Position at the Hague Conference in International Family Law

The Permanent Bureau of the Hague Conference on Private International Law (HCCH) is seeking a Legal Officer (full-time).

JOB DESCRIPTION: He or she will work in the areas of international family law and international child protection and be part of a team, under the direction of the responsible First Secretary, supporting the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention. Additionally, the Legal Officer will work on a variety of projects arising from recommendations made by various Special Commissions, including international family mediation and the private international law issues surrounding the status of children (including international surrogacy arrangements).

Duties may further include comparative research on general aspects of cross-border family law, work on the international child abduction database (INCADAT), drafting of research papers and other documentation, drafting and general preparation of materials for publication, answering daily requests for information relating to the relevant Conventions, preparation for meetings (including Special Commission meetings), assistance in the preparation of and participation in conferences, seminars and training programmes, giving presentations and lectures on issues related to international family law, and such other work as may be required by the Secretary General from time to time.

JOB QUALIFICATIONS: The successful applicant will have a good knowledge of private international law, particularly in the areas of international family law and international child protection. Familiarity with comparative law and public international law is desirable as is knowledge of civil law systems. He or she will have excellent language skills (oral and drafting) in at least one official language of the Hague Conference (English or French), and should have a good working knowledge of the other. Knowledge of a third language is an asset. He or she will be sensitive with regard to different legal cultures, and any experience with non-western cultures would be helpful. He or she should work well in a team and respond well to time-critical requests. Five to 10 years experience as a lawyer in private practice or in an academic or research institution, or as a government

official or an official with an International Organisation is required. Type of appointment and duration: two-year contract, with the possibility for renewal. Grade (Co-ordinated Organisations scale): +/- A1/1 subject to relevant experience.

APPLICATION PROCEDURE: Deadline for applications: 4 January 2012

Applications should be made by e-mail, with *Curriculum Vitae*, letter of motivation and at least two references, to be addressed to the Secretary General, e-mail: secretariat@hcch.net

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Workshop on the Proposal for a Common European Sales Law

On 17 and 18 November 2011, following the official opening of the secretariat of the European Law Institute (ELI), the ELI will host its first project workshop. Dedicated to the Proposal for a Common European Sales Law (CESL) the workshop will bring together leading European scholars and discuss the context, the structure and the content of the envisioned optional instrument. More information on the event is available on the Institute's website.

Official Opening of the Secretariat of the European Law Institute

On 1 November 2011 the Secretariat of the recently founded European Law Institute (ELI) has moved to its new premises in Vienna. To mark the occasion a public presentation of the ELI, and of the work of the Secretariat, will be made on 17 November 2011 at 10 am in the presence and with the support of Viviane

Reding, Vice-President of the European Commission and EU Commissioner for Justice, Fundamental Rights and Citizenship. More information on the event is available on the Institute's website.

Agreements as to Succession

On the 31st. October the Spanish magazine *La Ley-Unión Europea* published a paper on Article 18 (Agreements as to succession) of the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession. Authors, Professor Santiago Álvarez-González and Isabel Rodríguez-Uría-Suárez (University of Santiago de Compostela) highlight that the mere existence of a special rule for agreements as to successions is to be welcome. Nevertheless, they propose some amendments to the current text and the need of rethinking some general options. Some of these proposals are similar to ones made by others scholars or Institutions (actually, authors agree on a wide extent with the Max Planck Comments); some others reflect the need to explore new solutions.

Authors propose the express inclusion of joint wills in the text of Article 18. They also consider that the substantive scope of the rules on applicable law to the agreements as to successions must be clarified, especially in its relationship with the lex succesionis. They disagree with the rule of Article 18 (4) of the Proposal. It is a rule that introduces a vast amount of uncertainty in the parties' expectations; this is the reason why they claim it must be suppressed. Furthermore, they consider than the place given to the possibility to make a choice of law to the whole agreement by the Article 18 (3) of the Proposal should be enlarged, allowing the parties involved in a such agreement to choose the law of the habitual residence of each of them and not only the law that they could have chosen in accordance with Article 17; that is, the law of each of their nationalities at the moment of choice.

The “rule of validation” of Article 18 (1) is analysed to conclude that, although it introduces an instrument to provide the *favor validitatis*, well acknowledged in comparative law, it could sometimes bring uncertainty as to the extent of the testamentary freedom (ie, parties are aware that the agreement they made is null and void according to the applicable law and the person whose succession is involved makes a new will). In the same sense, authors agree with the alternative solution (habitual residence of any of the persons whose succession is involved) provided by Article 18(2) for agreements concerning the succession of several persons, but they wonder whether such a conflict-rule-substantive approach is legitimate in the European Law context.

