Fourth Asia-Pacific Conference of the Hague Conference

From 26 to 28 October 2011, the Hague Conference on Private International Law held its fourth Asia-Pacific Conference in Manila, Philippines, to discuss the relevance, implementation and practical operation of a number of important Hague Conventions within the Asia Pacific Region.

The Manila Conference focused on the areas of family law and legal co-operation and litigation, with particular emphasis on the *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* and the *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* (Apostille Convention). It also considered private international law aspects of temporary and circular economic migration.

The Conclusions and Recommandations of the conference can be downloaded here.

New Issue of Arbitraje. Revista de arbitraje comercial y de inversiones

The latest issue of *Arbitraje. Revista de arbitraje comercial y de inversiones* (2011, vol. 3), has just been released. I would like to highlight some of its contents:

> C. Kröner, "Crossing the Mare Liberum: the Settlement of Disputes in an Interconnected World" (in english)
>
> P. Perales Viscasillas, "La reforma de la Ley de Arbitraje (ley 11/2011, de 20 de mayo)"

M. Ceñedo Hernán, “La intervención judicial en el arbitraje en la Ley 11/2011 y en la Ley Orgánica 5/2011, de reforma de la legislación arbitral”

N. P. Castagno, “International Commercial Arbitration and Punitive Damages” (in English)

V. Andreeva Andreeva, “Resolución extrajudicial de conflictos relacionados con los contratos con consumidores celebrados en los mercados financieros internacionales”

I. Iruretagoiena Agirrezabalga, “El arbitraje de inversión en el marco de los APRI celebrados entre dos Estados miembros de la unión: los APRI intra-UE y el Derecho de la Unión”

A. Fernández López, “Algunos criterios relevantes sobre el arbitraje de Costa Rica tras la Ley nº 8937 de 2011”

C. Jarrosson, “Les principales tendences du nouveau droit français de l’arbitrage international” (in French)

M.E. Ancel, “Le nouveau droit français de l’arbitrage: le meilleur de soi-même” (in French)

Also, the magazine includes legal texts, Spanish and foreign case law (sometimes annotated), comments on selected bibliography, and news of interest to the world of arbitration.

New Book on Parental Responsibility and Child

Protection

Dorothea van Iterson: "Ouderlijke verantwoordelijkheid en kinderbescherming" (Parental Responsibility and Child Protection)

On 1st May 2011 the 1996 Hague Child Protection Convention entered into force in the Netherlands. Consequently the Netherlands joined the group of countries where this Convention is in force alongside the Brussels II bis Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003). The Regulation has been operative in the EU (with the exception of Denmark) from 1 March 2005.

A new book, entitled "Ouderlijke verantwoordelijkheid en kinderbescherming" (Parental Responsibility and Child Protection), aims to give guidance on the way the two instruments are to be applied together and in conjunction with other instruments such as the 1980 Hague Child Abduction Convention. It describes similarities and differences between the instruments and identifies areas for uniform interpretation. The themes dealt with are: scope, co-operation, jurisdiction, applicable law, recognition, enforceability and enforcement. The rules of the Convention and the Regulation on each theme are compared. A comparative table summarizes the subject matter discussed in each chapter. The author reviews case law of the EC/EU Court of Justice and the Dutch courts from 2005 onwards, illustrating the operation of the international instruments and the statutory provisions implementing them in the Netherlands. Special attention is given to administrative and judicial co-operation. These aspects have become an intrinsic element of Dutch legal practice.

The volume (260 pages) was written by Dorothea van Iterson. It is part of the series "Praktijkreeks IPR" (chief editors: L.Strikwerda and P.Vlas). It was published on 1st September 2011 by MAKLU Publishers, www.maklu.nl.

More information as well as the table of contents can be found on the publisher's website.

Van Den Eeckhout on Private International Law as a Conductor for Achieving Political Objectives

This opinion is contributed by Professor Veerle Van Den Eeckhout, who teaches international private law at the universities of Leiden and Antwerp.

Private International Law, *quo vadis*

PIL as a perfect conductor for achieving political objectives?

A Tale of Lost Innocence

Before long a new book will be added to the Dutch Civil Code: on 1 January 2012 Book 10 will enter into force (1). Book 10 codifies Dutch private international law ('PIL').

