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.

Paris, the Jurisdiction of Choice?

On January 17th, the President of the Paris Commercial Court (*Tribunal de commerce*) inaugurated a new international division.

The new division, which is in fact the 3rd division of the court (*3ème Chambre*), is to be staffed with nine judges who speak foreign languages, and will therefore be able to assess evidence written in a foreign language. For now, the languages will be English, German and Spanish, as one juge speaking Spanish and two speaking German are currently on the court.

In an interview to the *Fondation de droit continental* (*Civil law initiative*), the President of the Court explained that the point was to make French justice more competitive and attract international cases. It also made clear that France was following Germany's lead, where several international divisions were established in 2009 in Hamburg and Cologne.

French Commercial Courts

It should be pointed out to readers unfamiliar with the French legal system that French commercial courts are not staffed with professional judges, but with members of the business community working part-time at the court (and for free). In Paris, however, many of these judges work in the legal department of their company, and are thus fine lawyers.

Also, French commercial courts (and French civil courts generally) virtually never hear witnesses, so the issue of the language in which they may address the court does not arise.

Some issues

So, the new international division will be able to read documents in several foreign languages. However, nothing suggests that parties or lawyers will be able either to speak, or to write pleadings, in any other language than French. Lawyers arguing these cases will still need to file their pleadings in French, and thus to translate them in English beforehand for their clients. Furthermore, the interview of the Court's President seems to suggest that using a foreign language will not be a right for the parties. Quite to the contrary, it seems

that it will not be possible if one of the parties disagrees, and demands documents be translated in French.

Will that be enough to attract additional commercial cases to Paris?

I wonder whether introducing class actions in French civil procedure would have been more efficient in this respect.

For the full interview of the Court's President, see after the jump.

Creation of an International Chamber at the Tribunal de Commerce [Commercial Court] of Paris

On January 17, 2011, the Tribunal de Commerce of Paris will inaugurate an international chamber, an event all the more in the nature of an official endorsement because this chamber, which already exists, remains unknown to the general public. The President of the Tribunal de Commerce of Paris, Christian de Baecque, explains the stakes of this rehabilitation.

What has driven the need for official recognition of the international chamber of the Tribunal de Commerce of Paris?

Some months ago, I learned of a draft law issued by legislators in Germany allowing documents to be examined by a court without their translation being mandatory. I found the idea to be excellent and after some research, I realized that the French Code allows this practice.

Many people share this idea, with the objective of promoting Paris as a judicial location. There is, in effect, a currently ongoing struggle between the Anglo-American law and civil law. And it is up to us, at the Tribunal de Commerce, to ponder specific actions.

Is the international chamber of the Tribunal de Commerce of Paris therefore participating in this promotional effort?

Yes, absolutely. The stakes underlying a general recognition of this chamber is to avoid the outflow of judicial business to foreign courts. All of the chambers of the Tribunal de Commerce in the resolution of disputes are specialized. We thus also had a chamber specialized in international law. It operated when the parties were neither French nor European. But obviously there were few litigated disputes that actually justified the existence of this chamber. The innovation at the level of the Tribunal is to make public the existence of this chamber, and this publicity should put the Tribunal de Commerce of Paris in a strong position to handle international disputes and thus enhance the position of the civil law.

Could you tell us about the composition of this international chamber?

The 3rd Chamber of the Tribunal, which is the international chamber, will be composed of nine judges having the requisite knowledge of foreign languages, whether English, German or Spanish, so as to be able to accept exhibits that have not been translated into French (to the extent, obviously, that all the parties would be in agreement). This does not exclude the use of foreign languages in any other chamber. The international chamber wishes to serve as a model, it is not intended to be exclusive.

Three languages have been selected, English, German and Spanish. Why not use only English, as is the case in Germany?

