Publication book Party Autonomy in International Property Law

Roel Westrik, Jeroen van der Weide (eds.), Party Autonomy in International Property Law. Sellier, 2011

This book is the result of a Conference that was held on May 27 and 28, 2010, at the Erasmus School of Law in Rotterdam, the Netherlands. The subject of the conference, 'Party Autonomy in Property Law', is known as highly controversial. The conference perfectly met its objective: analyzing and commenting on the question whether party autonomy or, more specifically, a choice of law possibility in matters of Property Law should be recommended or required. The inspired and vivid discussions that took place at the conference are also embodied in this book.

The book includes twelve contributions around four themes: 1) General aspects of party autonomy, as seen from the perspective of Continental Law as well as of Common Law; 2) Private International (Property) Law; 3) Developments and prospects in Europe and in European Law Projects (e.g. European conflict rules for property law?); 4) Assignment in Private International Law, Financial Instruments/the Collateral Directive; Insolvency Law.

Spanish Mortgages Are Null And Void. Who Says?: The Ecuadorian Parliament

Nicolás Zambrana has kindly sent me this text. Nicolás Zambrana Tévar (nzambranat@unav.es) is assistant lecturer of Private International Law at the University of Navarra, Pamplona, Spain. He is also member of the Grupo de

Several Ecuadorian political parties have introduced a new draft bill in the Ecuadorian Parliament which explicitly manifests that “no legal validity will be given in Ecuador to financial arrangements made to acquire the property of houses (viviendas) in Spain and the judicial acts which may have been derived from such arrangements because the latter have been made under conditions of illegality and fraud”. Another paragraph of this draft bill introduces criminal sanctions for those responsible of entities which try to seize property for this reason in Ecuador (http://www.librered.net/?p=13006).

The present Spanish economic doom commenced with a real estate crisis. As in the US case, many mortgages were arranged on the basis of the belief that the economic situation would remain stable and the real estate prices would continue to rise. Nevertheless, when the bubble exploded, thousands of families saw how the price of the house which guaranteed their loan began to decrease while their interests continued to increase. Furthermore, apparently, many immigrants contend that they had no idea about the Spanish foreclosure system, where the mortgagor (typically, the bank) can auction the house (often obtaining much less than the market price) and still having to pay the remaining part of the secured debt.

Ecuadorians amount to more than 11% (approximately 360.000) of the total amount of immigrants in Spain (Wikipedia). In 2010, Correa, the populist president of Ecuador had already made a public statement in the sense that debts whose creditors were Spanish banks would not be enforceable in Ecuador (El País.com 18/10/2010).

Spain has no bilateral treaty with Ecuador for the recognition and enforcement of foreign judicial decisions. Therefore, decisions made by Spanish tribunals seeking recovery of debts from assets located in Ecuador would be at the mercy of the Ecuadorian legal system and, hypothetically, the new bill would be applicable. It

deserves to be noted that the new draft bill not only amends the Ecuadorian recognition and enforcement system in such a way that all those with assets in Ecuador would be able to benefit from it, but it also declares Spanish mortgages null and void by reason of fraud, with a clear extraterritorial reach which would have no effect whatsoever in Spain but may have effects in, for instance, other Latin American countries. Criminal sanctions promised would be of less interest for private international lawyers, but they may scare plenty of bank officials, given the great presence that Spanish banks have in those countries.

We will inform you of any forthcoming events related to this bizarre new law.

Morrison on the Impacts of McIntyre on Minimum Contacts

Alan B. Morrison, who is the Lerner Family Associate Dean for Public Interest & Public Service at the George Washington University Law School, has published The Impacts of *McIntyre* on Minimum Contacts in Arguendo, the online version of the *George Washington Law Review*.

> *The Supreme Court's June 2011 decision in J. McIntyre Machinery, Ltd. v. Nicastro seriously unsettles the law of personal jurisdiction in suits against manufacturers of dangerous products that are delivered, through a distributor, to the jurisdiction where the product harmed a person using it. The plurality opinion not only failed to satisfy its stated goal of clarifying the law twenty years after Asahi Metal Industry Co. v. Superior Court, but has set the stage for a significant increase in litigation at the preliminary stage when personal jurisdiction defenses are supposed to be resolved. Both the plurality and the concurrence placed great emphasis on the lack of a factual showing of the defendant's minimum contacts with the forum state, which will almost certainly*

lead plaintiffs to undertake substantial nonmerits discovery of the defendant and, in cases like this, the distributor and the employer of the injured plaintiff. Although McIntyre involved a non-U.S. defendant, its rationale also applies when the product maker is from another state, thereby substantially increasing the ability of U.S. companies to avoid suits in jurisdictions where the injured plaintiff resides. The focus on physical contacts with the forum state also suggests that obtaining personal jurisdiction over those whose contacts with the forum state exist only via the Internet will be even less likely than under the current state of the law. And the plurality's suggestion that the solution may lie in Congress conferring broad territorial jurisdiction upon the federal courts where there is diversity of citizenship raises the possibility of a significant increase in personal injury suits in federal district court to avoid personal jurisdiction issues, even where the state court is literally across the street and all the issues involce state law.

