Conference Report: CISG Basel Conference, 29 and 30 January 2015, University of Basel

The CISG entered into force around 35 years ago – reason enough to celebrate and discuss the state of this instrument. Under the auspices of the University of Basel, in cooperation with UNCITRAL and the Swiss Association for International Law, a large number of experts convened on 29 and 30 January 2015 in order to present current trends and problems.

Panel 1 dealt with the economic analysis of the CISG (Prof. Dr. B. Piltz, Dr. L. Spagnolo, G. Moser and Prof. P. Winship). The core question was whether and to what extent the CISG does in fact what it promises which is to reduce transaction costs. A lot of skepticism and reservations, in particular from the US-American speaker, about economic analysis were articulated but the overall impression was that it is more efficient to have the CISG than not to have it even though it is hardly possible to substantiate, let alone quantify, this impression. However, compared to alternatives, for example the selection of a national law by choice-of-law clauses including the numerous limitations to party autonomy, it appears plausible to believe that instruments like the CISG have beneficial effects. Any less favorable result would of course have been somewhat impolite on a birthday party for the CISG.

Panel 2 discussed extending the CISG beyond sales contracts in respect to distribution contracts, contracts on natural gas, on deduction and set-off and on the statute of limitations (Prof. Dr. P. Perales Viscasillas, Dr. F. Mohs, Prof. Dr. C. Fountoulakis, Dr. P. Hachem). It became clear that long-term contracts and service contracts are of growing importance and that the unification of contract law should continue working on these types of contracts. And indeed, UNIDROIT is currently working on principles for long-term contracts that may supplement the UPICC (http://www.unidroit.org/work-in-progress-studies/current-studies/long-term-contracts). On the basis of the current state of the CISG, each of the presentations demonstrated that the distinction between external and internal lacunae is far from trivial which sometimes may contribute to doubts about the economic

efficiency of unified law.

Panel 3, originally planned as the second part of the conference but postponed due to late arrivals (snow storms in New York), analysed the recent trend towards a decline of reservations to the CISG under Articles 92, 93, 95, 96 (Prof. Dr. U. Schroeter, Prof. Dr. J. Ramberg, Prof. Dr. S. Han). Reservations were described not so much as a flaw but rather as a tool for enabling uniformity, at least to the degree politically possible. It was assumed that the reservation in Article 94 for regional harmonization may play a growing role in the future, in particular in Asia.

Panel 4 again turned to the question of extending the CISG, now in respect to validity issues (Prof. Dr. S. Eiselen, Prof. L. Gama, Prof. J. Gotanda, Prof. E. Sondahl Levin), and discussed the complex relation of the CISG to the control of standard terms on fairness, to contractual limitations of liability, to the repayment of attorney's fees as damage and other issues. Contractual limitations for example could be viewed as covered by the CISG in respect to their incorporation, formal validity and interpretation whereas their validity as such, for example in light of protective or otherwise mandatory law, would have to be seen outside the scope, but it was suggested that the general standards of the CISG such as party autonomy, reasonableness or good faith should control and, if necessary, limit the impact of the applicable national law – an approach that slightly mirrors the control by the European Court of Justice of the exercise of public policy clauses by Member State courts in European instruments of private international law.

Panel 5, under the heading of "CISG, State Action and Regionalisation" discussed whether and to what extent the CISG, in particular in comparison to the CESL, would be suitable for sales contracts with consumers (Prof. Dr. Y. Atamer), how to fill gaps in Article 78 CISG relating to default interest for late payments (Prof. Dr. J. Ramberg), how to apply the CISG to government purchases, in particular in relation to mandatory requirements of public procurement law (Dr. C. Pereira) and the relation of the CISG to OHADA (Dr. J. A. Penda Matipe). It became clear that the CISG, by adequate interpretation and standard terms control, could address many of the core issues of consumer protection.

Panel 6 continued the discussion on the regionalization of the CISG by focusing on the harmonization in the EU and its impact on the CISG, for example by the Late Payment Directive (Prof. Dr. C. Witz), on the political difficulties in the past

and the currently limited, but may be not that much limited prospects of the CESL (M. Zaleski) – "replacement by modified proposal that will come to life this year", the harmonization in Asia, in particular with regard to the potential Principles (Prof. Dr. H. Sono) and Latin America (Prof. A. Garro).