In most cases, the judges of the Tribunal de commerce have had the occasion throughout their careers to draft contracts in a foreign language. They have mastered the fine points of the language. Here it is not solely a question a question of translation; the words have an economic meaning and not only a literary one. Also, if that judge has the language skills to grasp the subtleties of a document, it seems logical to provide wider latitude to this mode of operating. Of course, the judgment and the consequences that the judge derives therefrom will be drafted in French.

With the 3rd Chamber, the use of such or another language will depend on of the language skills of the judges. It so happens that next year I will have a judge who speaks Spanish and two German-speaking judges, from whence the decision to hear cases in these two languages.

You are quite willing to state that the object of the process is

marketing.

We are in fact going to put in place a mechanism that already exists in a new packaging, and this is being done so as to promote a practice that is unknown to the judges themselves. The latter, just as is the case with the lawyers, often lose a lot of time in translation. Certain cases by-pass the Tribunal de Commerce because of this linguistic obstacle, and I am not referring here to foreign businessmen who, for lack of information as to this mechanism, do not come to attend the hearings. The re-implementation of this international chamber must show that the language is not a barrier for pursuing international dispute resolution in France.

Germany, The Precursor in Hearing Cases in a Foreign Language

In Germany, the Rhine-North-Westphalia and Hamburg Länder, in 2009, took the initiative of putting international chambers in place in the Courts of First Instance of Hamburg and Koln for international commercial cases. Mr. Brauch, Attorney offers some clarification on the current situation and on the differences in relation to the French mechanism.

The establishment of these first international chambers was followed in 2010 by a request to the Bundesrat (the representative council of the Länder in the Federal Republic) to amend the Federal Code on the Organization of the courts so as to introduce this model in the other Länder of the Federal Republic.

In these "pilot" chambers, the proceeding may thus be held entirely (memoranda of the parties, probative evidence, oral argument at the hearing and the decisions of the Court) in English upon the request of both parties.

English is the only language selected for these chambers because, considered to be the language of international trade, it also serves to pacify the struggles with the courts, with those in England for example, so that the case can be conducted in English in accordance with civil law. English is also in many cases the language of neutrality, as in the case of Franco-German transactions.

This mechanism of the international chamber seems go further than that its

French counterpart, in the sense that the entire proceeding, from the arguments to the judgment and inclusive of the pleadings, is pursued in the English language. Only the executory portion is translated for the bailiff into German. For these specialized chambers, the Court of Appeals is also considering establishing special chambers dedicated to proceedings held in English.

As soon as the Federal code of procedure is amended, the establishment of these international chambers will extend to other Länder in cities such as Frankfurt, Munich, Stuttgart and Düsseldorf.

I absolutely approve of these mechanisms which are especially effective in handling international contracts for financial services or of merger/acquisition, an area in which I am especially involved. In such transactions, all of the documents are often drafted in English, even if the two parties are neither English nor American, but German and French or other. Il may be, in fact, that these companies are affiliated with American or English groups, and that the representatives of the parent companies are insisting on having the case litigated in an English language proceeding. Until now, it was necessary in such a case to have recourse to international arbitration or to a foreign English-language court. The establishment of such international chambers thus allows for a proceeding to be held before a German State Court. This is a real opening onto the international horizon.

Italian Forum on the Brussels I Review Proposal (2): Lis Pendens and Related Actions

Following our previous post on the **forum on the Brussels I review currently hosted by the website of the Italian Society of International Law** (SIDI-ISIL), another comment has been added, on the amendments proposed by the

Commission in respect of **lis pendens and related actions**. The contribution is authored by *Fabrizio Marongiu Buonaiuti* (University of Rome "La Sapienza"), who has recently published an extensive monograph on the regime of lis pendens and related actions in Italian law, in the European regulations and in other international instruments (*Litispendenza e connessione internazionale. Strumenti di coordinamento tra giurisdizioni statali in materia civile*, Napoli, 2008):

- *Fabrizio Marongiu Buonaiuti*, Litispendenza e connessione nella proposta di revisione del regolamento n. 44/2001.

