Franzina on Negrepontis v. Greece

Pietro Franzina (University of Ferrara) has published Some Remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad in the last issue of the Italian journal *Diritti umani e diritto internazionale*.

The paper is a note discussing the implications of the recent jugdment of the European Court of Human Rights in *Negrepontis v. Greece* where the court held that Greece had violated Article 8 by denying recognition to an adoption order issued by a Michigan court.

The note is also available on the website of the Italian society for international law.

SSRN Max Planck Research Paper Series, Vol. 1, No. 4 (2011)

The latest issue of the Max Planck Institute for Comparative & International Private Law Research Paper Series was released on December 20, 2011. The papers are available on SSRN. The table of contents reads as follows:

Shoot-Out Clauses in Partnerships and Close Corporations – An Approach from Comparative Law and Economic Theory

> Holger Fleischer, Max Planck Institute for Comparative and International Private Law, Stephan Schneider, Max Planck Institute for Comparative and International Private Law
> *forthcoming in:* European Company and Financial Law Review 2012
>
> This article analyses shoot-out clauses as a popular means of resolving deadlocks in two member partnerships or close corporations. It presents the different varieties of shoot-out clauses developed in Anglo-American legal

practice that are being increasingly discussed on the European continent. It goes on to look at their advantages and disadvantages by exploring the rich economic literature on partnership dissolution mechanisms in game theory. Finally, it focuses on the permissibility of these clauses and the doubts cast upon them in Germany, Austria, England and the United States.

Challenges for the European Law Institute

Reinhard Zimmermann, Max Planck Institute for Comparative and International Private Law
forthcoming in: Edinburgh Law Review 2012

This is the text of a speech given on the occasion of the Inaugural Congress of the European Law Institute in Paris on 1 June 2011. It attempts to familiarize the audience with essential features of that Institute and it does so by highlighting a number of specific challenges facing the Institute. These challenges arise, inter alia, from the Institute's ambition to be comprehensive, as far as legal professions, legal disciplines, and legal traditions are concerned. Specific attention is devoted to the notion of legal tradition(s) and the relationship between law and language. Finally, the position of the European Law Institute vis-à-vis other existing "networks" and organizations, the official organs of the European Union, and other organizations, worldwide, aiming at the harmonization of law, is highlighted. Throughout the speech, reference is made to the American Law Institute and the question is asked to what extent it can serve as a model for the European Law Institute.

Testamentary Formalities in Historical and Comparative Perspective

Reinhard Zimmermann, Max Planck Institute for Comparative and International Private Law, Kenneth Reid, University of Edinburgh – School of Law, Marius Johannes De Waal, affiliation not provided to SSRN
also published in: TESTAMENTARY FORMALITIES, COMPARATIVE SUCCESSION LAW, Vol. 1, pp. 432-471, Kenneth G.C. Reid, Marius J. de Waal and Reinhard Zimmermann, eds., Oxford University Press, October 1, 2011

This essay is the concluding chapter of a project analysing testamentary formalities in historical and comparative perspective. It provides an assessment of the overall development of the law in the countries surveyed, as well as some wider reflections on the nature and purpose of testamentary

formalities. More specifically, the essay focuses on the salient features of holograph wills, witnessed wills, public wills, and special wills; it analyses shared features (such as the requirements of the testator's signature, witnesses, date, unitas actus, incorporation of formal documents, wills by disabled persons); and it discusses the steady shift away from strict formalism which is a significant theme in many legal systems.

Europäisches Privatrecht – Irrungen, Wirrungen (European Private Law – Delusions, Confusions)

Reinhard Zimmermann, Max Planck Institute for Comparative and International Private Law
also published in: Begegnungen im Recht: Ringvorlesung der Bucerius Law School zu Ehren von Karsten Schmidt anlässlich seines 70, Geburtstags, Mohr Siebeck, pp. 321-350, 2011

This essay critically examines the way in which European private law has developed over the past ten years. It emphasizes that we now have six sets of model rules which have not yet been subjected to critical and comparative scrutiny. None the less, a new Group is busy drafting yet another text which is to obtain an authoritative status. The new Group is working under the same pressure of time that has bedevilled the drafts of the DCFR and the PCC. As far as consumer contract law is concerned, we have about the same number of textual layers. In addition, we seem to have two projects, running side by side. However, neither of them is based on a proper and critical revision of the acquis comunautaire. The essay also draws attention to a number of other peculiarities in both the arguments advanced by official actors and the processes chosen by them. And it expresses the hope that the establishment of a European Law Institute may help to avoid the present delusions and confusions.

