in the *Max Planck Encyclopedia of European Private Law*.

Rühl on Unilateralism in European Private International Law

Giesela Rühl (Jena University) has posted Unilateralism in European Private International Law on SSRN.

> *The articles deals with unilateralism and multilateralism in European Private International Law. It provides an overview of the historical development and looks at trends in current national and international legal systems. It argues that, in Europe, multilateralism has by and large prevailed both on the level of national and on the level of international (European) law. However, it also shows that unilateralism plays an important role in international economic law and secondary European Union law.*

The paper is forthcoming in the *Max Planck Encyclopedia of European Private Law*.

Boehm on Private Securities Fraud Litigation after Morrison

Joshua L. Boehm, who is a J.D. Candidate at Harvard Law School, has published Private Securities Fraud Litigation after *Morrison v. National Australia Bank*: Reconsidering a Reliance-Based Approach to Extraterritoriality in the last issue of the *Harvard International Law Journal*.

In June 2010, the U.S. Supreme Court issued a momentous decision in Morrison v. National Australia Bank, upending decades of federal appeals court precedent in transnational securities law. The Court established a bright line, transaction-based test for when Section 10(b) ("Sec. 10(b)") of the Securities Exchange Act of 1934 ("Exchange Act") can apply extraterritorially. Morrison essentially requires that the fraud-related transactions at issue be conducted in the United States to allow a claim for relief in U.S. courts. This has had a significant impact on securities litigation because Sec. 10(b) and its implementing regulation, Rule 10b-5, provide the most common cause of action for securities fraud in the United States.

This new test has resulted in a narrower field for private Sec. 10(b) litigation than that available under the dominant regime before Morrison, the Second Circuit's conducts and effects test ("conducts-effects"). Lower federal courts, principally the Southern District of New York ("SDNY"), have already cited Morrison to dismiss multiple Sec. 10(b) cases with a transnational element. But this effect may well be short-lived. In July 2010, with the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "DFA"), Congress restored conducts-effects for transnational securities fraud suits brought by the U.S. government, while also directing the Securities and Exchange Commission ("SEC") to conduct a study on whether and to what extent a private right of action should be extended beyond Morrison's transactional test.

For years before Morrison, the conducts-effects test was consistently criticized on the grounds that it was overly broad and unevenly applied. While Morrison answered those who called for predictability, the Dodd-Frank Act's partial overruling of the decision has, at least for the moment, infused this area of law with more ambiguity than it had pre-Morrison. Courts, shareholders, and companies will continue to operate in this uncertain state until at least early 2012, when Congress will receive the SEC's report on private rights of action and decide how to finalize the extraterritorial scope of that realm of law.

The financial, legal, and even diplomatic implications of these developments are immense. Yet all ultimately relate to a fundamental tension arising from the goal of ensuring that the United States is neither a "Barbary Coast" for "international securities pirates" nor a "Shangri-La of class-action litigation representing those allegedly cheated in foreign securities markets."

Reconciling such aims requires consideration of the ever-internationalizing nature of corporate activity and securities markets, as well as class-action litigation trends, the availability of securities fraud remedies abroad, and coherence with other areas of law in which presumptions of extraterritoriality are made.

Brand on Access to Justice and Due Process

Ronald A. Brand, who is the Chancellor Mark A. Nordenberg University professor at the University of Pittsburgh School of Law, has posted Access-to-Justice Analysis on a Due Process Platform on SSRN. Here is the abstract:

In their article, Forum Non Conveniens and The Enforcement of Foreign Judgments*, Christopher Whytock and Cassandra Burke Robertson provide a wonderful ride through the landscape of the law of both forum non convenience and judgments recognition and enforcement. They explain doctrinal development and current case law clearly and efficiently, in a manner that educates, but does not overburden, the reader. Based upon that explanation, they then provide an analysis of both areas of the law and offer suggestions for change. Those suggestions, they tell us, are necessary to close the "transnational access-to-justice gap" that results from apparent differences between rules applied in a forum non conveniens analysis and rules applied to the question of recognition of foreign judgments. While the analysis is good, it ignores core differences among legal systems, particularly the due process core of U.S. jurisdictional jurisprudence and the "access to justice" approach to jurisdiction, particularly of European civil law systems (from which most other civil law systems draw their origins). This distinction involves a fundamental difference, with U.S. doctrine focusing on the rights of the defendant and the civil law doctrine focusing on the rights of the plaintiff. So long as this difference exists, it will not be possible to wrap the process of declining*

jurisdiction and the process of recognition of foreign judgments in the same cloak of doctrine in order to provide common or connected analysis.

The paper is forthcoming in the *Columbia Law Review Sidebar*.

Vacancies at the BIICL

The British Institute of International and Comparative Law is one of the leading independent research centres for international and comparative law in the world. Its research, events and publications are based on deep scholarly knowledge and strong practical experience that can be applied to many situations. It seeks to make an impact around the world through the operation of international and comparative law and the rule of law. It has undertaken a number of recent innovative strategies that have led to the foundation of the Bingham Centre for the Rule of Law and the creation of new research positions.

The Institute is looking to appoint a **Deputy Director** to provide clear organisational leadership at a senior level and to support the Institute Director in the management of the Institute. This is a new post, which offers an exciting opportunity for an experienced senior administrator to create, enhance and implement key strategies of the Institute, and to make a difference to the work of an important research charity. The person appointed is expected to work well in partnership with highly talented and dedicated legal scholars and administrative staff, as well as legal practitioners.

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