The article can be freely downloaded here.

Peterson on the Timing of Minimum Contacts after Goodyear and McIntyre

Todd David Peterson, who is a professor of law at the George Washington University Law School, has published The Timing of Minimum Contacts After *Goodyear* and *McIntyre* in the last issue of the *George Washington Law Review*.

The Supreme Court has never articulated a reason why the "minimum contacts" test, which determines whether a defendant's contacts with a forum are sufficient to subject it to in personam jurisdiction there, is required by the Due Process Clause, or why the Due Process Clause should impose any limitation on the exercise of personal jurisdiction at all. Because the Court has not provided a reason, several issues remain unclear, including what the relevant time period

is during which a defendant's contacts with the forum state may subject it to personal jurisdiction within that state. As I discussed in a previous article, the Supreme Court has never directly addressed the issue of the timing of minimum contacts in any of its personal jurisdiction decisions, which has resulted in confusion among the lower courts about how to apply the minimum contacts test.

The Supreme Court recently had the opportunity to clarify its personal jurisdiction jurisprudence, especially with regard to the stream of commerce theory of jurisdiction and the timing issue, in Goodyear Dunlop Tires Operations, S.A. v. Brown and J. McIntyre Machinery, Ltd. v. Nicastro. These new cases raise many important questions with respect to the issues addressed in my previous article. This article analyzes Goodyear and McIntyre in an attempt to resolve some of those issues. First, it analyzes whether Goodyear and McIntyre modify existing Supreme Court personal jurisdiction precedent in a significant way, and whether the Court's holdings make sense in the context of existing precedent. It also addresses the more fundamental issue of whether the Supreme Court clarified the rationale for imposing a contacts requirement under the Due Process Clause. Finally, this Article examines the more specific issue of whether the Court's opinions shed any further light on the issues relating to the timing of minimum contacts in either general or specific jurisdiction cases.

The article can be freely downloaded here.

Whytock and Robertson on Forum Non Conveniens and the Enforcement of Foreign

Judgments

Christopher A. Whytock (Irvine School of Law) & Cassandra Burke Robertson (Case Western Reserve University School of Law) have published Forum Non Conveniens and the Enforcement of Foreign Judgments in the last issue of the *Columbia Law Review*.

When a plaintiff files a transnational suit in the United States, the defendant will often file a forum non conveniens motion to dismiss the suit in favor of a court in a foreign country, arguing, as the forum non conveniens doctrine requires, that the foreign country provides an adequate alternative forum that is more appropriate than a U.S. court for hearing the suit. Some defendants, however, experience "forum shopper's remorse": Having obtained what they wished for—a dismissal in favor of a foreign legal system with a supposedly more pro-defendant environment than the United States—they encounter unexpectedly pro-plaintiff outcomes, including substantial judgments against them. When this happens, a defendant may argue that the foreign judiciary suffers from deficiencies that should preclude enforcement of the judgment—an argument seemingly at odds with the defendant's earlier forum non conveniens argument that the same foreign judiciary was adequate and more appropriate. This Article shows that under current doctrine, these seemingly inconsistent arguments are not necessarily inconsistent at all. The forum non conveniens doctrine's foreign judicial adequacy standard is lenient, plaintifffocused and ex ante, but the judgment enforcement doctrine's standard is relatively strict, defendant-focused, and ex post. Therefore, the same foreign judiciary may be adequate for a forum non conveniens dismissal, but inadequate for purposes of enforcing an ensuing foreign judgment. However, these different standards can create a transnational access-tojustice gap: A plaintiff may be denied both court access in the United States and a remedy based on the foreign court's judgment. This Article argues that this gap should be closed, and it proposes doctrinal changes to accomplish this.

The article can be freely downloaded here.

Robertson on Third Party Financing of Transnational Litigation

Cassandra Burke Robertson, who teaches at Case Western Reserve University School of Law, has posted the Impact of Third-Party Financing on Transnational Litigation on SSRN. The abstract reads:

Third-party litigation finance is a growing industry. The practice, also termed "litigation lending," allows funders with no other connection to the lawsuit to invest in a plaintiff's claim in exchange for a share of the ultimate recovery. Most funding agreements have focused on domestic litigation in Australia, the United Kingdom, and the United States. However, the industry is poised for growth worldwide, and the recent environmental lawsuit brought by Ecuadorian plaintiffs against Chevron demonstrates that litigation funding is also beginning to play a role in transnational litigation.

