Issue 2011.1 Nederlands Internationaal Privaatrecht

The first issue of 2011 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht*, which was published in April of this year (apologies for the late posting), was a special issue on Human Rights and Private International Law.

It includes the following interesting contributions:

Laurens Kiestra, Article 1 ECHR and private international law, p. 3-7. The conclusion reads:

In this paper, the role of Article 1 ECHR, which defines the scope of the instrument, with regard to private international law has been discussed. When a court of one of the Contracting Parties either applies a foreign law or recognizes a foreign judgment originating from a third State, there is no reason not to apply the ECHR to such cases. Even though such a third State has never signed the ECHR, it would ultimately be the court of one of the Contracting Parties whose application of a foreign law or recognition of a foreign judgment violating one of the rights guaranteed in the ECHR that would breach the ECHR. This follows from the Court's case law concerning the extraterritorial effects of the ECHR which has been confirmed by the little case law that specifically deals with private international law. Even in circumstances in which there is only a negligible connection with the Contracting Party, the situation does not change appreciably. Such situations still come within the jurisdiction of the Contracting Party and the ECHR is thus applicable to such cases. This does not mean that there cannot be any consideration of specific private international law issues, but only that such concerns should be dealt with within the system of the ECHR. Therefore, one could question whether the public policy exception resulting in the non-application of the ECHR, because of the relative character of the exception, is permissible in light of Article 1 ECHR.

Michael Stürner, Extraterritorial application of the ECHR via private international law? A comment from a German perspective, p. 8-12. The conclusion reads:

In Article 1 the ECHR binds Contracting States to the observance of its provisions. Authorities of each such State must duly respect and foster Convention rights, implying that the entire legal order of that State must comply with Convention standards. Consequently, the ECHR influences private international law along with other branches of such legal systems. Its rules and provisions must equally avoid contradicting Convention rights. Within such legal orders, the ECHR applies to national and transnational cases alike. As soon as there is jurisdictional competence in the Contracting State's courts, a judge acts as part of the State organs bound by the Convention. The operation of choice-of-law rules as applied by national courts and the ensuing results must be in accordance with Convention standards, just as much as the operation of any other national law of such State. If the consequence of the application of foreign law is a violation of the Convention, the forum judge has to see to it that this violation is avoided or corrected. This can be achieved via the public policy exception which is, in its turn, heavily influenced, inter alia, by ECHR standards. However, such an alteration of the resulting application of foreign law referred to through the rules of private international law does not in itself entail an extraterritorial application of the ECHR. There is, as concluded above, no obligation upon a State under public international law to install or apply choice-of-law rules at all; thus there can be no violation of generally accepted principles of international law through a State's application of a public policy exception emerging from its own legal system, including (in the case of the ECHR) its own obligations assumed under public international law.

Ioanna Thoma, The ECHR and the *ordre public* exception in private international law, p. 13-18. Here is an abstract from the introduction:

The purpose of this paper is to crystallize whether the ECHR claims an autonomous and direct application superseding the theoretical premises and technical construction of the conflicts rule itself or whether there is an intertwining interplay between the Convention's ordre public européen and the ordre public exception clause as understood in private international law. First, some examples from domestic case law will demonstrate the methodological approach taken vis-à-vis the interaction between the ECHR and the exception clause of ordre public). Second, further examples from the case law of the ECHR will highlight the position taken by the ECtHR on this question. On the basis of this bottom up and top-down approach our observations and conclusions will be

presented.

Patrick Kinsch, Choice-of-law rules and the prohibition of discrimination under the ECHR, p. 19-24. The abstract included on SSRN reads:

This article deals with the relevance, or irrelevance, of the principle of non-discrimination to that part of private international law that deals with choice of law. Non-discrimination potentially goes to the very core of conflict of laws rules as they are traditionally conceived – that, at least, is the idea at the basis of several academic schools of thought. The empirical reality of case law (of the European Court of Human Rights, or the equally authoritative pronouncements of national courts on similar provisions in national constitutions) is to a large extent different. And it is possible to adopt a compromise solution: the general principle of equality before the law may be tolerant towards multilateral conflict rules, but the position will be different where specific rules of non-discrimination are at stake, or where the rules of private international law concerned have a substantive content.

