Rome III Regulation Published in the Official Journal

The Rome III regulation (see our most recent post here, with links to the previous ones) has been published in the Official Journal of the European Union n. L 343 of 29 December 2010. The official reference is the following: **Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation** (OJ n. L 343, p. 10 ff.).

Pursuant to its Art. 21(2), **the regulation should apply from 21 June 2012 in the 14 Member States which currently participate in the enhanced cooperation** (Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia).

Art. 18 (*Transitional provisions*) provides that "[the] regulation shall apply only to legal proceedings instituted and to agreements of the kind referred to in Article 5 [choice of the applicable law by the spouses] concluded as from 21 June 2012". The same article stipulates that "effect shall also be given to an agreement on the choice of the applicable law concluded before 21 June 2012, provided that it complies with Articles 6 and 7" (rules governing material and formal validity of the agreement). As regards proceedings commenced in the court of a participating Member State before 21 June 2012, the regulation will be without prejudice to *pacta de lege utenda* concluded in accordance with the law of that State (Art. 18(2)).

In order to make national rules concerning formal and procedural requirements of an *optio legis* fully accessible, Art. 17 (applicable from 21 June 2011) requires the participating Member States to communicate any relevant information in respect thereof to the Commission, which will make them publicly available, in particular through the website of the European Judicial Network in civil and commercial matters.

(Many thanks to Federico Garau – Conflictus Legum blog – for the tip-off)

Morocco Judicial Seminar on Cross-Border Protection of Children and Families

The report of the Hague Conference is available here, and the conclusions of the Seminar can be found here.

Visit of the Hague Conference in Viet Nam (Adoption)

The report of the Hague Conference is available here, and the report of the visit prepared by the Permanent Bureau and the Ministry of Justice of Viet Nam can be found here.

Swiss Book on the Resolution of IP Disputes

The second volume of the Series of books on intellectual property law of the University of Geneva was recently released. It comprises the papers (either in English or in French) which were written for the conference of intellectual property law of February 8, 2010 which was devoted to the theme ***Resolution of intellectual property disputes/La résolution des litiges de propriété***

intellectuelle.

The book, which was edited by Jacques de Werra, a professor of law at the University of Geneva, includes the following papers:

- Joost Pauwelyn, *The Dog That Barked But Didn't Bite: 15 Years of Intellectual Property Disputes at the WTO*
- Pierre Véron, *Le contentieux de la propriété industrielle en Europe : état des lieux, stratégies et perspectives*
- Edouard Treppoz, *Les litiges internationaux de propriété intellectuelle et le droit international privé*
- Julie Bertholet & Pierre-Alain Killias, *La création de juridictions spécialisées : l'exemple du Tribunal fédéral des brevets*
- Torsten Bettinger, *ICANN's New gTLD Program: Applicant Guidebook and Dispute Resolution*
- Bernard Hanotiau, *L'arbitrabilité des litiges de propriété intellectuelle*
- Sarah Theurich, *Designing Tailored Alternative Dispute Resolution in Intellectual Property: the Experience of WIPO*

The full table of contents can be found here.

The book can be ordered here.

Rome III Regulation Adopted by Council

As a Christmas gift for European PIL scholars, the first enhanced cooperation in the history of the EU has been achieved in the field of conflict of laws (on the origin of the initiative see our previous post here).

The Council, in its meeting of 20 December 2010, **adopted the Rome III regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation** (for previous steps of the

procedure, see here and here). As of mid-2012 (18 months after its adoption, pursuant to Art. 21), the Rome III reg. will apply in the **14 Member States** which have been authorised to participate in the enhanced cooperation by Council decision no. 2010/405/EU: Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia. Further Member States which wish to participate may do so in accordance with the second or third subparagraph of Article 331(1) of the Treaty on the Functioning of the European Union.

The text of the new regulation is available in Council doc. no. 17523/10 of 17 December 2010; after the signing of the President of the Council, it will be soon published in the Official Journal. The regulation is accompanied by a Declaration of the Council regarding the insertion of a provision on *forum necessitatis* in reg. no. 2201/2003, worded as follows:

> *The Council invites the Commission to submit at its earliest convenience to the Council and to the European Parliament a proposal for the amendment of Regulation (EC) No 2201/2003 with the aim of providing a forum in those cases where the courts that have jurisdiction are all situated in Member States whose law either does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings (forum necessitatis).*

The European Parliament, merely consulted under the special legislative procedure provided by Art. 81(3) TFEU for measures concerning family law, gave its opinion on 15 December 2010 (informal contacts with the Council have ensured that the EP views were taken into account in the final text). In the preamble of the legislative resolution, the EP called "on the Commission to submit a proposal for amendment of Regulation (EC) No 2201/2003, limited to the addition of a clause on *forum necessitatis*, as a matter of great urgency before the promised general review of that Regulation".

