Fornasier on European Contract Law and Choice of Law

Matteo Fornasier, a senior research fellow at the Max Planck Institute for Comparative and International Private Law in Hamburg, has written an interesting article on the optional instrument of European contract law and choice of law. The article is forthcoming in Rabels Zeitschrift für ausländisches und internationales Privatrecht and can be downloaded here. The English abstract reads as follows:

> *Ten years after placing the idea of a European contract law on the political agenda, the European Commission has announced its intention to take legislative action soon. A proposal for a regulation on an optional instrument of European contract law is expected in the fall of 2011. The regulation would create a set of European contract rules which would exist alongside the various national regimes and could be chosen as the applicable law by the parties to the contract. Such an instrument raises a number of questions with regard to private international law in general and the Rome I Regulation in particular. Should the choice of the European contract law be subject to the general rules on party choice under Rome I or does the new instrument call for special rules? Also, should the European contract law be eligible only where the relevant choice of law rules refer the contract to the law of a Member State or should the parties also be allowed to opt for the European rules where private international law designates the law of a third state as the law applicable to the contract? And finally, how does the optional instrument relate to the CISG and other uniform law conventions? The following paper discusses possible models of how to fit the optional instrument into the system of private international law. In particular, it examines which solution is the best suited to achieve the primary goal of the optional instrument, i.e. to improve the functioning of the internal market.*

Towards a Coherent European Approach to Collective Redress

The Commission's consultation on collective reddress, aiming to identify common legal principles on collective redres, ended in April 2011. On 15 July 2011, the European Parliament published a draft report on collective redress. I might be wrong, but I think the document has gone unfairly unnoticed. You can have a look at it here.

Twenty Years' Work by GEDIP

A new book gathering 20 years of work by the European Group for Private International Law has just been published. Building European Private International Law. Twenty Years' Work by GEDIP was edited by Marc Fallon, Patrick Kinsch and Christian Kohler.

> *During the last 20 years, private international law has been significantly transformed in Europe. Since its creation in 1991, the European Group for Private International Law (EGPIL, also commonly known as GEDIP) sustained this evolution. Composed of specialists in private international law who are also interested in European law, the GEDIP focuses on the interaction between these two fields of research. The work of the GEDIP focuses on international instruments of various nature – in particular, those of the Hague Conference on Private International Law, and the European Convention for the protection of human rights and fundamental freedoms. The issues covered by the annual meetings are chosen and analyzed in an independent way without a mandate from European or international institutions. The aim is to foster progress of knowledge by using an issue-by-issue method. This working method allowed the GEDIP to develop new tools which turned out to sustain the preparation of several European acts in civil and commercial matters – namely, the Regulations Brussels II, Rome I, Rome II, and Rome III, as well as possibly the*

forthcoming regulation on succession or the revision of the Brussels I Regulation. GEDIP documents reflect the evolving debate on private international law in Europe for 20 years. Their publication into a monograph at the occasion of the GEDIP's 20th anniversary aims to improve their dissemination and is accompanied by a detailed index to facilitate their consultation.

The full table of content is available here. More details are available here.

European Parliament's Workshop on the Brussels I Proposal (rescheduled)

The workshop organized by the EP JURI Committee on the review of the Brussels I regulation, originally scheduled on 20 September 2011 (see our previous posts here and here) is taking place in Brussels this morning (h 10.00 – 12.00).

The live video streaming is broadcasted on this page. The link to the recorded session can be found here.

ECHR Finds Immunity Violates Right to Access to Court

We should have reported earlier about this interesting judgment of the European Court of Human Rights of June 29th, 2011 (*Sabeh El Leil v. France*), where the Great Chamber of the Court ruled that France violated Article 6 of the European

Convention by failing to give access to a court to an ex-employee of the Koweiti embassy in Paris suing his employer after it had dismissed him in 2000.

The ECHR had already ruled a year before in *Cudak v. Lithuania* that while sovereign immunities coud justify limiting the right to access to courts, preventing employees of embassies from suing their employers was a disproportionate limitation to their right when they were neither diplomatic or consular staff, nor nationals of the foreign states, and when they were not performing functions relating to the sovereignty of the foreign state.

In *Sabeh El Leil*, the French Courts had mentioned that the employee had "additional responsabilities" which might have meant that he was involved in acts of government authority of Koweit. The European court finds that the French courts failed to explain how it had been satisfied that this was indeed the case, as the French judgements had only asserted so, and had not mentioned any evidence to that effect.