PIL lawyers may be sorely tempted to devote all their energy to the *presentation* and *interpretation* of the rules of Book 10, because it seems reasonable to assume that the lengthy codification process has also involved a process of reflection on PIL. Even so, the completion of the codification process marks the perfect time to make an appeal to both PIL lawyers and non-PIL lawyers to reflect on PIL once again, albeit *from a special angle*: if PIL is studied as a discipline that is *not* isolated from other branches of law but that interacts with these other branches; if it is recognised how PIL is occasionally 'used' as a vehicle to achieve policy objectives or *may* at least make a difference; if it is revealed that PIL may act as a 'hinge', and if it is recognised that interaction with PIL may make a difference in various debates in which PIL initially did not seem to be an essential factor, then, the burning question arises how PIL should be 'used' in the future and what our attitude should be towards future PIL developments.

And despite its codification, PIL *will* continue to evolve in the years ahead. If only as a result of the ongoing Europeanization of PIL, PIL rules may change at a fast

rate in the next few years.

What is more: the very phenomenon of the Europeanization of PIL is illustrative of the 'discovery' of PIL by European institutions as a discipline that 'matters' – particularly when it comes to encouraging the exercise of European freedoms, such as the free movement of persons, the freedom of establishment and the free movement of services ? and it is also illustrative of the application of PIL by many policymakers and of the occasional attempts to use PIL as a policy instrument for achieving objectives beyond the scope of PIL itself.

A recent example illustrating the dynamics of the 'discovery' of PIL at the *Dutch* national level is the attempt to base rules of international marriage law on migration targets (2). It turns out that in the view of the Dutch legislator, PIL could have a role to play in the current migration and integration debate.

By now, the significance of PIL rules has become apparent in *various* current debates, as is shown by topics such as the regulation of international posting of workers within Europe or the liability of multinationals for environmental pollution outside Europe or
international corporate social responsibility (3); in addition, both these topics are perfectly suitable as case studies exploring the role of PIL rules in decisions on whether to permit companies to take advantage of differences between legal systems. These case studies may also give a picture of the potential of PIL for the advocates of 'social justice'.

By now, the role PIL rules could play in addressing situations of 'competing norms' in a globalising world is attracting increasing international attention (4).

But what *is* or *should be* the role of PIL? Does it have a 'neutral' role? Is PIL 'neutral' in the sense that PIL rules are supposed to result in the application of the legal system that is 'most closely connected' in any case – following on from the 'neutral PIL' as expounded by Von Savigny? Or is PIL 'neutral' in quite a different sense by now, namely that PIL is apparently unable to resist attempts to use this branch of law instrumentally and to mould it into a shape that best suits the result needed? Is PIL degenerating into a political tool, with the resulting loss of its innocence? But what is the position of modern trends in PIL where there is a focus on concerns like the protection of weaker parties? Can a specific PIL trend be opted for 'à la carte', so to speak, depending on whether it suits the

requirements of the case, as in a pick and choose system? *What* interests can or may PIL serve at the end of the day?

Writing from the Kamerlingh Onnes Building in Leiden, where '100 years of superconductivity' was commemorated recently and where the profile area called 'Interaction between Legal Systems' was launched recently as well, I find it hard to resist the
temptation to define the issue at hand in terms of conductivity or superconductivity and the interaction between legal systems: how good a '(super)conductor' is PIL when it comes to attempting to control the result needed; is PIL neutral once brought on the 'right' temperature, is PIL the 'path of least resistance', what is the internal resistance of PIL itself? How does PIL interact with various disciplines and how does PIL itself affect the interaction between various legal systems?

A scrutiny of some case studies- focusing, *inter alia*, on the interaction between international family law and the free movement of persons/migration law, the interaction between international labour law and European law, the interaction between international tort law and developments concerning the liability of multinationals for human rights violations- may enable a general view to be developed on the role, resistance levels and individual character of PIL. Unless one should conclude that a distinction should be made based on the characteristics of each case study: for example, a distinction based on whether PIL rules are invoked in an intra-Community context, or a distinction based on the question whether or not the pressure exercised by European freedoms on PIL rules drives PIL in the same direction.

An examination of and reflection on PIL from *this* perspective requires answering both legal-technical and legal policy questions. These are tough questions; but an attempt to answer these may offer some guidance to those who will find themselves in the midst of the turbulent developments that will affect PIL, whether codified or not, in the years ahead.

---

(1) The Act of 19 May 2011 adopting and implementing Book 10 (Private International Law) of the Dutch Civil Code, Bulletin of Acts and Decrees 2011,

272. Decree of 28 June 2011 fixing the time of entry into force of the Adoption and Implementation Act of Book 10, Bulletin of Acts and Decrees 2011, 340.