A welcome comment on ECJ's "Berliner Verkehrsbetriebe" ruling

Last Friday the Spanish magazine *La Ley-Unión Europea* published a comment on ECJ case C- 144/10 by Professor Rafael Arenas (Universidad Autónoma, Barcelona). Prof. Arenas provides some welcome, useful keys on the understanding of the relationship between ECJ rulings in cases C- 04/03, *GAT,* and C-144/10 *BVG;* he also takes into account the reference for a preliminary ruling from the Supreme Court of the United Kingdom (C-54/11) in the same case, still pending before the ECJ. A little reminder: five years ago, in *GAT,* the ECJ established that art. 16(4) of the Brussels Convention applies to any proceedings on the validity of a patent , even if this validity is discussed by way of a plea in objection. On May, 12 2011, the ECJ issued a ruling on C-144/10, *BVG v. JPMorgan,* a case in which a contractual claim was contested by the defendant -a

company-, on the basis that the agreement was not valid because the decisions of the society's organs, which had led to the conclusion of the contract, were null and void. The defendant tried to avoid the London jurisdiction, arguing that the only competent courts were the German ones since the defendant was a German company, and one of the issues under discussion was the validity of decisions of its organs. According to the defendant, article 22(2) of the Regulation applies although the doubts on the validity of the company's decisions was just a preliminary question. Apparently, the ECJ's ruling in *GAT* supports the defendant's arguments. The ECJ established, however, that in the case *BVG v. JPMorgan* article 22(2) of Regulation 44/2001 does not apply. The ECJ maintains that this decision does not contradict his previous ruling in case 4/03, *GAT*; but it is obvious that the compatibility of both judgments requires some explanation. That is why we recommend Prof. Arenas's comment.

Radicati on Arbitration and the draft Brussels I Review

Luca G. Radicati di Brozolo, who is a professor of law at the Catholic University of Milan and a partner at Bonelli Erede Pappalardo, has posted Arbitration and the Draft Revised Brussels I Regulation on SSRN. The abstract reads:

> *This paper discusses the provisions on arbitration of the European Commission's December 2010 draft review of Reg. (EC) 44/2001 against the backdrop of the earlier proposals on the inclusion of arbitration within the scope of the Regulation. The analysis focuses principally on the functioning and implications of the lis pendens mechanism laid down by Article 29(4) of the draft, pointing out the analogy between the role conferred on the law and forum of the seat of the arbitration and the mechanism of home country control that is at the heart of European Union law. The article also analyzes the reasons and positive consequences of the Commissions' restraint in not extending the scope of the Regulation to other arbitration – related issues, especially the circulation of judgments dealing with the validity of arbitration agreements and awards.*

The article's conclusion is that the Commission proposal is well balanced. Whilst it does not solve all problems relating to conflicts between court proceedings and arbitration within the EU, it addresses the most pressing one, that of concurrent court and arbitration proceedings. Moreover, it does so in terms which, in contrast to the use of anti-suit injunctions in aid of arbitration, are reconcilable with the basic tenets of European Union law. Its approach is indisputably favorable to the development of arbitration and does not jeopardize the acquis in terms of arbitration law of the more advanced member States.

Retirement of J J Spigelman as Chief Justice of New South Wales

It is appropriate to note on this blog the recent retirement of J J Spigelman as Chief Justice of New South Wales. A number of his judgments and speeches over the course of his tenure as Chief Justice constitute significant contributions to Australian private international law.

They are identified in his chapter entitled 'Between the Parochial and the Cosmopolitan' in the recently published collection *Constituting Law: Legal Argument and Social Values* (Federation Press, 2011) edited by Justin Gleeson and Ruth Higgins. That chapter also provides an overview of the former Chief Justice's views on the approach of the judiciary to the foreign elements that arise in cases, including cross-border issues, venue disputation, enforcement of judgments, judicial co-operation and determining questions of foreign law. The chapter is based on a speech given by the former Chief Justice in June 2010, the text of which may be found here.

