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?

Bonanza at the British Institute

There's plenty for private international law aficionados to devour in programme of forthcoming events at the British Institute of International and Comparative Law.

First, on Friday 6 November, Jonathan Faull, Director General of the Commission Justice, Freedom and Security (JLS) Directorate is giving the Chalfen Memorial Lecture on "Law-making in Brussels", giving perhaps an insight as to the likely future direction on civil justice policy in light of the forthcoming Stockholm

Programme.

Secondly, on Tuesday 10 November, the Institute offers a first reaction to the Commission Proposal on Cross-Border Succession and Wills. Chaired by Professor Jonathan Harris (University of Birmingham), the speakers include Professor Paul Matthews (King's College, London), Richard Frimston (solicitor, London) and Oliver Parker (Ministry of Justice).

Thirdly, on 18 November 2009, in what promises to be a lively event, Professor Christian von Bar (Universität Osnabrück) will be entering the lion's den to speak on the controversial topic of "A Model Civil Code for Europe?". Believers, agnostics and conflicts lawyers are equally welcome to register. Lord Justice Rix chairs.

Last (but by no means least), the Herbert Smith Private International Law Seminar Series continues on 9 December 2009 with a session entitled "Jurisdiction Agreements on Trial: Current Problems – Future Solutions". Chaired by Filip De Ly (Erasmus University, Rotterdam), the speakers include Barbara Dohmann QC, Professor Harris and Professor Trevor Hartley (joint reporter for the Convention on Choice of Court Agreements).

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Unfair arbitration clause before the ECJ

In a recent decision of October 6, 2009 (C 40/08 – Asturcom Telecomunicaciones SL v. Maria Cristina Rodríguez Nogueira) the European Court of Justice held that a national court or tribunal hearing an action for enforcement of an arbitration award which has become final and was made in the absence of the consumer is required to assess *of its own motion* whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair.

As in the Elisa María Mostaza Claro v. Centro Móvil Milenium SL (C-168-05) case, the dispute arose from a subscription contract for a mobile telephone concluded between Asturcom and Mrs Rodríguez Nogueira. The contract contained an arbitration clause under which any dispute concerning the performance of the contract was to be referred for arbitration to the Asociación Europea de Arbitraje de Derecho y Equidad (European Association of Arbitration in Law and Equity) ('AEADE'). The seat of that arbitration tribunal, which was not indicated in the contact, was located in Bilbao.

An arbitral award condemned Mrs Rodríguez Nogueira to pay EUR 669,60 to Asturcom. The consumer neither participated into the arbitral proceedings nor did she intend to get the annulment of the award, as permitted by the Spanish Arbitration Law.

Asturcom brought an action before the Juzgado de Primera Instancia No 4 de Bilbao for enforcement of the award.

First, the Spanish Court of First Instance rules that the arbitration clause contained in the subscription contract is unfair. However, the Spanish Law on Arbitration does not allow the arbitrators to examine of their own motion whether unfair arbitration clauses are void and secondly, the Spanish Code of Civil Procedure (Ley 1/2000 de Enjuiciamiento Civil) does not contain any provision dealing with the assessment to be carried by the court or tribunal having jurisdiction as to whether arbitration clauses are unfair when adjudicating on an action for enforcement of an arbitration award that has become final.

In those circumstances, the Juzgado de Primera Instancia decided to stay the proceedings and to refer to the Court the following question for a preliminary ruling:

"In order that the protection given to consumers by [Directive 93/13] should be guaranteed, is it necessary for the court hearing an action for enforcement of a final arbitration award, made in the absence of the consumer, to determine of its own motion whether the arbitration agreement is void and, accordingly, to annul the award if it finds that the arbitration agreement contains an unfair arbitration clause that is to the detriment of the consumer?"

The ECJ held that national courts having jurisdiction for the enforcement of arbitral awards made in the absence of the consumer are "required to assess of

their own motion whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair, *in so far as, under national rules of procedure, they can carry out such an assessment in similar actions of a domestic nature*.

If that is the case, it is for that court or tribunal to establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that clause".

In my opinion, the decision is written in a misleading way.