(2) See the Proposal for a Bill on Marriage and Family Migration, *TK* 2009-2010, 32175. If the PIL provisions included in this bill are enacted, the provisions of Book 10 of the Dutch Civil Code on international marriage law will immediately be rendered obsolete by national developments.

(3) Incidentally, a scrutiny of the liability of multinationals for human rights violations outside Europe reveals the extent to which not only PIL rules on *applicable law* but also PIL rules on *international* jurisdiction, such as the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, are of paramount importance in the regulation of such liability. For this reason, the current process of revision of the above regulation should be considered from this angle too.

(4) See, for example, the Guest Editorial by H. Muir-Watt, in which she highlights PIL aspects of both these topics as well as her recent call for studying PIL as 'Global Governance'.

Punishment and impecuniosity in London

The British Institute of International and Comparative Law's Private International Law series (sponsored by Herbert Smith LLP) is moving into its Autumn programme with two events on Wednesdays 2 and 9 November (17:00 to 19:00), to be held at the Institute's London headquarters (Charles Clore House, Russell Square).

The first, entitled "Punitive Damages – Europe Strikes Back?!" focuses on the reception of US punitive damages awards in European systems, looking at recent French, Spanish and Italian case law. Chaired by Professor Rachael

Mulheron (Queen Mary College, University of London), the speakers include my conflictoflaws.net colleague, Professor Marta Requejo Isidro (University of Santiago de Compostela), as well as Dr Maxi Scherer (Wilmer Hale, London and Sciences Po, Paris) and Dr Francesco Quarta (University of Salento).

The second, entitled "Insolvency: Current Questions in Cross-Border Scenarios" aims to do what it says on the tin, highlighting topical issues such as the inter-relation of cross-border assignment and insolvency laws, the relationship between arbitration and insolvency proceedings, recognition and enforcement of foreign insolvency judgments and the (many) shortcomings of the Insolvency Regulation. Chaired by Sir Roy Goode CBE QC (needing no introduction), the speakers include Professor Federico Mucciarelli (University of Modena and Reggio Emilia), Dorothy Livingston (Herbert Smith LL), Dr Ann-Catherine Hahn (Baker & McKenzie, Zurich) and Look Chan Ho (Freshfields Bruckhaus Deringer LLP, London).

For further details, and booking information, just click on the links above.

Juif or not Juif?

Do you own an iPhone or an iPad? I don't, and so was not aware of the fact that, if I had, I could have bought an App(lication) called "Jew or not Jew?" for less than 2 Euros.

Well, could have only, because after some French Jewish and anti-racism organizations complained in September that the App violated French law, Apple announced that it would stop making it available in France. One month later, it announced its willingness to extend its decision to the entire European Union.

There have been reports, however, that Apple would have made the App available again, in France, a few weeks later.

The New iChoice of Law Rule

Deciding to withdraw the App from the entire EU because French law might have

been violated would certainly be a novel approach to choice of law.

To the question 'which law governs whether an online Application can be sold anywhere in Europe?', Apple seems to answer: French law. Or have Apple's lawyers identified an issue with European law?

An iRemedy as well?

Although most French organizations were satisfied with the decision of Apple to stop making available the App, *Le Monde* reports that one, the *Ligue internationale contre le racisme et l'antisémitisme* (Licra), has decided that it was not enough and that Apple should do more: destroy from afar all applications sold before September. Licra claims that Steve Jobs (that's right, Steve Jobs himself. He was such a visionary that he was also able to predict how the law of remedies would evolve) made statements in 2008 demonstrating that this would be perfectly possible from a technical point of view.

The case was heard today by a Paris court. *Le Monde* reports that Apple's lawyers relied on French law and argued, inter alia, that such a remedy would violate the property rights of buyers of the App.

The court will deliver its judgment on November 17.

And now the World?

But that is not all! Four French organizations have filed a new suit in France against Apple Inc. and are seeking an order that Apple make the App unavailable in the rest of the world.

Hearing on November 24th.

Stay (i)tuned.

Establishment of the James Crawford Prize

The Editors of the Journal of International Dispute Settlement (JIDS) and Oxford University Press (OUP) have announced the establishment of **The James Crawford Prize of the Journal of International Dispute Settlement**. This annual prize will award £500 of OUP books and a subscription to JIDS to the author of the best paper received by the Journal. The winning paper will also be published in JIDS. For the 2012 Prize, submissions are required by 28 February 2012 to be considered for the award.