Bans on foreign law (mainly sharia law)

A reading proposal for a Sunday afternoon: Julian Ku's (Opinio Iuris) recent post on the Oklahoma's prohibition on foreign and international law, that threatens to spread to other States. The ban affects every legal precept of other nations or culture in Arizona's proposal.

Journal of Private International Law Conference 2011 (Update)

Following Martin's post announcing the fourth Journal of Private International Law Conference which will take place in Milan on April 14-16, 2011, I am pleased to announce that the University of Milan has created a webpage gathering all practical details regarding the conference.

Among other information, the programme of the conference is available here, and the registration form here.

Weiler on his Own Trial

We had previously reported about this criminal action initiated for a book review against NYU law professor Joseph Weiler.

The trial took place last week in Paris. Weiler reports on it here.

Verdict on March 3rd.

New French Book on Cross-Border Debt Recovery

I am delighted to announce the publication of a book that I have coauthored with Clotilde Normand, who practices at Baker & McKenzie in Paris, and Fanny Cornette, who teaches at the University of Rouen, on International Enforcement Law, or Cross-Border Debt Recovery (*Droit international de l'exécution – Recouvrement des créances civiles et commerciales*) .

The book is divided in two parts. Part one discusses how foreign judgments, arbitral awards, authentic acts and decisions of international courts can be declared enforceable in France. Part two explores how enforcement can then actually take place in France in an international context. In particular, it discusses attachments of assets and court injunctions backed with financial penalties.

More details can be found here.

O’Hara and Ribstein on Conflict Rules and Global Competition

Erin A. O’Hara, who is a professor of law at Vanderbilt Law School, and Larry E. Ribstein, who is a professor of law at the University of Illinois College of Law, have posted Exit and the American Illness on SSRN. Here is the abstract:

> This essay, prepared for a book on the effect of regulatory, liability, and litigation inefficiencies on the global competitive position of the U.S., focuses on the role of the US federal system. We show that, although multiple US states offer significant potential for jurisdictional choice to address misguided or inappropriate law, this system is only a partial solution to these problems and can itself be a source of bad law and excessive litigiousness. Federal law and enforcement of contractual choice-of-law, choice-of-court, and arbitration clauses provide some, but only partial, relief. As a result, choice of law and jurisdiction rules potentially expose firms that do business nationally or internationally to oppressive law in any of the US states. Without reform of the rules regarding jurisdictional choice the US is losing an opportunity to exploit the edge in international competition it might get from its federal system.

Italian Forum on the Brussels I Review Proposal

The Italian Society of International Law is currently holding a Forum on the Brussels I Review Proposal.

The Forum offers contributions of Italian scholars on the Proposal, in Italian. So far, two have been posted:

- Pietro Franzina, La garanzia dell'osservanza delle regole sulla competenza giurisdizionale nella proposta di revisione del regolamento "Bruxelles I"
- Antonio Leandro, La proposta per la riforma del regolamento "Bruxelles I" e l'arbitrato

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Publication: Liber Amicorum Bernardo Cremades

Bernardo Maria Cremades Sanz Pastor, University professor and lawyer of the Ilustre Colegio de Abogados of Madrid, former Vice President of the London Court of International Arbitration, and member of the ICSID Panels of Conciliatiors and Arbitrators, is undoubtedly the Spanish best known and most recognised legal professional in international arbitration. He has been, and remains, the great master of arbitration in Spain; but his brilliant career is admired far beyond our borders, making him the best of our ambassadors. It is therefore no surprise that the Spanish Arbitration Club has decided to pay tribute to his long career with the publication of a book that gathers the contributions of more than seventy experts in the field: prestigious specialists from around the world that have paid homage to Bernardo Cremades with studies, written primarily in English, that cover the most important fields of arbitration.

Click here to see the table of contents of the book (publishing house: La Ley. ISBN/ISSN: 978-84-8126-590-3)