Die Regelung der Willensmängel im Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht (Defects in Consent in the Proposal for a Regulation on a Common European Sales Law)

Sebastian A.E. Martens, Max Planck Institute for Comparative and International Private Law
forthcoming in: Archiv für die civilistische Praxis

This article provides an in-depth analysis of Chapter 5 ‘Defects in consent’ of the optional Common European Sales Law that was proposed by the Commission 11th October 2011. The provisions of this chapter are put into perspective, and the author takes account of the developments of each norm from the PECL to the DCFR and the feasibility study of the Expert Group that was published in May 2011. Each provision is commented upon and, where necessary, detailed suggestions for changes are made. If, but only if, these suggestions are taken up, Chapter 5 of the optional Common European Sales Law will generally be in line with the modern development in the European legal systems and a wide consensus amongst legal scholars in Europe. In the present state, Chapter 5 could not yet serve as part of an acceptable Common European Sales Law.

Das neue Internationale Privatrecht der Volksrepublik China: Nach den Steinen tastend den Fluss überqueren (The New Private International Law of the People’s Republic of China: Crossing the River by Feeling the Stones)

Knut Benjamin Pissler, Max Planck Institute for Comparative and International Private Law
forthcoming in: Rabels Zeitschrift für Ausländisches und Internationales Privatrecht

On October 28, 2010, the “Law of the Application of Law for Foreign-related Civil Relations” was promulgated in the People’s Republic of China. The law aims to consolidate the Chinese conflict of laws regime and signals a new step towards a comprehensive codification of civil law in China.

The promulgated law emphasizes party autonomy and the closest connection as general principles. The law furthermore replaces nationality with habitual residence as the principal connecting factor for personal matters in Chinese private international law. However, some lacunas remain and new questions arise from the law. The legislative gaps concern the form of legal acts, the maintenance duties after divorce as well as the assignment and transfer of rights and duties in general. New questions arise from the provisions in the law establishing alternative connecting factors. Regarding the free choice of law with regard to rights in movable property provided by the law, it is additionally questionable how the rights of third parties are protected where

they are not aware of such a choice of law. The decision of the legislator to exclude renvoi will force Chinese courts to apply foreign law even if the foreign private international private law refers back to Chinese law.

Symposium on the Proposed Common European Sales Law

On Friday, 20 January 2012, the German Notary Institute, the University of Würzburg and the Notary Institute at the University of Würzburg will host an academic Symposium on the Proposed Common European Sales Law. More information is available on the German Notary Institute's website. Registration is online. The programme reads as follows:

09.00 Uhr Kaffee und Gebäck (Coffee and Pastries)

09.20 Uhr Begrüßung (Welcome Address), Prof. Dr. Oliver Remien, University of Würzburg, Tagungsleiter

Vormittagsblock (Morning Session)

09.30 Uhr Einführung (Introduction), Prof. Dr. Dirk Staudenmayer, European Commission, General Directorate Justice

09.40Uhr An assessment of the proposed Regulation on a Common European Sales Law, Prof. Dr. Dr. h.c. mult. Ole Lando, Copenhagen Business School

10.10Uhr Der räumlich-persönliche Anwendungsbereich des Gemeinsamen Europäischen Kaufrechts (The personal and territorial scope of application of the Common European Sales Law), Prof. Dr. Stefan Leible, University of Bayreuth

10.30 Uhr Anwendungsbereich: Vertragsparteien und Vertragsgegenstand (Scope of application: parties to the contract and object of the contract), Prof. Dr. Thomas Pfeiffer, LL.M., University of Heidelberg

10.50 Uhr Diskussion (Discussion)

11.20 Uhr Kaffeepause (Coffee break)

11.45 Uhr Das Gemeinsame Europäische Kaufrecht – eine sinnvolle Option für B2B-Geschäfte? (The Common European Sales Law – a rational choice for B2B-transactions?), Prof. Dr. Thomas Ackermann, LL.M., University of Munich

12.05 Uhr EU-Kompetenz, Funktionsbedingungen und Perspektiven (EU-Competence, conditions for performance and perspectives), Prof. Dr. Hans Christoph Grigoleit, LL.M., University of Munich

12.25 Uhr Diskussion (Discussion)

13.00 Uhr Mittagessen (Lunch)

Nachmittagsblock (Afternoon Session)

14.30 Uhr Vertragsbegriff und Vertragsabschluss , einschließlich AGB-Problemen (Concept of contract and contract formation, including problems of general business terms), Prof. Dr. Wolfgang Ernst, LL.M., University of Zurich