The selection will be made by a Prize Committee composed of the Editorial Director, the Associate Editors, and possibly further members of the Editorial Board of JIDS depending on the narrower fields of the papers submitted for the prize. The Committee may choose not to award the prize and hold it over for a subsequent year if, in their view, the papers submitted do not reach the standards required.

For the first JIDS Prize the award will be published and announced in the second issue of volume 3 of JIDS, in July 2012.

Submissions should be sent to thomas.schultz@graduateinstitute.ch

---

The Alien Tort Statute Plot Thickens

Today, the United States Court of Appeals for the Ninth Circuit issued a mammoth en banc opinion in the case of Sarei v. Rio Tinto. All 166 pages of the court's splintered analysis deserves careful consideration. Here is a short review of the court's conclusions.

First, the Ninth Circuit holds that the Alien Tort Statute may be applied

extraterritorially notwithstanding recent Supreme Court caselaw requiring a clear statement of extratteritorial intent. Slip op. at 19337-19339.

Second, the Ninth Circuit holds that there can be corporate liability under the ATS. Slip op. at 19341.

Third, the Ninth Circuit holds that there may be aiding and abetting liability under the ATS. Slip op. at 19342.

Fourth, the Ninth Circuit holds that there is arising under jurisdiction in ATS cases and that courts may develop federal common law in such cases. Slip op. at 19343; id. 19347.

Fifth, the Ninth Circuit holds that prudential exhaustion may be required in ATS cases and that the district court did not abuse its dicretion in refusing to dismiss the case for lack of exhaustion. Slip op. at 19353.

Sixth, the Ninth Circuit holds on the facts of the case that the political question doctrine, international comity, and the act of state doctrine do not require dismissal. Slip op. at 19358.

Seventh, the Ninth Circuit holds that a claim for genocide and war crimes may be pled under the ATS against a corporation when there is purposeful conduct alleged. Slip op. at 19375. The court reserves judgment on whether a lesser standard is applicable given the purposeful allegations in this case. Id.

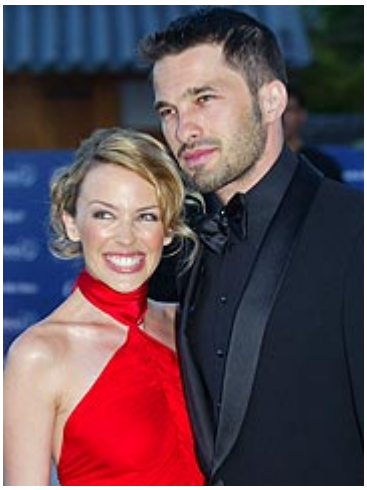
Eighth, the Ninth Circuit holds that a claim of racial discrimination is not cognizable under the ATS, although a claim of apartheid is cognizable by assumption. Slip op. at 19380.

There are various concurrences and dissents that take up some of these issues. In particular, there is a debate between the judges as to whether a lesser standard than purpose might be pled under the ATS.

These holdings complicate the ATS landscape substantially given other recent appellate decisions. The Supreme Court's cert. grant in *Kiobel* (discussed earlier on this blog) just became much more important to resolving many of these question. It will be especially interesting to see what the Government's position through the Solicitor General's office will be in *Kiobel* given the many citations to Harold Koh's writings on corporate liability relied on by the en banc panel.

ECJ Rules in E-Date Advertising and Martinez

The Grand Chamber of the European Court of Justice has delivered today its joint judgment in E-Date Advertising and Martinez (Cases C-509/09 and C-161/10). We had reported earlier on the Advocate General's opinion.



In these cases, the ECJ was asked two important questions.

Internet and Infringement of Personality Rights

The first question was concerned with the interpretation of Article 5.3 of the Brussels I Regulation in cases of alleged infringement of personality rights by means of content placed online on an internet website. Article 5.3 grants jurisdiction to the court of the place where the harmful event occurred or may occur. In *Fiona Shevill*, the Court had held that victims of defamation by means of newspapers could sue the publisher either for the whole harm suffered in the country where the publisher is established, or in countries where the newspaper was distributed, but only for compensation of the harm suffered in the relevant country.

Were these criteria to be adapted in cases where internet was the media used by the alleged tortfeasor? The Court ruled:

48 The connecting criteria referred to in paragraph 42 of the present judgment must therefore be adapted in such a way that a person who has suffered an infringement of a personality right by means of the internet may bring an action in one forum in respect of all of the damage caused, depending on the place in which the damage caused in the European Union by that infringement occurred. Given that the impact which material placed online is liable to have on an individual's personality rights might best be assessed by the court of the place where the alleged victim has his centre of interests, the attribution of jurisdiction to that court corresponds to the objective of the sound administration of justice, referred to in paragraph 40 above.

