Third Issue of 2009's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains three articles and several casenotes. The full table of content can be found here.

The first article is authored by Professor Anne Sinay Cytermann, who teaches at Paris V University. It wonders why jurisdiction and arbitration clauses are regulated differently in consumer and labour contracts (*Une disparité étonnante entre le régime des clauses attributives de juridiction et les clauses compromissoires dans le contrat de travail international et le contrat de consommation international*). The English abstract reads:

> *Although both are deemed weaker parties, the worker and the consumer do not benefit from the same protection on the international sphere, particularly as far as choice of jurisdiction clauses are concerned. Indeed, when such clauses are included in an employment contract, they are subjected to a highly restrictive regime, under which they are considered to be void when they derogate from mandatory heads of jurisdiction, while arbitration clauses cannot be invoked against the worker. On the other hand, when the same clauses appear in consumer contracts, they are exposed to a far ore liberal regime which validates in principle both choice of court and arbitration clauses. It would be preferable that a similar treatment be provided for both types of contract, along the lines of the model applicable to employment contracts.*

The second article is authored by Franco Ferrari, a professor at the University of Verona and a a visiting professor a several law schools in New York. It offers remarks on the law governing contractual obligations in absence of choice by the parties under article 4 of the Rome I Regulation (*Quelques remarques sur le droit applicable aux obligations contractuelles en l'absence de choix des parties – Art. 4 du Règlement Rome I-*):

A comparison between article 4 of the 1980 Rome Convention on the law applicable to contractual obligations, the commission's proposal in its 2003 Green Paper and the final version of the same provision in the "Rome I" Regulation shows that the latter, ostensibly a compromise between the Convention's flexibility and the proposal's rigid system of connecting factors, is in fact very close to the original model, at least such as it was implemented by the courts in the various Contracting States. Thus, while the Commission had attempted to correct the Convention's principle of proximity by introducing greater certainty in the form of rigid and autonomous connecting factors, article 4 of the Rome I Regulation, which, like the Commission's proposal, does indeed contain a list of (eight, non exclusive) connecting factors, subjects these to an escape or exception clause similar to that of the Convention, except for the fact that the negative conditions which trigger the clause are stricter. The court must examine of its own motion whether these requirements are fulfilled, even when the contract comes the difference between the Convention, in which the proximity principle presided over the determination of the applicable law in the absence of party choice, and the Regulation in which the role of this principle is less formally apparent, is in fact very limited.

In the last article, Professor Petra Hammje from Cergy University briefly presents a recent addition to the French civil code providing a choice of law rule for civil unions. There is not abstract, but I'll report shortly on this.

Finally, I am glad to report that the *Revue Critique* has recently been put online and that those articles can now be downloaded.

Dámaso Ruiz-Járabo Colomer

Advocate General Dámaso Ruiz-Jarabo Colomer has passed away in Luxembourg. Born in 1949, Mr Dámaso Ruiz-Jarabo Colomer was Judge and then Member of the Consejo General del Poder Judicial (General Council of the Judiciary of Spain). He worked as professor of Administrative Law and served as Head of the Private Office of the President of the Consejo General del Poder Judicial. He was an ad

hoc Judge at the European Court of Human Rights and Judge at the Tribunal Supremo (Supreme Court of Spain) from 1996. Since 19 January 1995 he was also Advocate General at the Court of Justice. Among his writings we may recall the book "El Juez nacional como juez comunitario" (Civitas, 1993), or the articles "Los derechos humanos en la Jurisprudencia de Tribunal de las Comunidades Europeas" (Poder Judicial, 1989, pp. 159-184); "Técnica Jurídica de protección de los derechos humanos en la Comunidad Europea" (Revista de Instituciones Europeas, 1990, pp. 151-186); "La jurisprudencia del Tribunal de Justicia sobre la admisibilidad de las cuestiones prejudiciales" (Revista del Poder Judicial, 1997, pp. 83-114); "La réforme de la Cour de Justice opérée par le Traité de Nice et sa mise en oeuvre future" (Revue Trimestrielle de Droit Euopeen, 2001, pp. 705-725); "Los Tribunales constitucionales ante el Derecho comunitario" (Estudios de Derecho Judicial, 2006, pp. 185-202), or the recent "El Tribunal de Justicia de la Unión Europea en el Tratado de Lisboa" (Noticias de la Unión Europea, 2009, pp. 31-40). As Advocate General he worked in many fields, including Private International Law. He will be remembered among us for his opinion in cases as Lechouritou (as. C- 292/05, on the Brussels Convention), Deko Marty (as. C- 339/07, on Regulation num. 1346/2000 of 29 May 2000 on insolvency proceedings) Roda Golf (as. C-14/08, concerning Regulation num. 1348/2000 on the service of documents).

