French Supreme Court Rules on European Enforcement Order

On January 6th, 2012, the French Supreme Court for Private and Commercial Matters (*Cour de cassation*) ruled for the first time on the European Enforcement Order established by Regulation 804/2005.

The issue before the court was whether a European Enforcement Order (EEO) certificate could stand and justify enforcement measures after the certified decision had been set aside in its legal order of origin. The *Cour de cassation* held that it could not despite the fact the the certificate had not been withdrawn in its legal order of origin.

Facts

The parties were a German couple who had married in 1970 in Germany. They had separated 20 years later. The husband was paying maintenance to his wife. In 2005, she sued before a German court arguing that he was not paying her what he ought to and claiming almost 1 million euros. The husband had moved to France, and thus probably did not hear about the case.

In October 2005, a Stuttgart Court issued a judgment ordering payment of 1 million euros. In January 2006, the same court certified the 2005 judgment as a European Enforcement Order. In December 2006, the wife attached a bank account and a house in France.

It seems that the husband realized at that point what had been going on in Germany. He challenged the German 2005 judgment in Stuggart, which transfered the case to a Court in Mainz. He also sought a stay of the enforcement proceedings in France, that he obtained. In 2007, the Mainz Court found that he owed nothing at all to his wife. She appealed. In 2008, the Court of appeal of Karlsruhe confirmed that she had no claim against her husband.

The husband then petitioned the French enforcement court to lift all enforcement measures carried out in France. The wife argued that this could not be done as long as she would have a valid EEO certificate. The French court disagreed and lifted all enforcement measures. The wife appealed to the Caen court of appeal,

and then to the *Cour de cassation*.

Is the EEO Certificate Autonomous?

The reason why an EEO certificate must be issued is that it will then be the title used by enforcement authorities abroad to enforce the certified judgment. One could argue, therefore, that enforcement authorities in Europe should only be concerned with the EEO certificate.

In many of its provisions, the EEO Regulation provides that certificates wrongly issued must be withdrawn by the court of origin (see, eg, Article 10). Article 6 of the EEO Regulation even provides so for cases when the certified decision has ceased to be enforceable.

> *6.2 Where a judgment certified as a European Enforcement Order has ceased to be enforceable or its enforceability has been suspended or limited, a certificate indicating the lack or limitation of enforceability shall, upon application at any time to the court of origin, be issued, using the standard form in Annex IV.*

One possible interpretation of these provisions could be that certificates only stop producing their effects when they are withdrawn, and that they stand autonomously until this happens.

Another interpretation, however, is that EEO certificates only facilitate the circulation of judgments, and they are therefore not autonomous. If such judgments disappear, they cannot stand anymore.

This interpretation is seemingly endorsed by the *Cour de cassation*, which relies on the following provision:

> *Article 11 Effect of the European Enforcement Order certificate*
>
> *The European Enforcement Order certificate shall take effect only within the limits of the enforceability of the judgment.*

The Court rules that the EEO certificate could thus not found enforcement measures in France after the German court of appeal had ruled that the German certified judgment was not enforceable anymore. Existing enforcement measure had to be lifted.

Liability

The French lower courts had also held the wife liable for abuse of process. The *Cour de cassation* confirms the liability of the holder of the certificate, who is found to have committed a wrong for continuing to enforce the certificate after the German court of appeal had finally ruled that the wife had no claim against her husband.

In France, creditors seeking to enforce EEO certificates after the underlying judgment has been finally set aside are thus committing a wrong.

Fourth Issue of 2011'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 addressing private international law issues and several casenotes. The table of contents can be found here.



In the first article, Dr. Markus Buschbaum et Dr. Ulrich Simon discuss the European Commission's Proposals regarding jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and the property consequences of registered partnerships.

In the second article, Patrick Kinsch (Luxembourg Bar and University of Luxembourg) explores the impact of the *Negrepontis* case of the European Court of Human Rights on the public policy exception in the law of foreign judgments.

Book: Feraci, “L’ordine pubblico nel diritto dell’Unione europea”

Ornella Feraci (Univ. of Siena) has recently published “L’ordine pubblico nel diritto dell’Unione europea” (*The public policy in EU Law*) (Giuffrè, 2012). An abstract has been kindly provided by the author (the complete table of contents is available on the publisher’s website):

The work aims to examine one of the classic topic of private international law in the perspective of the European Union law under the two aspects of applicable law and recognition and enforcement of foreign decisions. Through the analysis of the case-law of the Court of Justice of the European Union and of the most recent instruments of private international law of the Union, it comes to identify a new concept of “public policy of the European Union”, which intends to protect the fundamental principles of European Union law; the book investigates the characteristics of the exception, trying to identify the functions, the relations with national public policy of the Member States and, as far as possible, the content.

Title: “L’ordine pubblico nel diritto dell’Unione europea“, by *Ornella Feraci*, Giuffrè (series: Collana di Studi del Dipartimento di Diritto pubblico dell’Università di Siena), 2012, XVI – 463 pages.

ISBN: 9788814173394. Price: EUR 50. Available at Giuffrè.

Call for Proposals

Please see below for a call for proposals for a conference to be held 20-22 June 2012

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Call for Proposals – Collective Redress in the Cross-Border Context

Large-scale international legal injuries are becoming increasingly prevalent in today's globalized economy, whether they arise in the context of consumer, commercial, contract, tort or securities law, and countries are struggling to find appropriate means of providing collective redress, particularly in the cross-border context. The Hague Institute for the Internationalisation of Law (HiiL), along with the Netherlands Institute for Advanced Study in the Humanities and Social Sciences (NIAS), will be responding to this new and developing challenge by convening a two-day event on the theme "Collective Redress in the Cross-Border Context: Arbitration, Litigation, Settlement and Beyond." The event includes two different elements – a workshop on 21-22 June 2012 comprised of invited speakers from all over the world as well as a works-in-progress conference on 20-21 June 2012 designed to allow practitioners and scholars who are interested in the area of collective redress to discuss their work and ideas in the company of other experts in the field. Both events are organized by the Henry G. Schermers Fellow for 2012, Professor S.I. Strong of the University of Missouri School of Law.

Persons interested in being considered as presenters for the works-in-progress conference should submit an abstract of no more than 500 words to Professor S.I. Strong at strongsi@missouri.edu on or before 1 May 2012. Decisions regarding accepted proposals will be made in early May, and those whose proposals are accepted for the works-in-progress conference will need to submit a draft paper by 4 June 2012 for discussion at the conference. All works-in-progress submissions should explore one or more of the various means of resolving collective injuries, including class and collective arbitration, mass arbitration and mass claims processes, class and collective litigation, and large-scale settlement and mediation, preferably in a cross-border context. Junior scholars in particular are encouraged to submit proposals for consideration.

Persons presenting at the works-in-progress conference will have to bear their own costs, since there is no funding available to assist with travel and other expenses. The works-in-progress conference will be held on 20 and 21 June 2012 at NIAS, Meijboomlaan 1, 2242 PR Wassenaar, The Netherlands. Wassenaar is approximately 20 minutes from The Hague by car. The workshop of invited speakers will be held on 21 and 22 June, also at NIAS.

Both the Schermers workshop and the works-in-progress conference are open to

the public, although advance registration is required. More information on both events is available at the HiiL website (www.hiil.org) or from Professor Strong at strongsi@missouri.edu.

Contact: Prof. S.I. Strong at strongsi@missouri.edu

Deadline for proposals: 1 May 2012

For more on the Henry G. Schermers Fellowship at HiiL/NIAS, see: http://www.hiil.org/organ-bios/prof-s-i-strong

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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.