Here are extracts of the Press Release of the Court:

> ***An accountant, fired from an embassy in Paris, could not contest his dismissal,in breach of the Convention***
>
> ***Principal facts***
>
> *The applicant, Farouk Sabeh El Leil, is a French national. He was employed as an accountant in the Kuwaiti embassy in Paris (the Embassy) as of 25 August 1980 and for an indefinite duration. He was promoted to head accountant in 1985.*
>
> *In March 2000, the Embassy terminated Mr Sabeh El Leil's contract on economic grounds, citing in particular the restructuring of all Embassy's departments. Mr Sabeh El Leil appealed before the Paris Employment Tribunal, which awarded him, in a November 2000 judgment, damages equivalent to 82,224.60 Euros (EUR). Disagreeing with the amount of the award, Mr Sabeh El Leil appealed. The Paris Court of Appeals set aside the judgment awarding compensation. In particular, it found Mr Sabeh El Leil's claim inadmissible because the State of Kuwait enjoyed jurisdictional immunity on the basis of which it was not subject to court actions against it in France.*

Complaints, procedure and composition of the Court

Mr Sabeh El Leil complained that he had been deprived of his right of access to a court in violation of Article 6 § 1 of the Convention, as a result of the French courts' finding that his employer enjoyed jurisdictional immunity.

The application was lodged with the European Court of Human Rights on 23 September 2005 and declared admissible on 21 October 2008. On 9 December 2008, the Court's Chamber relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected.

Decision of the Court

Access to a court (Article 6 § 1)

Referring to its previous case-law, the Court noted that Mr Sabeh El Leil had also requested compensation for dismissal without genuine or serious cause and that his duties in the embassy could not justify restrictions on his access to a court based on objective grounds in the State's interest. Article 6 § 1 was thus applicable in his case.

The Court then observed that the concept of State immunity stemmed from international law which aimed a promoting good relations between States through respect of the other State's sovereignty. However, the application of absolute State immunity had been clearly weakened for a number of years, in particular with the adoption of the 2004 UN Convention on Jurisdictional Immunities of States and their Property. That convention had created a significant exception in respect of State immunity through the introduction of the principle that immunity did not apply to employment contracts between States and staff of its diplomatic missions abroad, except in a limited number of situations to which the case of Mr Sabeh El Leil did not belong. The applicant, who had not been a diplomatic or consular agent of Kuwait, nor a national of that State, had not been covered by any of the exceptions enumerated in the 2004 Convention. In particular, he had not been employed to officially act on behalf of the State of Kuwait, and it had not been established that there was any risk of interference with the security interests of the State of Kuwait.

The Court further noted that, while France had not yet ratified the Convention

on Jurisdictional Immunities of States and their Property, it had signed that convention in 2007 and ratification was pending before the French Parliament. In addition, the Court emphasised that the 2004 Convention was part of customary law, and as such it applied even to countries which had not ratified it, including France.

On the other hand, Mr Sabeh El Leil had been hired and worked as an accountant until his dismissal in 2000 on economic grounds. Two documents issued concerning him, an official note of 1985 promoting him to head accountant and a certificate of 2000, only referred to him as an accountant, without mentioning any other role or function that might have been assigned to him. While the domestic courts had referred to certain additional responsibilities that Mr Sabeh El Leil had supposedly assumed, they had not specified why they had found that, through those activities, he was officially acting on behalf of the State of Kuwait.

The Court concluded that the French courts had dismissed the complaint of Mr Sabeh El Leil without giving relevant and sufficient reasons, thus impairing the very essence of his right of access to a court, in violation of Article 6 § 1.

Just satisfaction (Article 41)

The Court held, by sixteen votes to one, that France was to pay Mr Sabeh El Leil 60,000 euros (EUR) in respect of all kind of damage and EUR 16,768 for costs and expenses.

Dickinson on Brussels I Bis

Andrew Dickinson has posted 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 (Recast) ("Brussels I bis" Regulation) on SSRN. The abstract reads:

This note considers several aspects of the reforms proposed by the Commission

(COM (2010) 748 final, 14 December 2010) to the current EU legal framework regulating the jurisdiction of Member State courts, and the recognition and enforcement of judgments, in civil and commercial matters, as contained in Regulation (EC) No. 44/2001 (the "Brussels I" Regulation). It suggests possible amendments to the Commission's Proposal, as set out in the Annex.

This paper was presented by the author at a hearing on the review of the Brussels I Regulation held at the European Parliament on 20 September 2011. It is a publication of the European Parliament.

Einhorn on the Enforcement of Judgements on Arbitral Awards

Talia Einhorn, who is a professor of law at Ariel and Tel Aviv Universities, has posted The Recognition and Enforcement of Foreign Judgments on International Commercial Arbitral Awards on SSRN. The abstract reads:

The question of the recognition and enforcement of foreign judgments on arbitral awards, as distinct from the recognition and enforcement of the arbitral awards themselves, finds diverging answers in different jurisdictions and in legal doctrine. With respect to judgments on judgments, the general rule is that a judgment rendered in State B, enforcing or recognizing in State B a judgment rendered in State A, cannot as such be enforced or recognized in State C. It is rather the original judgment rendered in State A that has to be relied upon in recognition and enforcement proceedings in all other states.