May he rest in peace.

Publication: Hess, Europäisches Zivilprozessrecht

Prof. Dr. Burkhard Hess (Heidelberg) has published a comprehensive work on European Law of Civil Procedure:

Europäisches Zivilprozessrecht

(C.F. Müller 2010. XXXII, 752 pages, Hardcover 128 EUR; ISBN 978-3-8114-3304-5)

The publication provides an analysis of the European Community's legislative competences including the new legal situation under the Treaty of Lisbon, the different instruments of European procedural law, their interpretation and the relationship between the different Community instruments. In addition, the book discusses the preliminary reference procedure provided by Art. 234 EC and gives an outlook on the future developments of European procedural law as well as the possibility of creating a uniform code of European civil procedure.

In particular, the book analyses all relevant Community instruments:

- Brussels I Regulation
- Brussels II bis Regulation
- legal instruments on Judicial Assistance (Service of Documents, Taking of Evidence, Legal Aid)
- Insolvency Regulation
- European Order of Payment Procedure
- European Enforcement Order for Uncontested Claims
- Small Claim Procedure
- Maintenance Regulation
- Directive on Mediation

More information on this book can be found here.

Conference on the Role of Ethics in International Law

Some of our readers will be interested in the following conference this Friday in Washington, D.C.

The Role of Ethics in International Law

Event Information
Friday, November 13, 2009 / 8:30 AM
Tillar House/Cosmos Club
Washington, D.C.

Each year, the International Legal Theory Interest Group of the American Society of International Law convenes a special conference to consider an important theoretical issue in international law. This year, the conference will focus on the Role of Ethics in International Law. Special attention will be paid both to the role of ethics in public and private international law, as well as to normative and theoretical perspectives. The panels will feature the following distinguished scholars.

The Role of Ethics in Public International Law
Moderator: Brian Lepard, University of Nebraska School of Law
Roger P. Alford, Pepperdine University School of Law, *Moral Reasoning in International Law*
Oona A. Hathaway, Yale Law School, *Why Do States Comply With International Law?*
Edward T. Swaine, George Washington University Law School, *Breaching*

The Role of Ethics in Private International Law
Moderator: Trey Childress, Pepperdine University School of Law
Lea Brilmayer, Yale Law School, *The Ethical Problem in Private International Law*
Perry Dane, Rutgers School of Law, *The Natural Law Challenge to Choice of Law*
Dean Symeon C. Symeonides, Willamette University College of Law, *The Quest for Multistate Justice*

Normative and Theoretical Perspectives
Moderator: Tim Sellers, Baltimore University School of Law
Samantha Besson, University of Fribourg/Duke University School of Law, *The Nature of Human Rights Theory*
H. Patrick Glenn, McGill University, *The Ethic of International Law*
Mary Ellen O'Connell, Notre Dame Law School, *Finding*Jus Cogens*: Preemptory Norms and Natural Law Process*

Lunch will be served as part of this free conference for ASIL members ($15.00 for non-ASIL members). For further information, see here.

And the Winner Is …

The awards of the most noticeable cases of the ECJ go to:

Centros: 5 votes

and

Gasser: 5 votes

But let's congratulate also:

Owusu: 3 votes

Krombach: 2 votes

Most Noticeable Cases of the ECJ

On Monday November 23rd, 2009, the Master in European Litigation of the university of Luxembourg will celebrate its tenth anniversary.

One of various talks to be given throughout the afternoon will present and discuss the **Ten Most Noticeable Cases of the European Court of Justice in the Last Decade**. No doubt, the speaker will not focus specifically on private international law, but it is my intention to urge him to include at least one.

Now, the next question is of course, Which one?

I am therefore asking readers: which case (or couple of cases) of the ECJ has been the most noticeable one in the last decade for private international lawyers? and

since we got started, what about the most noticeable one since the creation of the Court?

Netherlands Proposal on Private International Law ("Book 10")

A Dutch Proposal on Private International Law, to be included as Book 10 of the Civil Code of the Netherlands, has been put before Parliament (Tweede Kamer, 2009-2010, 32137, Vastellings- en Invoeringswet Boek 10 Burgerlijk Wetboek; with *Memory van Toelichting*/Explanatory Memorandum). This long-awaited proposal is a Consolidating Act of 165 provisions, merging 16 existing Conflict of Laws Acts (such as those on Names, Marriage, Divorce and Corporations), with some minor amendments. New are the 17 general provisions, containing rules on, amongst others, the application of choice of law rules, public policy, special mandatory rules, party autonomy, and capacity, though these largely reflect the current rules formulated in case-law or laid down in the special acts. Where applicable, reference to the relevant Conventions and EU Regulations is made. As for Rome I and Rome II, the Proposal provides that these Regulations also apply where the case falls outside the (material) scope of these Regulations.