14.50 Uhr Informationspflichten des Unternehmers und Widerrufsrechte des Verbrauchers (The professional's duties of information and the consumer's right of revocation), Prof. Dr. Dirk Looschelders, University of Düsseldorf

15.10 Uhr Diskussion (Discussion)

15.40 Uhr Kaffeepause (Coffee break)

16.10 Uhr Der Verordnungsentwurf und die Problematik seiner Lücken (The proposal for a regulation and the problems of its gaps), Prof. Dr. Beate Gsell, maître en droit (Aix-en-Provence), University of Munich

16.30 Uhr Leistungsstörungsrecht (Law of non-performance), Prof. Dr. Florian Faust, LL.M., Bucerius Law School, Hamburg

16.50 Uhr Schadensersatz und Rückabwicklung (Damages and restitution), Prof. Dr. Christiane Wendehorst, LL.M., University of Vienna

17.10 Uhr Diskussion (Discussion)

17.45 Uhr Schlusswort (Closing Remarks)

Addresses to the French PIL Committee, 2008-2010

The collection of the addresses to the French Private International Law Committee (*Comité français de droit international privé*) during academic years 2008-2009 and 2009-2010 was published earlier this fall.

The committee is addressed by four speakers each year, typically two young French academics, one practitioner and one foreign academic. The publication includes non only the paper of the speaker, but also the debate which followed (all in French).

The last volume addressed the following topics:

– Fiducie-sûreté et conflit de lois (Dammann)
– Les développements procéduraux récents de l'espace judiciaire européen : la naissance d'un ordre processuel interétatique (Jeuland)
– La connexité internationale (Lemaire)
– La résidence habituelle, un critère de rattachement en quête de son identité : perspectives de common law (McEleavy)
– Les effets en France des actions de groupe étrangères (Seraglini)
– La détermination de la loi applicable au contrat de travail par la chambre sociale de la Cour de cassation (Chagny)
– La protection internationale des sous-traitants (M.E. Ancel)
– Quelle protection pour les héritiers réservataires sous l'empire du futur règlement européen ? (Bonomi)

More details on the volume can be found here.

Adresses to the French PIL Committee, 2006-2008

The previous volume of the collection of the addresses to the French Private International Law Committee (*Comité français de droit international privé*) covers academic years 2006-2007 and 2007-2008.

The addresses discussed the following topics:

– Réflexions sur le rattachement des immeubles en droit international privé (Thierry Vignal)
– De quelques difficultés posées en droit français par la mise en oeuvre de la compétence répressive universelle (Renée Koering-Joulin)
– Le renouveau de la théorie des droits acquis (Etienne Pataut)
– La loi applicable à défaut de choix par les parties selon l'article 4 de la proposition de règlement Rome I (Franco Ferrari)
– L'ordre public de rattachement (Petra Hammje)
– La liberté de choix dans les instruments communautaires récents : Rome I et Rome II – L'autonomie de la volonté entre intérêt privé et intérêt général (Claudia Hahn)
– L'ordre public international à l'épreuve du relativisme des valeurs (Léna Gannagé)
– Le droit international privé espagnol aujourd'hui ou le dépassement des paradigmes (José Carlos Fernandez Rozas)

The first few pages pages of each paper can be freely downloaded here.

Publication of Michael Bogdan's Hague Lecture

The latest volume in the pocket book serie of the Hague Academy of International Law is the General Course given by Michael Bogdan on Private International Law as Component of the Law of the Forum.

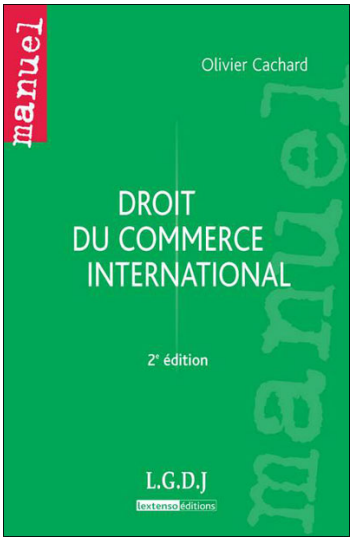
Michael Bogdan is Professor of Comparative and Private International Law in the Law Faculty of the University of Lund. He is member, and former President, of GEDIP (Groupe européen de droit international privé). He is also member of the International Academy of Comparative Law and associated member of the Institut de droit international.