Argentina’s Diplomatic Immunity in Belgium and France

Should waivers of diplomatic immunity in financial contracts be taken seriously? Should they be interpreted as narrowly as possible? Should it be specifically the case for states close to bankruptcy? For the same reasons, should the scope of diplomatic immunity be interpreted broadly?

These questions arise after two judgments delivered in the same case by the French supreme court and the Court of appeal of Brussels last summer interpreted differently the same contractual clause whereby the Republic of Argentina had waived its sovereign immunity in a financial contract.

Background

On Christmas 2001, the gift of Argentina to its creditors was to declare a moratorium on payments of its external debt. One such creditor was NML Capital Ltd, which was the beneficial owner of bonds issued by Argentina in year 2000. As the relevant financial contracts contained a clause granting jurisdiction to New York courts, the creditor sued Argentina before a U.S. federal court, and obtained in 2006 a judgment for USD 284 million.

In the summer 2009, NML Capital initiated enforcement proceedings in Europe. It had enforcement authorities carry out provisional attachements over banks accounts of the Argentine embassies (and of various other Argentine public bodies or missions to international institutions such as UNESCO) both in France and in Belgium.

Argentina challenged the validity of these provisional attachements on the ground that they violated its diplomatic immunity.

Argentina's Waivers of Sovereign Immunities

The relevant financial contracts contained clauses whereby the Republic waived all immunities for the purpose of enforcing a judgment ruling against it in the context of the relevant contracts. Each of the clauses in the different financial contracts then provided for exceptions, i.e. assets over which enforcement of the judgment could not be sought. The first exception was the reserves held by the central bank of Argentina. The second and third exception were two categories of public assets on Argentina's territory. The fourth were certain assets related to the budget of Argentina as defined by a particular Argentine statute.

This looked like carefully drafted clauses. None of them mentioned diplomatic immunity, or diplomatic assets. At the same time, the only assets which the clauses excluded from the waiver were located in Argentina, which suggested that diplomatic assets were covered by the waiver clause.

Belgium

In a judgment of 21 June 2011, the Brussels Court of Appeal dismissed Argentina's challenge and held that the bank accounts could be attached by the plaintiff.

With respect to the scope of the waiver clause, the court found that the 1961 Vienna Convention on diplomatic relations only provides for one requirement for waiver of the diplomatic immunity: it should be express. The court ruled that the waiver in the financial contract was express. It rejected the argument that the diplomatic immunity could only have been waived by a clause providing specifically that diplomatic immunities were also waived, as there is no such requirement in the 1961 Vienna Convention.

France

In a judgment of 28 September 2011, the French supreme court for private and criminal matters (*Cour de cassation*) held that Argentina still benefited from its diplomatic immunity, and that the provisional attachements carried out in France were thus void.

With respect to the scope of the waiver clause, the court held that waivers of diplomatic immunities must not only be express, but also special, i.e. provide specifically that they cover diplomatic assets. As it was perfectly aware that the second requirement is absent from the Vienna Convention, the court relied on customary international law. The judgment, however, is as cryptic as all judgments of the court, and thus does not explain how the court comes to this conclusion about the content of customary international law, and whether particular sources were considered.

With respect to the scope of the diplomatic immunity, the Vienna Convention also raised an issue, as it does not mention bank accounts among the assets covered by the diplomatic immunity. Again, the court held that, under customary international law, the diplomatic immunity extended to the accounts of embassies. On this point, the Brussels Court of appeal had reached, reluctantly it seems, the same conclusion.

Further readings

The enforcement of the judgment was also sought, and challenged, in the United Kingdom. The UK Supreme Court ruled on the case in a judgment of July 2011.

Issue 2011.2 Nederlands Internationaal Privaatrecht

The second issue of 2011 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* includes the following articles on the

Brussels I Recast (contributions on Provisional Measures and Arbitration), Service of Documents and the new Chinese Private International Law Act:

Jolien Kruit, Voorlopige maatregelen: belangrijke wijzigingen op komst voor de (natte) praktijk!?, p. 271-279. The English abstract reads:

In its proposal to amend the Brussels I Regulation (COM(2010) 748), the European Committee has proposed several changes to the current rules on provisional, including protective, measures, as set out in Article 31 of the Brussel I Regulation and the case law of the European Court of Justice. Most strikingly, the Committee has proposed (1) that an obligation be implemented for the preliminary judge to cooperate with the Court where proceedings are pending as to the substance; and (2) that provisional measures, including – subject to certain conditions – measures which have been granted ex parte, are to be enforced and recognized, if they have been granted by a Court having jurisdiction on the substance of the case. This paper discusses these suggested changes and their consequences for daily practice. It is argued that if the proposed changes are implemented as suggested, serious problems may arise and that the Courts will have to give a reasonable interpretation to the provisions in order to create a practicable and useful regime.