This article, prepared for a symposium on "International Law in Crisis," speculates about how the growing litigation-finance industry may reshape transnational litigation in the coming decades. It argues that the individual economic incentives created by third-party financing will likely increase the number of transnational lawsuits filed, raise the settlement values of those lawsuits, and spread out the lawsuits among a larger number of countries than was typical in the past. It further hypothesizes that these individual choices about transnational litigation will lead countries to reassess their internal balance of litigation and regulation and will create pressure for greater international coordination of litigation procedure, including transnational forum choice and cross-border judgment enforcement.

Roundtable on the Proposal for a Common European Sales Law

On Friday, 9 December 2011 the Maastricht European Private Law Institute (M-EPLI) will host a roundtable on the Proposal for a Common European Sales Law. The conference will take place on the Brussels Campus of Maastricht University. Here is the programme:

12.30 Reception

12.45 Welcome Address by Prof. Jan Smits

Panel 1

13.00 Prof. Eric Clive – *A General Perspective on the CESL*

13.30 Prof. Giesela Rühl – *Aspects of Private International Law*

14.00 Ms Fatma Sahin (Discussant)

14.15 Mr Stefaan Verhamme (Discussant)

14.30 General Discussion

15.00 Coffee Break

Panel 2

15.30 Mr. Gary Low – *The Choice of Legal Basis for the CESL*

16.00 Dr. Nicole Kornet – *The CESL and the CISG*

16.30 Ms Ursula Pachl (Discussant)

17.00 Ms Simone Cuomo (Discussant)

17.30 General Discussion

18.00 Closing Words & Reception

More information is available here.

Hovenkamp on U.S. Antitrust's Jurisdictional Reach Abroad

Herbert J. Hovenkamp, who is a professor of law at University of Iowa – College of Law, has posted Antitrust's "Jurisdictional" Reach Abroad on SSRN. Here is the abstract:

> *In its Arbaugh decision the Supreme Court insisted that a federal statute's limitation on reach be regarded as "jurisdictional" only if the legislature was clear that this is what it had in mind. The Foreign Trade Antitrust Improvement Act (FTAIA) presents a puzzle in this regard, because Congress seems to have been quite clear about what it had in mind; it simply failed to use the correct set of buzzwords in the statute itself, and well before Arbaugh assessed this requirement.*
>
> *Even if the FTAIA is to be regarded as non-jurisdictional, the constitutional extraterritorial reach of the Sherman Act is hardly unlimited. It reaches only to restraints affecting commerce "with" foreign nations rather than those affecting commerce "among" the several states. At the same time, however, the canon of construction against extraterritorial application should not apply to the Sherman Act. First, the statutory language condemning restraints of trade or monopolization of commerce "among the several States, or with foreign nations" is not boilerplate and clearly extends to foreign commerce. Second, the FTAIA itself expressly recognizes or grants the Sherman Act's extraterritorial reach to "import trade or import commerce."*
>
> *The implications for interpreting the FTAIA as limiting the antitrust law's*

subject coverage rather than the court's jurisdiction are mainly that, even if the language of the complaint states a claim, the district court will be able to conduct its own jurisdictional fact findings. Further, this inquiry may occur at any time during the proceeding, may occur on the court's own motion, and cannot be waived. A nonjurisdictional interpretation of the FTAIA will thus make it more difficult for defendants to obtain dismissals at an earlier stage. Even here, however, the Supreme Court Twombly and Iqbal decisions require greater specificity in pleading, and will thus serve to diminish the difference between the standards for a motion to dismiss for lack of jurisdiction, and a motion to dismiss for failure to state a claim.

Third 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 full table of contents can be found here.

The first article is a presentation of the new French legislation on arbitration by Professor Sylvain Bollee (Paris I University).

The second article is a study of the international dimension of the liability of rating agencies by Professor Mathias Audit (Paris X University).

French Plaintiffs Drop Jewish or Not Jewish App Lawsuit

French Jewish and anti-racism organizations have dropped the proceedings that they initiated in France against Apple.

The French plaintiffs sought an injunction enjoining Apple from selling its application "Jewish or not Jewish" anywhere in the world. Earlier this fall, at the outset of the proceedings, Apple had already stopped making available the App not only in France, but also in Europe. The plaintiffs did not consider it to be enough and had sought a worldwide injunction.

The French press reports that the French plaintiffs have dropped the case after Apple informed them that it would stop selling the App elsewhere in the world.

From a conflict perspective, the outcome of the case is truly remarkable. The allegation that the App violated the law of one (small) market has led one of the biggest corporations in the world to withdraw the product worldwide.