First Issue of 2011's Journal du Droit International

The first issue of French *Journal du droit international* (*Clunet*) for 2011 was just released.

It includes three articles, two of which explore conflict issues.

In the first article, a leading French public international lawyer, Professor Mathias Forteau (Paris Ouest Nanterre University), offers his views on the concept of transnational public policy (*L'ordre public « transnational » ou « réellement international » . – L'ordre public international face à l'enchevêtrement croissant du droit international privé et du droit international public*). The English asbtract reads:

> *While private international law and public international law get closer in the contemporary international society, especially due to the widening of the realm of European law, apparently some legal notions still belong exclusively to private international law and their definition and enforcement remain within States' exclusive jurisdiction. This seems to be the case of the « international public policy » exception which aims at protecting national values when domestic judges are requested to apply a foreign law incompatible with these values. Contemporary practice shows however that international public policy is subject to a process of internationalisation which impacts both its sources and the mechanisms through which it is enforced. Such trend is not restricted to transnational law (« transnational public policy »). International public policy is nowadays also regulated by public international law – and may therefore be undergoing a metamorphosis of its meaning and function in a way which is not yet clearly well-defined.*

In the second article, professor Benjamin Remy (Poitiers University) discusses the legitimacy of choice of court agreements (*De la profusion à la confusion : réflexions sur les justifications des clauses d'élection de for*). The English asbtract reads:

> *Various justifications are usually summoned to explain the admission of choice*

of forum clauses : forseeability of the judge, neutrality of the judge and the ability to choose a « better » judge. Unfortunately, this profusion leads to confusion when it comes to the definition of the appropriate rules governing such a clause. Firstly, ambiguities arise from the fact that most issues related to the choice of forum clauses are to be given different answers depending on the justification one has focused on. Therefore, the predictability of the rules governing the choice of forum clauses cannot be achieved. Secondly, the plurality of justifications seems to prevent any appreciation of their relevancy. Moreover, authors often use arguments which belong to different rhetorical systems, based on different justifications, leading to conclusions that cannot be reasonnably justified.

Articles of the *Journal* can be downloaded by LexisNexis Jurisclasseur's subscribers

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Tourism and Jurisdiction to take Centre Stage in Supreme Court of Canada

On March 21, 22 and 25, 2011 the Supreme Court of Canada will hear appeals in four private international law cases. Each is a case in which the Ontario court has held that it has jurisdiction to hear the dispute and that the proceedings should not be stayed in favour of another forum.

Two of the cases – *Van Breda* (information here) and *Charron* (information here) – involve Ontarians who were killed or severely injured while on holiday in Cuba. They now seek to sue various foreign defendants in Ontario. These cases involve tourists in the traditional sense of the word. Two of the cases – *Banro* (information here) and *Black* (information here) – involve claims for defamation over the internet and damage to reputation in Ontario. There is some allegation that these cases involve what has become known as "libel tourism", especially in

England and in the United States.

Several parties have already been granted leave to appear as intervenors and others are seeking such leave. The decisions in these four cases could be very important for the Canadian law on jurisdiction.

The Supreme Court of Canada now posts PDFs of the written submissions of litigants as they are received, so those wanting more details about the cases should click on the "factums" button for each case.

Canadian Case on State Immunity

In *Kazemi (Estate of) v. Islamic Republic of Iran*, 2011 QCCS 196 (available here) the estate of Zahra Kazemi and her son, Stephan Kazemi, sued Iran and certain state officials in Quebec, alleging that in 2003 Ms. Kazemi was tortured and assassinated in Iran. The defendants argued that the claim could not succeed due to state immunity.

Much of the court's analysis involves the provisions of the *State Immunity Act*, R.S.C. 1985, c. S-18. The court has to consider whether this statute is a complete code on the issue of state immunity or whether it is open to courts to create exceptions to the statutory immunity beyond those listed in the statute. The court also has to address whether aspects of the statute are constitutional.

The court ends up concluding that the estate has no claim because the wrongs done to her occurred in Iran and so are covered by the immunity under the statute. However, the court allows the claim by Stephan Kazemi, a claim for his own losses arising from hearing the reports of what was done to his mother, to continue since his losses were suffered in Quebec, not Iran, and so the immunity does not cover them (see section 6 of the statute).

The decision is lengthy (220 paragraphs), and yet it does not mention the recent decision of the Supreme Court of Canada on state immunity: *Kuwait Airways Corporation v. Republic of Iraq* from October 2010.

Green Paper on the Free Movement of Public Documents

On December 14th, 2010, the European Commission issued a Green Paper exploring whether the circulation of public documents should be simplified: Less Bureaucracy for Citizens: Promoting Free Movement of Public Documents and Recognition of the Effects of Civil Status Records.