Once the Proposal is adopted, this Book 10 of the Civil Code will replace the existing special PIL acts. Since it is part of the Civil Code, it only includes choice of law rules. International jurisdiction, recognition and enforcement and other international procedural issues, as far as not governed by international and EU instruments, will still be regulated by the Code of Civil Procedure.

See for earlier developments on Dutch Private International Law, Kramer, IPRax 2007/1 (overview 2002-2006) and Kramer, IPRax 2002/6 (overview 1998-2002).

Publication: International Jurisdiction and Commercial Litigation.

International Jurisdiction and Commercial Litigation. Uniform Rules for Contract Disputes, by Hélène van Lith, T.M.C. Asser Press (distributed by Cambridge University Press), 2009.

This interesting book includes a comprehensive analysis of the basic approaches to international jurisdiction in commercial contracts, and compares the jurisdictional systems of major continental European countries, the UK, the US and the Brussels Regulation. The author explores whether any common grounds exist in international jurisdiction rules, and assesses the feasibility of a uniform global system for international contract disputes, also in relation to the previous work of the Hague Conference on a worldwide jurisdiction convention.

This book is the commercial edition of a Ph.D., defended at Erasmus University Rotterdam in 2009.

Annual Conference of the American Association of Private International Law (ASADIP)

The American Association of Private International Law (Asociación americana de derecho internacional privado ASADIP) will hold its third annual conference "International Business Law in a time of change" on 12 and 13 November in Venezuela, Isla de Margarita). A special tribute will be given to Tatiana Maekelt, who was one of the most outstanding conflicts scholars of Latin America.

Among the topics that will be addressed and which might interest members of this list are:

- Bernard Audit (Paris II Panthéon-Assas University) on “Problemas actuales del convenio arbitral: efecto negativo, extensión a otros contratos y a otros miembros del grupo societario”
- Georges Bermann (ColumbiaUniversityl) on “Recent Trends in Parallel Litigation”
- Herbert Kronke (Heidelberg University) on “Transnational Certainty and the Convention on Intermediated Securities –Reflections on Key Issues”
- David P. Stewart (Georgetown University) on “Companies and Human Rights: Litigation in the United States Under the “Alien Tort Statute”
- Juan M. Velázquez Gardeta (Basque Country University) on “Challenges of E-Commerce: North American Case Law and the Future of Latin America”
- Didier Opertti Badán (Catholic University of Uruguay) on “The Situation of Private International Law in a Context of Globalization”

For more information, please consult the website of the conference: http://www.negociosinternacionales.com.ve/

and here to ask for your membership to the associacion.

Time to Update the Rome I Regulation

The Council has adopted a corrigendum to all versions of the Rome I Regulation to correct what appears to be an “obvious error”. Art. 28, which had previously provided that the Regulation would apply to contracts concluded “after” (French: “après”; German: “nach”) 17 December 2009, will now refer to contracts concluded “as from” (French: “à compter du”; German “ab”) 17 December 2009, bringing it in line with Art. 29 which requires that the Regulation be applied “from” 17 December 2009. The corrigendum was first published on 8 October and itself revised on 19 October. Under the procedures for corrigenda (set out in

a Council Statement of 1975), the amendment will apply unless the European Parliament took objection within 8-days (and there is no reason to believe that this is the case). It is understood that the text of the corrigendum will appear in the Official Journal later this month.

The change would appear satisfactorily to put to bed the lacuna which had troubled the German delegation to the Council's Civil Law Committee, with the result that lawyers concluding agreements on 17 December 2009 can now rest more easily. Any legal opinions relating to such contracts can now, with confidence, be based on the Rome I Regulation (as opposed to the Rome Convention).

Unfortunately, those grappling with the Rome II Regulation do not have the same comfort. As has been highlighted on these pages, there remains a controversy as to whether the Regulation applies to events giving rise to damage "which occur after" 20 August 2007 (the Regulation's apparent entry into force date under Art. 254 EC) or those occurring "from"/"after" 11 January 2009 (the Regulation's application date) (see Arts. 31-32). The problem here is not so much the use of the word "after" in Art. 31 in contrast to the word "from" in Art. 32 (a mere trifle by comparison), but the fact that the Regulation uses different terminology ("entry into force"; "application") in these two provisions dealing with its temporal effect and does not (explicitly, at least) stipulate an entry into force date in either of them. Commentators disagree as to the correct solution, and a division of opinion has emerged (for example) in England (where the majority favour 20 August 2007 as the relevant date) and Germany (where opinion is divided, but is understood numerically to favour 11 January 2009). Member State courts will, no doubt, need to grapple with this soon. The question is: who will get there first, and which solution will they prefer?