Australian article round-up 2011: International co-operation

Concluding the Australian article round-up, readers may be interested in the following articles raising points about international co-operation on conflicts issues:

- Rosehana Amin, 'International Jurisdiction Agreements and the Recognition and Enforcement of Judgments in Australian Litigation: Is There a Need for the Hague Convention on Choice of Court Agreements?' (2010) 17 *Australian International Law Journal* 113

One of the difficulties faced by judges and practitioners when dealing with disputes arising from international commercial transactions is in the application and enforcement of a choice of court or foreign jurisdiction clause to determine the relevant court to adjudicate the dispute. This article explores the process undertaken by Australian courts when deciding whether they should exercise jurisdiction. In addition, the legal uncertainty arising from the distinction drawn between exclusive and non-exclusive jurisdiction clauses, and the ambiguous approach employed in the enforcement of a jurisdiction clause is considered. The Hague Conference on Private International Law has developed the Hague Convention on Choice of Courts Agreement 2005 and it is intended to promote the enforceability of exclusive choice of court agreements and establish the international recognition and enforcement of resulting judgments. This article considers whether Australia should, like its American and European counterparts, take steps to sign and ratify the Hague Convention. Further, the article also assesses the impact the Convention will have in resolving jurisdictional issues faced by Australian courts and the recognition and enforcement of a resulting decision. Finally, the article posits that the Hague Convention will clarify the uncertainties facing Australian courts in international jurisdictional disputes.

- Gina Elliott and David Hughes, 'Australia joins the Hague Service Convention' (2010) 84 *Australian Law Journal* 532:

The Hague Service Convention will come into force for Australia on 1

November 2010. The Convention presently has 61 states parties, and is the most important multilateral convention in the field of transnational services of process. This article sets out the main features of the Convention, including when it applies, the manner in which the Convention will interact with Australian law, and the methods provided by the Convention for the transmission of documents for service abroad. The article also discusses foreign case law that has developed in connection with key issues that arise under the Convention.

Van Den Eeckhout on Corporate Human Rights Violations

Veerle Van Den Eeckhout (Leiden and Antwerp) has posted Corporate Human Rights Violations and Private International Law – The Hinge Function and Conductivity of PIL in Implementing Human Rights in Civil Proceedings in Europe: A Facilitating Role for PIL or PIL as a Complicating Factor? on SSRN. Here is the abstract:

In this article the author explores the role private international law ('PIL') could play in addressing human rights violations committed by a multinational company operating outside Europe ? possibly in a conflict zone ? in a civil action in Europe. The article examines the feasibility of civil recourse in a European country seen from the perspective of PIL. Is PIL functioning as a neutral hinge – identifying the competent court(s) and the applicable law in a neutral way ? or does PIL lend itself rather to function as a tool, either serving the economic concerns of multinational companies, or the aims of plaintiffs who wish to hold companies accountable? To answer this question, the author analyzes PIL rules and PIL techniques in a technical-legal way and evaluates them with a critical eye. In the analysis, the concept of 'access to justice' is used as a central key concept; access to justice is linked both with PIL rules on jurisdiction and PIL rules on applicable law: rules of jurisdiction are decisive in

'opening' the door to proceedings in a European country, in which subsequently – to the extent that the rules of applicable law allow this – human rights may be invoked and the interests of third-country victims as 'weaker parties' may be protected.

The area of PIL rules to be studied is ? mainly – the area of torts, with special attention for issues of negligence, omission, duty of care and complicity. As the PIL rules of European Member States are increasingly being 'communitarized', the main PIL rules to be studied and analyzed in this article are sources of European PIL. Thus, the focus will be on the Brussels I Regulation (including aspects of the ongoing revision process of this Regulation, particularly proposals which could either broaden or limit the possibility of starting proceedings in a European country) and the Rome II Regulation as unified European PIL sources, albeit with attention for potential national differences with respect to the application of the Rome II Regulation: evaluating the plausibility of various results is important, because it is conceivable that plaintiffs may choose between several European courts, taking into account in their choice the advantages or disadvantages of the specific way in which national courts will apply the Rome II Regulation ('shopping' possibilities for plaintiffs) and because it is conceivable that companies will take into account these differences in their decision where to 'establish' their headquarters and where to 'take decisions' etc. And indeed, the system of the Rome II Regulation makes it conceivable that different results are obtained depending on the European court that hears the case.