In the first place, it seems to mean that national courts having jurisdiction over the enforcement of arbitral awards should on their own motion raise the nullity of the arbitration clause on the basis of Directive 93/13.

However, they should do so only where their national procedural laws ("*in similar actions of a domestic nature*") authorize them to do so. Which means that in this case (if I understand well), as the provisions on the enforcement of domestic awards of the Spanish Code of Civil Procedure are silent on this matter, Spanish judges are not required to raise on their own motion the unfair arbitration clause… But what should we understand by "*in similar actions of a domestic nature*"? It is quite clear that the ECJ excludes the procedure of the enforcement of international awards from its ambit. But what are these provisions that national judges should look at???

If anyone has a clue on this…

New Journal of International Dispute Settlement

Oxford University Press will publish a new *Journal of International Dispute Settlement* from 2010 onwards. The General Editors will be Geneva based scholars Gabrielle Kaufman-K0hler and Joost Pauwelyn, with Thomas Schultz

being the Managing Editor.

Since the 1980s, a radical development has taken place in international dispute settlement. The number of international courts, tribunals and other international dispute resolution mechanisms has increased dramatically. The number of international disputes resolved by such means has risen in even greater proportions. These disputes more and more frequently raise issues that combine private and public international law, effectively bringing back to light the deep-seated interactions that have always existed between these two traditional fields of academic study. The regulatory impact of certain branches of international dispute settlement – such as international arbitration – further create the need to take a step back and think about where we are going. The growth of the field of international dispute settlement in practice, the novelty and significance of the issues posed, and the originality of the academic angle from which such issues need to be addressed are the factors that triggered the launch of the Journal of International Dispute Settlement.

JIDS defines its mission according to these developments. It is primarily designed to encourage interest in issues of enduring importance and to highlight significant trends in the field of international dispute settlement. Heavyweight and reflective articles will find preference over news-driven works. In addition to strictly legal approaches, the journal's purview encompasses studies inspired by legal sociology, legal philosophy, the history of law, law and political science, and law and economics. It covers all forms of international dispute settlement and focuses particularly on developments in private and public international law that carry commercial, economic and financial implications. The main subjects that will be dealt with are international commercial and investment arbitration, WTO dispute resolution, diplomatic dispute settlement, the settlement of international political disputes over economic matters in the UN, as well as international negotiation and mediation. Particular attention will be paid to questions that involve a combination of private and public international law.

JIDS will address procedural issues that arise in international dispute resolution procedures, such as provisional measures; the consensual character of jurisdiction; evidence; amicus curiae interventions; res judicata, lis pendens and double fora; the procedural influence of human rights; experts and witnesses; interpretation, revision and challenge of awards and decisions; recognition and

enforcement, etc. Comparative approaches, which are attentive to the different ways that these issues are dealt with in different types of dispute resolution procedures, are of particular interest.

The journal will also include substantive aspects pertaining to those fields of the law that are shaped by international courts and tribunals, be they of an interstate, private or mixed character. Hence, substantive issues in international economic law and international investment law will be considered, so long as the link to international dispute settlement is clearly established. This will include questions of substantive law properly speaking, but also more general aspects of the substantive evolution of international law, covering issues such as the proliferation of international dispute settlement mechanisms and the ensuing fragmentation of international law.

JIDS is intended not only for academics with an interest in international dispute settlement, international arbitration, private or public international law. It is also intended for practitioners who are looking for a single source that captures the fundamental trends with the field, allowing them to anticipate new issues and new ways to resolve them. Graduate and post-graduate students, government officials, in-house lawyers dealing with international disputes, and people working for international courts and tribunals and for international arbitration institutions should also find interest in this journal.

The contents of the first two issues of the Journal can be found here.

Krombach: an Update on the Efficacy of Private Enforcement in Criminal Law

As I promised readers to keep them updated on the recent developments in the Bamberski – Krombach case, and as it seems that there is not as much media

coverage of the case outside of France as there is in France, here are the latest news.

First and most importantly, the French media has reported that Krombach will be tried again in France in a bit less than a year. My recollection of French criminal law is that it is standard procedure when a person sentenced in abstentia is eventually caught. What this means, of course, is that the startegy elaborated by Bamberski has worked. In a report broadcasted yesterday night on France main TV channel, he said that he organized the abduction because he did not want to see Krombach die without serving his time in prison.