Jacomijn J. van Haersolte-vanHof, The Commission's Proposal to amend the arbitration exception should be embraced!, p. 280-288. An excerpt from the introduction reads:

This contribution will first address the current state of the law, based on the present text 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 (the 'Regulation') and the main case law of the European Court of Justice. Furthermore, the background and contents of the Commission Proposal1 will be discussed. This leads to an overview of the main reasons why the Commission's Proposal for a review of this Regulation should be accepted. (…) this contribution is based on the role attributed to the author at the Colloquium held on 25 January 2011 in The Hague, organized by the T.M.C. Asser Institute and the Stichting Dutch Legal Network for Shipping Transport, namely to defend the Commission's Proposal. In fact, this role had been designated even before the Commission's point of view had been published. The author was happy to defend this position, also when the Commission's Proposal was released. At the same

time, it should be noted that, initially, the author hoped for and supported a more exhaustive solution for arbitration to be incorporated into the Regulation. Nevertheless, a partial solution at this stage is to be preferred over the complete absence of any solution. But, as this contribution will show, it is not easy to provide for a partial solution. Hopefully, the legislative process will allow certain amendments and fine-tuning further to improve the present Proposal.

Vesna Lazic, The amendment to the arbitration exception suggested in the Commission's Proposal: the reasons as to why it should be rejected, p. 289-298. The conclusion reads:

The solution suggested in the Commission's Proposal is both disproportionate and inadequate to meet the needs of the commercial parties. There is a clear discrepancy between the 'problem' allegedly intended to be resolved and the amendments suggested in the Proposal for doing so. The suggested measure of transferring the court intervention in the pre-arbitration phase from one jurisdiction to another can hardly be explained by reasons such as 'enhancing the effectiveness of arbitration agreements' and enhancing the attractiveness of arbitrating in the EU. Particularly erroneous and inadequate is the suggested and presumed binding nature of the decision on the validity of an arbitration agreement, without providing for at least a minimal level of uniformity. It is exactly because the 1958 New York Convention regulates only some instances of court 'intervention' that it is preferable to have a separate instrument within which all relevant aspects would be dealt with. Such an instrument would serve as a genuine supplement to the 1985 New York Convention. It would be a proper means to overcome the undesirable effects of those provisions that proved outdated and, as such, unsuitable for modern business or that have given rise to difficulties and discrepancies in interpretation by national courts. Such a carefully drafted instrument would truly enhance the attractiveness of arbitrating within the EU. Partial solutions in the form of poorly drafted and vaguely worded amendments are counterproductive as they will only be driving away potential users from arbitrating in Europe. Unfortunately, it does not seem likely that the Commission will follow that path and address all the issues in one EU instrument. Numerous interventions, commentaries on the Green Paper and clear preferences for not dealing with issues concerning the interface between arbitration and litigation within the Regulation have obviously been ignored. Thus, it is unrealistic to expect that any comments and suggestions to that effect will have any

relevance in the future. Yet if the Commission wishes to pursue the approach of a '(partial) deletion of the arbitration exception' it is perhaps not too much to expect that the context and the wording of the amendment will be substantially reconsidered and revised. Thereby an approach comparable to Article VI(3) of the European Convention may be a suitable solution. This may be combined with prima facie control over the validity of arbitration agreements by the court seised when no arbitration has yet been initiated. Such an approach would ensure the full effectiveness of arbitration agreements.

Chr. F. Kroes, Bij nader inzien: de Hoge Raad komt terug van zijn opvatting dat bij de kantoorbetekening ex artikel 63 Rv ook het Haags Betekeningsverdrag moet worden gevolgd, p. 299-302 [Annotation to Hoge Raad 4 februari 2011, nr. 10/04456, LJN: BP0006 (NIPR 2011, 222) en nr. 10/05104, LJN: BP 3105 (NIPR 2011, 223). The English abstract reads:

Until recently, the Supreme Court held that national service at the office address of a party's counsel in the first instance ('office service') was not sufficient if the defendant had his/her domicile in a Member State of an international instrument on service abroad (an EU Regulation or a treaty). In such a case, the plaintiff should also adhere to the requirements for service under that instrument. The Supreme Court has now completely reversed its position. With regard to the Service Regulation II, it decided on 18 December 2009 that, in case the Service Regulation II would otherwise be applicable, office service is sufficient. On 4 February 2011, the Supreme Court handed down two decisions that make clear that the same applies in cases where defendants have their domicile in Member States of the Hague Convention on Service in Civil and Commercial Cases 1965. No doubt, these decisions are pragmatic. However, there are objections. First, it is unclear what effort a party's counsel must make in order to make sure that the document that has been served actually reaches his client. In most cases, this will not be a problem, but if counsel has lost contact, it certainly will be. Such an inability to reach the client will go unnoticed by the court that will then simply proceed by default. Secondly, problems with recognition and enforcement outside of the Netherlands may result from such an office service.

Ning Zhao, The first codification of choice-of-law rules in the People's Republic of China: an overview, p. 303-311. The conclusion reads:

Given the continued economic growth and the ever-increasing number of foreign-

related civil relations in the PRC, the enactment of the Statute is certainly a timely one. With this Statute, the legislator has succeeded in achieving the goals of codifying substantial parts of choice-of-law rules, and keeping them in line with major developments achieved in international and national codifications and reforms in this field. In spite of the influence of other codifications, the Chinese legislator has made this Statute suitable for Chinese social reality. From the foregoing, it is clear that the Statute gives preference to legal certainty and conflicts justice over flexibility and substantive justice. The Statute incorporates many of the most advanced developments in the field of choice of law, in that it modernizes and systematizes the rules that are currently in force. Parties in dispute and practitioners will certainly benefit from the clear and transparent rules prescribed in the Statute, and those rules will also facilitate the adjudication of international civil disputes by Chinese courts. Thus, as the first codification of choice-of-law rules in China, the Statute opens a new page for Chinese private international law. It is probably too early to draw a conclusion as to the effectiveness of the Statute, as only practice will put the advantages and inconvenience of the Statute into perspective. Nevertheless, the Statute seems to have the potential to succeed as a basic body of law in regulating choice-of-law problems in foreign related civil relations.

Third Issue of 2011's Belgian PIL E-Journal

The third issue of the Belgian bilingual (French/Dutch) e-journal on private international law *Tijdschrift@ipr.be / Revue@dipr.be* was just released.

The journal essentially reports European and Belgian cases addressing issues of private international law, but it also offers academic articles. This issue includes a note by Charline Daelman commenting on the recent case of the European Court of Human Rights *Negrepontis-Giannisis v. Greece* and discussing the Interaction Between Human Rights and Private International Law.

Presentation of the CLIP Principles

Following the publication of the final Draft Principles for Conflict of Laws in Intellectual Property which we reported here, the European Max-Planck Group on Conflict of Laws in Intellectual Property (CLIP) is now prepared to make their presentation. The conference organised for this purpose by will take place on 3-5 November in Berlin. The program is as follows:

Thursday, November 3
Welcome reception *Jürgen Basedow, Hamburg/Josef Drexl, Munich*

Friday, November 4
Introduction to the CLIP Project Jürgen Basedow, Hamburg
The principle of territoriality and the rules of the CLIP Principles on jurisdiction *Paul Torremans, Nottingham/Rochelle Dreyfuss, New York*
The principle of territoriality and the rules of the CLIP Principles on the applicable law *Josef Drexl, Munich/Dário Moura Vicente, Lisbon*
The approach of the CLIP Principles to ubiquitous infringement *Annette Kur, Munich/Rufus Pichler, New York*
Party autonomy and contracts under the CLIP Principles *Axel Metzger, Hanover/Ivana Kunda, Rijeka*
The approach of the CLIP Principles to recognition and enforcement of judgements *Pedro de Miguel Asensio, Madrid/Stefania Bariatti, Milan*

Saturday, November 5
The impact of the CLIP Principles on courts and arbitration *Mireille van Eechoud, Cambridge (Chair)/Joachim Bornkamm, Freiburg/François Dessemontet, Lausanne/Sierd Schaafsma, The Hague/Winfried Tilmann, Düsseldorf*
The impact of the CLIP Principles on legislation and international law *Alexander Peukert, Frankfurt (Chair)/Spiros Bazinas, UNCITRAL/Friedrich Bulst, DG Competition/Marta Pertegás, Hague Conference/Christian Wichard, WIPO*
The CLIP Principles and the parallel projects of the American Law Institute and

Waseda/KOPILA *Graeme Dinwoodie, Oxford (Chair)/Jane Ginsburg, New York/Toshiyuki Kono, Fukuoka*
Farewell address *Josef Drexl, Munich*

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.