Many thanks to Federico Garau (Conflictus Legum blog) and to Marina Castellaneta for the tip-off.

Luxembourg Conference on Provisional Measures (updated)

The *Journal des Tribunaux Luxembourg* will hold a conference on Provisional Measures in International Private and Criminal Law before Luxembourg Courts (*Les mesures provisoires du contentieux privé et le droit pénal international devant le juge luxembourgeois*) on **February 10th**, 2011, in Luxembourg.

Programme

17h00 : Accueil des participants

17h30-17h45 : Présentation du Journal des Tribunaux – Luxembourg et introduction au colloque, Marc Thewes, rédacteur en chef et avocat à la Cour

17h45-18h00 : Les mesures provisoires dans le contentieux commercial international, Gilles Cuniberti, professeur à l'Université du Luxembourg

18h00-18h15 : Les mesures provisoires dans le cadre des demandes d'entraide internationales en matière pénale, Michel Turk, magistrat

18h15-18h30 : La communication forcée de pièces par voie de référé dans le cadre d'un contentieux international – La Document discovery à la luxembourgeoise, Marc Kleyr, président du conseil de la concurrence

18h30-18h45 : Rapport de synthèse, Thierry Hoscheit

18h45-19h00 : Question time

19h00-21h00 : Cocktail dînatoire

More details can be found here.

Third Issue of 2010'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 and several casenotes. The full table of content can be found here.

The first article is authored by Jürgen Basedow, who is one of the directors of the Max Planck Institute of Comparative and International Private Law in Hamburg. The article discusses nationality as a connecting factor in European Union law (*Le rattachement à la nationalité et les conflits de nationalité en droit de l'Union Européenne*). The English abstract reads:

> *The constance and variety of recourse to nationality as connecting factor in the laws of Member States as within the private international law of the European Union requires that its use be confronted with article 18 TFEU, which prohibits all discrimination by reason of nationality. In cases of double nationality, the Court of Justice has undertaken to conciliate the principle and the prohibition by setting aside more traditional approaches in favour of one based on the equality of treatment of national regulations, which implies both preference to the first in time and mutual recognition. A renewed assessment of nationality as an indicator of close connection and a reading of article 18 which restricts its content to unilateral rules conferring rights and privileges to citizens of the forum State leads to the formulation of a corpus of general rules of private international law.*

The second article is authored by the Director of the *Revue*, Bertand Ancel (Paris II University) and its Editor in Chief Horatia Muir Watt (Sciences Po Law School). The article offers a comprehensive study of the 2009 maintenance regulation (*Aliments sans frontières. Le règlement CE n° 4/2009 du 18 décembre 2008 relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et la coopération en matière d'obligations alimentaires*). The English abstract reads:

Beyond its commitment to ensure the effectiveness within the European Union of the Convention and Protocol signed at the Hague on 23rd November 2007, on alimentary obligations, EC Regulation n° 4/2009 lays out the defining features of the future European private international law ; it imposes new orientations on jurisdictional issues, particularly since trans-European enforcement of judgments is now freed from the constraints of specific enforcement procedures or formalities ; on issues of applicable law, il devises a method of coordination with the Hague Protocol which consists in actually borrowing its content ; in turn, this content serves as a guarantee ensuring the free movement of decisions as between Member States ; finally, by extending its personal scope and establishing a forum necessitatis, it carries its own authority beyond the borders of the internal market so as to catch litigation involving third states.

Articles of the *Revue* can be downloaded here by subscribers.

When to Depart from Rome?

The Commission has published lists of the Conventions which Member States have notified under Art. 26(1) of the Rome I Regulation and Art. 29(1) of the Rome II Regulation.

It appears that Belgium alone among the Member States has not notified the Commission of any derogating conventions, even though it has ratified the Hague Traffic Accidents Convention and signed (but not ratified) the Hague Products Liability Convention, two instruments to which Art. 29(1) Rome II was clearly intended to apply.

The reasons for these omissions are unclear, with the deadlines for notification having long passed (28 July 2008 in the case of Rome II and 17 June 2009 in the case of Rome I). The failure to notify should not prevent Belgian Courts from applying the Hague Traffic Accidents Convention, just as it should not prevent any other Member State court from applying any convention involving a third state, to

determine the law applicable to contractual or non-contractual obligations. Belgium's apparent lack of engagement with EU private international law instruments, resulting in doubt for those litigating before Belgian courts, is however unfortunate. It is unclear whether the Commission intends to take steps to address this.