Judgments on arbitral awards may be treated differently. In the European Union, the recognition and enforcement of such judgments is regulated by the legal system of each Member State. Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Brussels I"), and formerly the Brussels Convention (1968), as well as the Lugano Convention (1988), excluded

"arbitration" from their scope. The Schlosser Report, as well as the decisions of the European Court of Justice in this matter, made it clear that the exclusion covers not only the recognition and enforcement of arbitral awards, covered already by the New York Convention, but extends also to all court proceedings related to arbitration, including proceedings to set aside an arbitral award and proceedings concerning the recognition and enforcement of a foreign arbitral award. The practice in different states (England, France, Germany, , Israel, the American Law Institute [ALI] first draft proposal of a Federal Statute on Recognition and Enforcement of Foreign Judgments) is diverse.

This paper submits that only the arbitral award should be the subject of recognition and enforcement proceedings. Foreign judgments on arbitral awards should not be recognized or enforced. For policy reasons, an exception should be made with respect to a court decision at the arbitral seat to set aside (or vacate) the award. With a view to coordinating results, weight may also be given, depending upon the circumstances, to issues decided by other foreign court judgments on arbitral judgments, as those may indicate that the award-debtor had waived a certain defense, or that he is precluded from raising one.

The paper is confined to judgments in proceedings undertaken under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (NYC). As of January 2011, 145 UN Member States have become NYC Contracting Parties. The numerous cases decided by national courts under the Convention and the vast literature devoted to its interpretation provide a rather comprehensive database.

Accordingly, this paper addresses the rules concerning recognition and enforcement of foreign arbitral awards under the NYC, noting the differences in practice among the NYC Contracting States (2.); an inquiry whether foreign judgments on arbitral awards should be recognized and enforced which first studies the analogous case of judgments on judgments (3.1), and then considers the differences between enforcing judgments on arbitral awards and enforcing the arbitral awards themselves (3.2); an analysis of the special case of judgments setting aside arbitral awards (4.); the possible coordination of results via waiver and preclusion (5.); and final conclusions (6.)

The paper was published in the last issue of the *Yearbook of Private International*

Law.

DSK Asserts Immunity in American Civil Lawsuit

See this post of Julian Ku over at *Opinio Juris*.



Galgano & Marrella, Diritto del Commercio Internazionale, III ed.

The Italian publisher house CEDAM has recently published the third edition of the leading textbook on International Business Law in the Italian language, "Diritto del commercio internazionale", authored by *Prof. Francesco Galgano* (emeritus at the University of Bologna) and *Prof. Fabrizio Marrella* ("Cà Foscari" University of Venice and Université de Paris I – Panthéon Sorbonne).

A presentation has been kindly provided by the authors (the complete TOC is available here):

> *The book aims at a comprehensive coverage of the legal issues global business managers face. Focusing on the trade, licensing and investment life-cycle that many domestic -new to international- and multinational organizations*

experience, it provides the necessary understanding of legal issues concerning import-export, market-entry strategies, protecting and licensing intellectual property to learning the special challenges of international investment operations. The third edition is updated to the most significant developments in the field such as: the Lisbon Treaty; Regulation Rome I on the law applicable to contractual obligations and Regulation Rome II on the law applicable to non contractual obligations. In addition, it offers updated information on, inter alia, the Unidroit Principles on International Commercial Contracts (2010); the new UCP 600 (the Uniform Customs and Practice for Documentary Credits, i.e. a set of rules on the issuance and use of letters of credit utilised by bankers and commercial parties in more than 175 countries in trade finance); INCOTERMS 2010; payment modalities, contracts of carriage and new ICC rules for demand guarantees. A special emphasis is given to arbitration as the main tool for dispute resolution in the international business world.

Title: Diritto del Commercio Internazionale, III edition, by *Francesco Galgano* and *Fabrizio Marrella*, CEDAM, Padova, 2011, XXXII-986 pages.

ISBN: 978-88-13-29966-8. Price: EUR 65.

Conference Announcement

On October 21, 2011, internationally renowned arbitrator Gary Born (also GAR Advocate of the Year 2010 and author of the OGEMID Book of the Year in both 2009 and 2010) leads an international group of experts in a frank discussion of issues that can arise when parties combine litigation tactics with international commercial arbitration. The symposium, entitled "Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration," will be held at the award-winning Center for the Study of Dispute Resolution at the University of Missouri School of Law. Associated events include a works-in-progress conference where authors discuss their current research with other specialists and a student writing competition sponsored by the Chartered Institute of Arbitrators (CIArb) North American Branch. The

registration fee for the symposium, including an “early bird” session concerning the new ICC Rules of Arbitration, is $50, and registration is available online. The symposium is co-sponsored by the CIArb North American Branch with additional support from the American Society of International Law, the ABA Section of International Law and Transnational Dispute Management. For more information on all events, see http://www.law.missouri.edu/csdr/symposium/2011/ or contact Professor S.I. Strong at strongsi@missouri.edu.