49 The place where a person has the centre of his interests corresponds in general to his habitual residence. However, a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State.

The Court concluded:

1. Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised.

E-Commerce Directive and Choice of Law

The German supreme court for civil matters had also interrogated the ECJ on the impact of the 2000 E-Commerce Directive on choice of law. Although Article 1-4 of the Directive provides that the Directive "does not establish additional rules on private international law", Article 3-2 provides:

> *2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.*

It has therefore long been wondered whether Art. 3-2 did in fact establish a choice of law rule providing for the application of the law of the service provider (ie in defamation cases the law of the publisher) or, at the very least, whether Article 3-2 imposes on Member states to amend their choice of law rules insofar as they would stand against the European freedom of service.

The Court ruled that Article 3.2 does not create a choice of law rule:

> *61 In that regard, it must be noted, firstly, that an interpretation of the internal market rule enshrined in Article 3(1) of the Directive as meaning that it leads to the application of the substantive law in force in the Member State of establishment does not determine its classification as a rule of private international law. That paragraph principally imposes on Member States the obligation to ensure that the information society services provided by a service provider established on their territory comply with the national provisions applicable in the Member States in question which fall within the coordinated field. The imposition of such an obligation is not in the nature of a conflict-of-laws rule designed to resolve a specific conflict between several laws which may be applicable.*
>
> *62 Secondly, Article 3(2) of the Directive prohibits Member States from restricting, for reasons falling within the coordinated field, the freedom to provide information society services from another Member State. By contrast, it is apparent from Article 1(4) of the Directive, read in the light of recital 23 in the preamble thereto, that host Member States are in principle free to designate, pursuant to their private international law, the substantive rules which are applicable so long as this does not result in a restriction of the freedom to provide electronic commerce services.*

63 It follows that Article 3(2) of the Directive does not require transposition in the form of a specific conflict-of-laws rule.

Yet, the Court ruled private international law should not stand in the way of the European freedom of service of e-commerce service providers:

66 In relation to the mechanism provided for by Article 3 of the Directive, it must be held that the fact of making electronic commerce services subject to the legal system of the Member State in which their providers are established pursuant to Article 3(1) does not allow the free movement of services to be fully guaranteed if the service providers must ultimately comply, in the host Member State, with stricter requirements than those applicable to them in the Member State in which they are established.

67 It follows that Article 3 of the Directive precludes, subject to derogations authorised in accordance with the conditions set out in Article 3(4), a provider of an electronic commerce service from being made subject to stricter requirements than those provided for by the substantive law in force in the Member State in which that service provider is established.

The Court concluded:

2. Article 3 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), must be interpreted as not requiring transposition in the form of a specific conflict-of-laws rule. Nevertheless, in relation to the coordinated field, Member States must ensure that, subject to the derogations authorised in accordance with the conditions set out in Article 3(4) of Directive 2000/31, the provider of an electronic commerce service is not made subject to stricter requirements than those provided for by the substantive law applicable in the Member State in which that service provider is established.

Krombach Sentenced Again to 15 years

On October 22nd, 2011, Doctor Dieter Krombach, 76, was sentenced to 15 years in prison by a French criminal court for killing Kalinka Bamberski in 1982. Again. A French criminal court had already sentenced Krombach in 1995 to 15 years. But he resided in Germany (where the alleged offence was also committed), and German authorities, after investigating the case, had dismissed the charges in the 1980s.

Krombach had thus not appeared before the French court in the first proceedings. French criminal procedure would not, at the time, allow his lawyer to represent him. After he was not only found guilty of killing the child, but also ordered to pay damages, he had sued France in Strasbourg, where France had been found to have violated Article 6 of the European Convention of Human Rights. When Andre Bamberski sought to enforce the civil judgment in Germany, the German court referred the case to Luxembourg. The European Court of Justice held that the violation of Article 6 was a ground for denying enforcement of the French judgment in Germany in one of its most important interpretative rulings of the Brussels Convention.

Krombach was thus protected by the combination of the border between Germany and France and the unfairness of French criminal procedure.

We have reported how, two years ago, Mr Bamberski decided to resolve the issue of the border by having Krombach kidnapped in Germany and delivered to French judicial authorities. Despite protests of German authorities, France decided to try Dr. Krombach again. The result is Saturday’s verdict.

So much for mutual trust. So much for the European single area of justice.