In spite of the undoubtedly great and rising importance of the international legislative co-operation regarding private international law, it must be remembered that no successful unification or harmonization of conflict rules has ever taken place on the universal level, and that the conflict rules stemming from international legislative co-operation between a limited number of countries give rise to the same problems as non-harmonized rules, whenever they have to be used in relation to countries not participating in the legislative co-operation in question. This book will therefore focus on the last-mentioned problems and refrain from dealing with the particular issues arising from international legislative co-operation in the field of private international law. One of the principal aims of Michael Bogdan is to demonstrate the relationship between the national rules of private international law and the rest of the legal system of the forum country, in the first place its substantive private law and its law of civil procedure, as well as to illustrate the impact of the forum country's general ethical and other values on its private international law.

More information on the book can be found here.

New French Book on International Commercial Law

Olivier Cachard, who is a professor of law at Nancy University, has published the second edition of his manual on international commercial law.



In the French tradition, the book includes developments on international commercial contracts, the law governing corporations, international insolvency, international bank undertakings, and international commercial arbitration. The table of contents is available here.

More details can be found here.

The United States Gives Plaintiffs in ATS Cases an Early Christmas Present

By way of brief follow up to the post below, the United States just filed this brief (10-1491tsacUnitedStates) in the *Kiobel* case in support of petitioners in which the Government argues, among other things, that a corporation can be held liable under federal common law for a violation of the ATS. This brief is in tension with previous briefs filed by the United States in other ATS cases.

Assuming the United States participates in oral argument, the Justices should have very interesting questions for the Government's lawyer.

Issue 2011.3 Nederlands Internationaal Privaatrecht

The third issue of 2011 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* includes the following contributions on the Brussels I Recast (lis pendens and choice of court), Voluntary Assignment, and case notes on *TNT Express v. Axa* and *Pammer/Hotel Alpenhof*:

Marielle Koppenol-Laforce, Herschikking Brussel I: litispendentie en forumkeuze, een positieve stap voorwaarts!?, p. 452-460. The English abstract reads:

This article deals with the proposed changes to the Brussels I Regulation in the field of the choice-of-forum clause and the related lis abili pendens provisions. The aim was to make choice-of-forum clauses more effective. The proposal of the Commission is that the chosen court be given priority over the other courts to deal with the questions of the validity and scope irrespective whether it is the first or the second court seized. The proposed articles, however, do not make clear to what extent the non-chosen court may deal with questions of validity and scope. The proposal also introduces a conflict of law rule for the applicable law to the substantive validity of the choice-of court clause, which is somewhat controversial. The conclusion of this article is nonetheless that the proposals are definitely an improvement. The priority given to the chosen court can certainly help to increase effectiveness of such clauses. However, for the proposed measures to be really effective in practise, the text could be made more precise and some inconsistencies should be resolved. This would also prevent courts from having to follow different approaches when dealing with a choice-of-court clause under the Brussels I Regulation and under the Hague Choice-of-Forum Convention.

Cornelis A. de Visser, The law governing the voluntary assignment of claims under the Rome I Regulation, p. 461-467. The conclusion reads:

Although the assignee and assignor can agree to whatever they wish and that shall be the law as between them, such an agreement cannot affect the rights of third parties, whether such third party is the debtor of the assigned claim or another third party. The position of the debtor of the assigned claim under the assignment is exclusively governed by the law governing the claim. Based on the private international version of the nemo plus principle, it is a straightforward, simple and consistent conclusion that the law governing the claim should also determine the validity and the effect of the assignment against third parties other than the debtor. Any proposal for a different EU conflict of laws rule on the third-party effect of the assignment of a claim does not provide a solution to the conflict of laws, will lead to situations of deadlock, will provide meaningless flexibility, will increase legal uncertainty and would thus only complicate the already rather complex litigation and practice in the cross-border voluntary assignments of claims.

M.A.I.H. Hoeks, CMR of EEX? Van samenloop, litispendentie en het vrij verkeer van beslissingen in Europa, p.468-472. The English abstract reads:

The seed from which the problem sprouted in the TNT-AXA case is the fact that the CMR, an international road carriage convention, refers to national law in Article 29 CMR. This Article determines that if the CMR carrier has caused damage to the cargo 'by such default on his part as, in accordance with the law of the court or tribunal seised of the case, is considered as equivalent to wilful misconduct', he is no longer entitled to exclude or limit his liability under the CMR. As a result, it is more likely for a German court of law to consider that a CMR carrier has caused damage by such default than for a Dutch court. Since this type of default denies the carrier the option to limit his liability to approximately Euro 11½ per kilogram as per Article 23 CMR, it is in the carrier's best interest to avoid the German legal system. Initially carriers thereto sped to Dutch courts in order to gain declaratory judgments of non-liability, or at least limited liability when damage occurred. As soon as the case became pending, it was thought that the lis pendens rule of Article 31(2) CMR would bar the cargo interest's access to any other forum, including the German one. However, when the German Bundesgerichtshof (the BGH) determined that such an action for a negative declaration did not concern the same subject as an action for a substantive claim,

parallel proceedings before a German court became an option. At that point it was no longer sufficient for the carrier to be the first to address a court. It became necessary to be the first to gain a final decision in order to bar the recognition and enforcement of any German decisions on the subject in the Netherlands. Unfortunately for TNT, the Dutch court of first instance that was addressed in the web of the TNT-AXA proceedings failed to decide in a manner that was favourable to the carrier. TNT was therefore forced to appeal, with the result that there was no final decision on the matter when the cargo interest's insurer, AXA, attempted to have the judgment it had sought in Germany recognised and enforced in the Netherlands. To prevent this, TNT asserted that, according to Article 71 Brussels I Regulation, it is not the Brussels I Regulation but the CMR that determines whether this is possible, because it was of the opinion that the CMR would prevent the recognition and enforcement of the German judgment on the grounds that the German court had no jurisdiction, due to the CMR's lis pendens rule. Conversely, the Brussels I Regulation only offers the option to refuse recognition because the court whose decision is to be recognised lacked jurisdiction in a very limited set of situations. None of which occurred in the TNT-AXA case. All in all, it took six legal procedures and seven years for the parties to reach the ECJ, the European Court of Justice. When asked whether the recognition and enforcement was in this case governed by the CMR or by the Brussels I Regulation, and whether some light could be shed on the meaning of Article 31 CMR, the ECJ determined that it was indeed the CMR that regulated the matter as it, in principle, is granted precedence by Article 71 Brussels I Regulation, and that it did not have the authority to interpret the meaning of the provisions of the CMR as this is not an EU instrument. However, since Article 71 Brussels I Regulation cannot be interpreted as leading to a result that is irreconcilable with one of the basic principles of the Brussels I Regulation, the favor executionis principle in this case, the rules of the CMR can only apply in the EU Member States insofar as they lead to a result that is in accordance with this principle. The precedence of the CMR can therefore not result in the recognition and enforcement of the German decision being rejected. Thus, it is only in theory that the rules of the CMR govern the matter, not in actual practice.

W. van den Aardweg, De gerichte activiteit van artikel 15 lid 1, onderdeel c, Brussel I: meer duidelijkheid door Luxemburgse gezichtspunten, p. 473-477. The English abstract reads:

This article reviews the recent ECJ decision in the joined cases of Alpenhof and Pammer on the notion of 'directed activity' as contained in Article 15, paragraph 1, under c, of the Brussels I Regulation in the context of e-commerce. This rule assigns jurisdiction to the courts of the country where the consumer resides whenever a trader directs commercial or professional activities to that Member State and the contract falls within the scope of such activities. In this case, the Grand Chamber clarified that in order to have 'directed activity' an intention on the part of the trader to target his activity towards a certain Member State is required. The mere use of a website with information which enables a consumer to contact the trader is insufficient to conclude that such an intention exists on the part of the trader. The Court considered several factors which could provide evidence of an intention on the part of the trader to target his professional and commercial activities towards a Member State. In his note the author comments on the decision and reviews several factors considered to be relevant by the Court, in particular the role of information required by statute and how the factors considered by the Court should be considered and duly weighed.

If you are interested in contributing to this journal, please contact Ms. Wilma van Sas at W.van.Sas-Wildeman@asser.nl

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ITA Winter Forum: February 2-3, 2012, San Francisco

The Institute for Transnational Arbitration has announced the content of its 2012 Winter Forum, and is including several topics of interest to private international law. The program includes, *inter alia*, discussions on the Role of Courts in Aid of International Arbitration and Precedent and Accuracy in Arbitration, and a Luncheon Interview with Prof. George A. Bermann, Chief Reporter of the ALI Restatement (Third) of the US Law of International Commercial Arbitration.

According to Susan Frank, one of the Co-Chairs of the Forum, "This is not just

another arbitration conference. Rather it is the first of its kind that seeks to build upon ITA's academic tradition and bring together practitioners and academics, executives and government officials, at both the junior and senior levels to foster a collaborative exchange on international arbitration. The first half of the forum will be targeted towards a group of works-in-progress, [and] the afternoon session we will be a Tylney-Hall style interactive discussion."

The full program and registration materials are available here.