It seems, therefore, that private enforcement can work pretty well in criminal law. I do not know whether Germany intends to do anything about it.

In the same TV show, Bambersky also explained how he had Krombach followed in Germany for 10 years so that he would always know where he was. It was reported that the people he hired for that job could inform him that Krombach had changed addresses in Germany seven times over a decade. It was reported that Bambersky would have taken the decision to initiate the process which led to the abduction when he learnt that Krombach was on the verge of changing addresses again.

Finally, Bambersky was charged with kidnapping, but he was not kept in preventive custody. When asked whether he feared to go to prison, he said that given that he had been deported in Poland during the war as a kid, it would be ok.

Bertoli: Party Autonomy and the Rome II Regulation

Paolo Bertoli (University of Insubria) has published two interesting articles (in English) on the role of party autonomy in the Rome II regulation. Here are the references:

Choice of Law by the Parties in the Rome II Regulation, in Rivista di diritto internazionale, 2009, pp. 697-716.

Party Autonomy and Choice-Of-Law Methods in the "Rome II" Regulation on the Law Applicable to Non-Contractual Obligations, in Il Diritto dell'Unione europea, 2009, pp. 229-264.

An abstract has been kindly provided by the author:

> *The articles discuss, also in comparison with American private international law theories and methods, the innovative provisions relating to party autonomy set forth in the EC "Rome II" regulation on the law applicable to non-contractual obligations, the choice-of-law methods that such provisions follow, and their role and significance in the framework of the European "federalized" private international law system. In particular, the articles demonstrate that a distinction can, and should, be made between cases in which party autonomy operates in the context, and demonstrates the existence in Rome II, of: (i) a traditional (or, in American terminology, "jurisdiction-selecting") choice-of-law method, (ii) a "content-oriented" choice-of-law method, and (iii) a European lex fori approach.*

With reference to the development of EC private international law, see also the author's thorough analysis of the role of the European Court of Justice, in his volume "Corte di giustizia, integrazione comunitaria e diritto internazionale privato e processuale" (Giuffrè, 2005) and "The Court of Justice, European Integration and Private International Law" (in *Yearbook of Private International law*, vol. VIII-2006, pp. 375-412: the article can be browsed through the Libreka! website).

New Title of De Conflictu Legum

Collection

Prof. Laura Carballo Piñeiro (University of Santiago de Compostela) has just published her monograph entitled *Las acciones colectivas y su eficacia extraterritorial. Problemas de recepción y transplante de las class actions en Europa* (Collective actions and their extraterritorial effectiveness. Issues on the reception and adaptation of class actions in Europe).

The book, the last one of the Collection De Conflictu Legum directed by Prof. Santiago Álvarez, deals with PIL problems of collective actions. Most of the proceedings implying collective actions take place in the United States, whilst in Europe there is still an ongoing debate concerning whether to introduce or to improve collective litigation in each single national legislation, and whether to develop some specific Community instrument on the subject (as suggested by the White Paper on damages actions for breach of the EC antitrust rules, and by the Green Paper on Consumer Collective Redress). Nevertheless, PIL problems are also of importance for European countries: an American class action may need to be served or enforced in Europe. From now on, as a result of the increasing number of States dealing with collective actions, international jurisdiction and conflict of laws issues are also at stake .

The book starts with a thorough identification of the procedural problems arising from collective actions. Prof. Carballo makes clear how the many misunderstandings on the topic -mostly due to mistrust of US-American class actions- are a hurdle in itself, not only for the introduction of collective justice in many States, but also for its practical application. Spain provides a good exemple: although collective-friendly, Spanish rules on collective actions on consumer matters lack clarity and basic guarantees are not laid down.

PIL issues follow this procedural introduction. Prof. Carballo studies if and how the international jurisdiction criteria laid down by Regulation *Brussels I* may apply when the action is collective; the application of international and community instruments in order to identify and notify absent class members; if it is necessary to create special conflict rules for collective actions in the European area of justice; and recognition and enforceability issues.