Here are some of the possible reforms discussed by the Green Paper.

Public documents:

> *a) The abolition of administrative formalities for the authentication of public documents*
>
> *The administrative formalities relating to the presentation of public documents, originally based on consular and intergovernmental practices, are still causing problems for European citizens and no longer meet the requirements or correspond to the state of development of contemporary society, in particular in an area of common justice.*
>
> *The need for these formalities, which are not suitable for relations between Member States based on mutual trust or for increased mobility of citizens, can legitimately be questioned.*
> *(…)*
>
> *b) Cooperation between the competent national authorities*
>
> *The abolition of administrative formalities could be accompanied by cooperation between the competent national authorities.*
> *(…)*
>
> *c) Limiting translations of public documents*
>
> *In parallel with the administrative formalities such as legalisation and the*

apostille, the translation of a public document issued by another Member State is another procedure citizens may have to deal with. Just like the abovementioned administrative formalities, translation also represents a cost in terms of time and money.

Optional standard forms, at least for the most common public documents (for example a declaration of the loss or theft of identity papers or a wallet), could be introduced in a number of administrative sectors in order to cope with translation requests and avoid costs.
(…)

d) The European civil status certificate

European driving licences and passports already exist. A European certificate of inheritance has been proposed by the Commission. Thought might be given to introducing a European civil status certificate.

This would exist alongside Member States' national civil status records. It would be optional, not compulsory. Citizens could continue to ask for a national certificate. The European certificate would not therefore replace Member States' civil status certificates.

Civil Status Records:

Several solutions could be considered to ensure recognition of the effects of a civil status record or legal situation connected with civil status created in a Member State other than the one in which it is invoked. In this context, it is important to stress that the EU has no competence to intervene in the substantive family law of Member States. Therefore, the Commission has neither the power nor the intention to propose the drafting of substantive European rules on, for instance, the attribution of surnames in the case of adoption and marriage or to modify the national definition of marriage. The Treaty on the Functioning of the European Union does not provide any legal base for applying such a solution.

Against this background, several practical problems arising in the daily lives of citizens in cross-border situations could be solved by facilitating recognition of the effects of civil status records legally established in other EU Member

> *States. The European Union has three policy options to deal with these problems: assisting national authorities in the quest for practical solutions; automatic recognition and recognition based on the harmonisation of conflict-of law rules.*

The consultation will take place from 14 December 2010 to 30 April 2011.

Many thanks to Bram van der Eem for the tip-off.

PhD Positions Erasmus School of Law (Rotterdam)

The Erasmus School of Law has two vacancies for PhD candidates within the Research project 'Securing Quality in Cross-Border Enforcement: Towards European Principles of Civil Procedure'. This project is financed by the Netherlands Organization for Scientific Research (NWO) within its prestigious Innovational Research Incentives Scheme (VIDI). Project supervisor is Prof. Dr. Xandra Kramer.

The Erasmus School of Law (Rotterdam, the Netherlands) offers an international and stimulating education and research environment, and has excellent terms of employment.

For more information and application click here.

Buxbaum on Reception of Conflict Conventions in the U.S.

Hannah Buxbaum, who is a professor of law at the University of Indiana in Bloomington, has posted Conflict of Laws Conventions and Their Reception in National Legal Systems: Report for the United States on SSRN.

> *This is the U.S. national report on "Conflict of Laws Conventions and Their Reception in National Legal Systems," prepared for the Intermediate Congress of the International Academy of Comparative Law held in 2008. The report discusses the various mechanisms for implementation of conflict-of-laws conventions in the United States: through federal legislation, federal rulemaking and state legislation. It reviews the conflict-of-laws conventions to which the United States is party (including in the areas of family law and litigation procedure), as well as recent case-law under those conventions. It also examines relevant aspects of U.S. law on treaties, discussing the issue of self-executing versus non-self executing treaties within the particular context of private law conventions.*

Lugano Convention in force in Switzerland

We had reported earlier on the willingness of Switzerland to apply the 2007 Lugano Convention in 2011.

Switzerland has indeed ratified the Convention on October 20th, 2010. The notice of the ratification to the Contracting Parties can be found here, and includes Switzerland's reservations and declarations.

Switzerland's official documents therefore provide that the Lugano Convention entered into force in Switzerland on January 1st, 2011. The Convention was

meant to enter into force on the first day of the third month following the new ratification.

Thanks to Rafaël Jafferali for the tip-off

Kinsch on Choice of Law and the Prohibition of Discrimination

Patrick Kinsch, who is a visiting professor at the University of Luxembourg and the Secretary General of the European Group for Private International Law, has posted Choice of Law and the Prohibition of Discrimination under the European Convention on Human Rights on SSRN. The abstract 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.*

The paper is forthcoming in the *Nederlands Internationaal Privaatrecht*.