But what is more: the current literature is for the most part rather sceptical about the possibilities the Rome II Regulation offers to third-country victims of violations of human rights committed by companies outside Europe. Accordingly, although the author argues that some of the avenues for plaintiffs allowed by the system of the Rome II Regulation appear to be underestimated in the literature – and although the author also argues that even the current version of the Rome II Regulation has the potential to enhance human rights – it will be recognized that there are hurdles to be taken. This raises the question whether the system of the Rome II Regulation needs to be amended or needs to be 'fleshed out' by a set of specific rules. This could comprise actions such as broadening the scope of Article 7 of the Rome II Regulation; unification of mandatory rules – e.g. similar to the way in which the European legislator

intervened in international labour law by unifying mandatory rules in the Posting Directive ? see the opening offered by the 'overriding mandatory rules' of Article 16 of the Rome II Regulation; promulgation – on a European level? – of statutory duties for companies with regard to extraterritorial compliance with human rights standards and creating more possibilities to take into account national or European rules on extraterritorial corporate criminal responsibility for human rights violations ? see the opening offered by the 'rules of safety and conduct' of Article 17 of the Rome II Regulation; unification of 'surrogate law' for cases where the plea of public order of Article 26 of the Rome II Regulation is successfully invoked.

Freeze! EU Proposal to Block Debtors' Accounts

The European Commission has adopted a Proposal for a Regulation creating a European Asset Preservation Order. As the press release accompanying the Proposal explains:

The Regulation would establish a new European Account Preservation Order that would allow creditors to preserve the amount owed in a debtor's bank account. This order can be of crucial importance in debt recovery proceedings because it would prevent debtors from removing or dissipating their assets during the time it takes to obtain and enforce a judgment on the merits. This will raise the prospects of successfully recovering cross-border debt.

The new European order will allow creditors to preserve funds in bank accounts under the same conditions in all Member States of the EU. Importantly, there will be no change to the national systems for preserving funds. The Commission is simply adding a European procedure that creditors can chose to use to recover claims abroad in other EU countries. The new procedure is an interim protection procedure. To actually get hold of the money, the creditor will have to obtain a final judgment on the case in accordance with national law or by

using one of the simplified European procedures, such as the European Small Claims Procedure.

The European Account Preservation Order will be available to the creditor as an alternative to instruments existing under national law. It will be of a protective nature, meaning it will only block the debtor's account but not allow money to be paid out to the creditor. The instrument will only apply to cross-border cases. The European Account Preservation Order will be issued in an ex parte procedure. This means that it would be issued without the debtor knowing about it, thus allowing for a "surprise effect". The instrument provides common rules relating to jurisdiction, conditions and procedure for issuing an order; a disclosure order relating to bank accounts; how it should be enforced by national courts and authorities; and remedies for the debtor and other elements of defendant protection.

The proposed European Account Preservation Order Regulation will now pass to the European Parliament and the Council of the EU for adoption under the ordinary legislative procedure and by qualified majority.

Good news, it seems, for Italian cheesemakers, but less so for French frozen pizza manufacturers planning to default on mozzarella invoices.

There will, no doubt, be more discussion of the Proposal on this site, once all have had a chance to digest its contents.

Australian article round-up 2011: Conflicts within the Australian federation

Continuing the Australian article round-up, readers may be interested in the following article and recently published book raising points about conflicts within

the Australian federation:

- Geoffrey Lindell and Sir Anthony Mason, 'The Resolution of Inconsistent State and Territory Legislatoin' (2010) 38 *Federal Law Review* 391:

[W]e have chosen to discuss an important aspect of the subject [of federalism] which has become even more important since the High Court recognised that State legislation is capable of operating beyond the territorial limits of the enacting State. That aspect is how conflicts are resolved between overlapping State and Territory civil and criminal legislation which is capable of operating beyond the territorial limits of the enacting State or Territory. Our aim is to identify the principles which govern, or should govern, the resolution of such conflicts. As will appear, the governing principles which we favour are as follows:

(1) a State (or Territory, if authorised by the Australian Parliament) can, subject to some limitations, legislate with extraterritorial effect in another State (or Territory); primacy will be accorded, in a case of direct or indirect inconsistency, to the law of the State (or Territory) legislature which has competence to legislate in the geographical area in which the law of the former State (or Territory) purports to operate (our 'main solution');

(2) the closer connection test suggested in Port MacDonnell Professional Fishermen's Association Inc v South Australia ('closer connection test') applies only where the same inconsistency arises with respect to legislation which seeks to operate outside the geographical area of both the jurisdictions mentioned in the first principle, for example Australian offshore areas; and

(3) principles (1) and (2) only operate in the absence of uniform choice of law rules prescribed by federal legislation which displaces them.

- Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011):

An important feature in all legal systems, but especially in federations whose polities have overlapping legislative powers, is that those laws regularly conflict – or at least are claimed to conflict. Any coherent legal system must have principles for resolving such conflicts. Those principles are of immense practical as well as theoretical importance. This book, which straddles

constitutional law and statutory interpretation, describes and analyses those principles.

This book does not merely address the conflicts between Commonwealth and State laws resolved by the Constitution (although it does that and in detail). It analyses the resolution of all of the conflicts of laws that occur in the Australian legal system: conflicts between laws enacted by the same Parliament and indeed within the same statute, conflicts between Commonwealth, State, Territory, Imperial laws and delegated legislation.

After identifying the laws in force in Australia, the chapters deal with:

- *conflicts in laws made by the same legislature, focussing on the interpretative process of statutory construction;*
- *repugnancy, a doctrine with continuing vitality in the areas of s79 of the Judiciary Act, delegated legislation and Territory laws;*
- *conflicts between laws of the Commonwealth and State laws, proposing that the categories of inconsistency (commonly three: direct, indirect and 'covering the field') are best seen aspects of a single constitutional concept;*
- *conflicts between the laws of two States, and*
- *conflicts involving the laws of the self-governing Territories.*

New Book on the Prohibition of Abuse of Law in EU Law

Is the Prohibition of Abuse of Law a New General Principle of EU Law? This was the topic of a conference which took place in Oxford in October 2008 and now the subject of this recently released volume in the Studies of the Oxford Institute of European and Comparative Law.

The Court of Justice has been alluding to 'abuse and abusive practices' for more

> *than thirty years, but for a long time the significance of these references has been unclear. Few lawyers examined the case law, and those who did doubted whether it had led to the development of a legal principle. Within the last few years there has been a radical change of attitude, largely due to the development by the Court of an abuse test and its application within the field of taxation. In this book, academics and practitioners from all over Europe discuss the development of the Court's approach to abuse of law across the whole spectrum of European Union law, analysing the case-law from the 1970s to the present day and exploring the consequences of the introduction of the newly designated 'principle of prohibition of abuse of law' for the development of the laws of the EU and those of the Member States.*

The book, which was edited by Rita de la Feria and Stefan Vogenauer (Oxford), covers the whole spectrum of EU law, which includes quite a few topics of interest for private international law scholars: company law, insolvency, civil procedure, and private law in general.

The full table of contents can be found here.

EESC Opinion on the Brussels I Review published yesterday

The Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' was published yesterday (OJ, C, 218). Though the Committee warmly welcomes the Commission's proposal and supports it, it nevertheless critisises the following aspects:

.- the exclusion of collective proceedings when abolishing the exequatur (art. 37)
.- the extent of the defamation exception (art. 37)
.- the drafting of the new mechanism for legal cooperation (art. 31)

.- the vagueness of the requirement that ‘coordination’ should be ensured between the court with jurisdiction on the substance and the court in another Member State which is seised with an application for provisional measures.
.- the insuficiency of the new rule on the recognition of arbitration agreements

According to the EESC, the Commission should also

.- consider amending Article 6 of Regulation 44/2001 in order to allow actions brought by different claimants to be dealt with collectively

.- keep a particularly close eye on the conduct of courts in the Member States, to ensure that the principle of mutual recognition of judgments is implemented correctly whenever decisions are made on jurisdiction for reasons of public policy

.- promote the development of a communication or guide on how to interpret Article 5 of the proposal

.- review the wording of Art. 24, in order to strengthen the legal position of consumers and employees and ensure that the same procedure is followed, regardless of which court has jurisdiction.