New Edition of Mayer/Heuzé's Droit International Privé

The tenth edition of Pierre Mayer and Vincent Heuzé's leading treaty on French private international law was released earlier this month.

Mayer and Heuzé are both professors at Paris I (Panthéon-Sorbonne) School of Law.

More details on the book can be found here.

Commission Proposal on the Review of Brussels I

The long awaited Commission proposal (COM(2010) 748/3) on the review of Brussels I has been published today. The proposed amendments are numerous and require more detailed study, but here are some of the highlights.

1) **Abolition of the exequatur.** Following the argumentation in the Green Paper on the costs, time and trouble of obtaining a declaration of enforceability in another Member State, and the abolition of the exequatur in recent specific instruments, the Commission proposal indeed provides for the abolition of the

exequatur (Art. 38). However, exceptions are made for defamation cases – also excluded from Rome II – and, most interestingly, compensatory collective redress cases – at least on a transitional basis. The 'necessary safeguards' are: 1) a review procedure at the court of origin in exceptional cases where the defendant was not properly informed, similar to the review clause in specific instruments abolishing the exequatur; 2) an extraordinary remedy at the Member State of enforcement to contest any other procedural defects which may have infringed the defendant's right to a fair trial; 3) a remedy in case the judgment is irreconcilable with another judgment which has been issued in the Member State of enforcement or – provided that certain conditions are fulfilled – in another country. The proposal also contains a series of standard forms which aim at facilitating the recognition or enforcement of the foreign judgment in the absence of the *exequatur* procedure as well as the application for a review.

2) **Extension of the Regulation to defendant's domiciled in third States.** The special grounds of jurisdiction will enable businesses and citizens to sue a non EU defendant in, amongst others, the place of contractual performance, or the place where the harmful event occurred. It further aims to ensure that the protective jurisdiction rules available for consumers, employees and insured will also apply if the defendant is domiciled outside the EU. Two additional fora are created: under certain conditions a non-EU defendant can be sued at the place where moveable assets belonging to him are located, or where no other forum is available and the dispute has a sufficient connection with the Member State concerned ("*forum necessitatis*"). Further, the proposal introduces a discretionary *lis pendens* rule for disputes on the same subject matter and between the same parties which are pending before the courts in the EU and in a third country.

3) **Enhanced effectiveness of choice of court clauses.** Another anchor is the improvement of the effectiveness of choice of court clauses, by: a) giving priority to the chosen court to decide on its jurisdiction, regardless of whether it is first or second seised, meaning that any other court has to stay proceedings until the chosen court has established or – in case the agreement is invalid – declined jurisdiction; b) introducing a harmonised conflict of law rule on the substantive validity, referring to the law of the chosen court. As the explanatory memorandum states, both modifications reflect the solutions established in the 2005 Hague Convention on the Choice of Court Agreements, thereby facilitating a possible conclusion of this Convention by the European Union.

4) **Improvement of the interface between the regulation and arbitration.** One of the most controversial issues giving rise to heated debates is whether the arbitration exception should be maintained. Art. 1 of the proposal still contains the arbitration exclusion, but adds 'save as provided for in Articles 29, paragraph 4 and 33, paragraph 3'. The proposed Article 29 includes a specific rule on the relation between arbitration and court proceedings, which obliges a court seised of a dispute to stay proceedings if its jurisdiction is contested on the basis of an arbitration agreement and an arbitral tribunal has been seised of the case or court proceedings relating to the arbitration agreement have been commenced in the Member State of the seat of the arbitration.

5) **Provisional and protective measures.** The proposal adds several articles concerning provisional, including protective measures. It provides that the court where proceedings on the substance are pending and the court that is addressed in relation to provisional measures, should cooperate in order to ensure that all circumstances of the case are taken into account when a provisional measure is granted. Further, the proposal provides for the free circulation of those measures which have been granted by a court having jurisdiction on the substance of the case, including – subject to certain conditions – of measures which have been granted *ex parte* (!). However, contrary to the Mietz decision, the proposal provides that provisional measures ordered by a court other than the one having jurisdiction on the substance cannot at all be enforced in another Member State, in view of the wide divergence of national law on this issue and to prevent the risk of abusive forum-shopping.

There are many more interesting proposed amendments. This proposal certainly is ambitious, but also controversial on some points. Let the negotiations and the scholarly debate begin!