Should American Courts Hear Transnational Tort Claims Against Corporations?

As was recently reported on this blog, in September the United States Court of Appeals for the Second Circuit entered an important decision in *Kiobel v. Royal Dutch Petroleum* regarding whether corporations may be sued under the Alien Tort Statute. The upshot of that opinion was that corporations cannot be sued under the Alien Tort State for violations of customary international law because "the concept of corporate liability . . . has not achieved universal recognition or acceptance of a norm in the relations of States with each other." Slip op. at 49.

Today, the Second Circuit denied panel rehearing and rehearing en banc (splitting 5-5). One particularly interesting concurrence in the denial of rehearing was issued by Chief Judge Dennis Jacobs. There he makes the following important legal and policy arguments concerning the use of the Alien Tort Statute against corporations and, perhaps, the prospect of transnational tort litigation generally against similar actors.

> *All the cases of the class affected by this case involve transnational corporations, many of them foreign. Such foreign companies are creatures of other states. They are subject to corporate governance and government regulation at home. They are often engines of their national economies, sustaining employees, pensioners and creditors–and paying taxes. I cannot think that there is some consensus among nations that American courts and lawyers have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them–and to beggar them by rendering their assets into compensatory damages, punitive damages, and (American) legal fees. Such proceedings have the natural tendency to provoke international rivalry, divisive interests, competition, and grievance–the very opposite of the universal consensus that sustains customary international law.*
>
> *The imposition of liability on corporations, moreover, raises vexed questions. What employee actions can be imputed to the corporation? What about piercing*

> *the corporate veil? Can these judgments be discharged in bankruptcy, and, if so, in the bankruptcy courts of what country? Punitive damages is a peculiar feature of American law; can they be exacted? These issues bear on the life and death of corporations, and are of supreme consequence to the nations in which the defendant corporations were created, make their headquarters, and pay their taxes. Is it clear that the nations of the earth would be complacent about having these matters decided in U.S. courts?*
>
> *These policy considerations explain why no international consensus has arisen (or is likely to arise) supporting corporate liability. Is it plausible that customary international law supports proceedings that would harm other civilized nations and be opposed by them–or be tantamount to "judicial imperialism"?*

Besides such policy arguments, Chief Judge Jacobs explained the impact that this will have on litigation tactics.

> *The holding of this case matters nevertheless because, without it, plaintiffs would be able to plead around Talisman in a way that (notwithstanding Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, — U.S. 13 —, 129 S. Ct. 1937 (2009)) would delay dismissal of ATS suits against corporations; and the invasive discovery that ensues could coerce settlements that have no relation to the prospect of success on the ultimate merits. American discovery in such cases uncovers corporate strategy and planning, diverts resources and executive time, provokes bad public relations or boycotts, threatens exposure of dubious trade practices, and risks trade secrets. I cannot think that other nations rely with confidence on the tender mercies of American courts and the American tort bar. These coercive pressures, combined with pressure to remove contingent reserves from the corporate balance sheet, can easily coerce the payment of tens of millions of dollars in settlement, even where a plaintiff's likelihood of success on the merits is zero. Courts should take care that they do not become instruments of abuse and extortion. If there is a threshold ground for dismissal–and Kiobel is it—it should be considered and used.*

This is a candid appraisal of the policy and legal arguments at play in ATS and transnational tort cases that deserves closer scrutiny in both legal and public policy circles.

MPI Comments on Green Paper on European Contract Law

The Max Planck Institute for Comparative and International Private Law has submitted its comments on the European Commission's Green Paper on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses.

These Comments are the product of a working group established inside the Institute which has met since September 2010. The Comments will also be published in a forthcoming issue of the *RabelsZeitschrift*.

> *While welcoming the Commission's initiative, the Institute criticizes that the Commission did not sufficiently consider the issue of the legislative competence of the EU. At present, an optional instrument (opt-in) drafted as a Regulation (option 4) and based on Art. 352 TFEU seems to be the preferable option. Such an instrument raises a number of questions regarding its choice and its area of application which have been addressed by the Working Group. An optional instrument should be granted a broad scope of application, including both B2B and B2C contracts, domestic contracts, intra-Union cross-border contracts as well as contracts with parties resident in third states. Its scope should neither be limited to cross-border contracts nor to contracts concluded online. At present, however, the Institute does not recommend any specific option since such a recommendation would in the end depend on the substantive quality of the final instrument. In this regard, an important preparatory work for any future European contract law, i.e. the Draft Common Frame of Reference (DCFR), has already been criticized by some members of the Working Group.*

See also the post of the Institute on its website.