Panel 7 dealt with the issue of the fairness of the CISG as contract law, partly with a focus on (compliance requirements for) supply and distribution chains. Prof. Dr. H. W. Micklitz posed the general question what kind of standards of fairness should apply to b2b sales relations, Prof. Dr. P. Butler addressed the relation between the "CISG and human rights – an Oxymoron?", Prof. Dr. P. Nalin discussed ethical standards in connection with international sales contracts, and Prof. Dr. A. Veneziano presented UNIDROIT's project on agricultural production contracts and explained the particularities – e.g. risk and value chain management but also imbalances of bargaining powers – and legal tools used by the parties up to now in this intriguing type of complex and relational contracts (http://www.unidroit.org/work-in-progress-studies/current-studies/contract-farming).

Last not least there was a round table discussion on the general issue of the future of unification of contract law (Prof. Dr. Ingeborg Schwenzer, Prof. Dr. Dr. h.c. M. Jametti Greiner, Dr. B. Czerwenka, Dr. L. Castellani, J. A. Estrella Faria) that revolved, amongst other themes, around the growing importance of relational contracts of all kinds (e.g. service contracts, long-term contracts etc.) – an excellent round-up for a truly excellent conference!

ECtHR on SAS v. France. A Comment.

Multiculturalism is one of the greatest challenges of our time. Minority but deeply rooted practices with a potential to bring social unrest to host countries – as may be, in our Western societies, the use of the full Islamic veil- raise questions to which law may answer with tolerance or reject with incomprehension and

hostility. It is with the first intention in mind that Prof. Zamora and Prof. Camarero, both from the University Jaume I (Castellón) have addressed the ECtHR decision *SAS v. France*, application number 43835/2011, in a paper written in Spanish, with an English abstract that reads as follows:

"The decision of the European Court of Human Rights related to the case S.A.S. is a historic milestone as far as the treatment of the religious freedom all along its jurisprudence is concerned. Throughout a critical analysis their foundations are submitted to review. Among them we underline the requirements of the so called *vivre ensemble* and the wide way it is granted to the State a 'margin of appreciation'. Both aspects are subject to scrutiny to reach the conclusion that there exists little ultimate basis to support the severe restriction imposed upon freedom of religion and the protection of minorities under the French law of 2010. Upon those basis, the study agrees upon that the above mentioned decision really masks the purpose of an institutional political balance looked for by the High Court in its ruling. A balance that in the present case turns out to be highly burdensome concerning the protection of Human Rights".

The full text is to be found in the *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 37 (2015).

Claudia Pechstein and SV Wilhelmshaven: Two German Higher Regional Courts Challenge the Court of Arbitration for Sport

By Professor *Burkhard Hess* (Director) and *Franz Kaps* (Research Fellow), *Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law*

In a decision of January 15, 2015, the Munich Court of Appeal (OLG) addressed

dispute resolution practices common to sports law. The case concerns the well-known German speed skater Claudia Pechstein. In February 2009, Ms. Pechstein was imposed a two year ban by the International Skating Union (ISU) for blood doping. As she had signed an arbitration clause, she challenged the ban before the Court of Arbitration for Sport (CAS). However, an arbitral tribunal of the CAS confirmed the ISU suspension in November 2009. Ms Pechstein challenged the award before the Swiss Federal Tribunal (case no. 4A 612/2009 and 4A 144/2010), but without success. On December 31, 2012, Ms. Pechstein started litigation before the German courts contesting the lawfulness of the ban. She has always asserted that the doping results are due to an illness she has inherited from her father. According to recent (innovative) expert testimonies her allegation is correct.

In its judgment of 15 January, the OLG Munich addressed the validity of the CAS arbitration agreement and the recognition of the arbitral award. Relying on German cartel law the Court concluded that the arbitration agreement was void (a) and the arbitral award could not be recognized (b).

(a) First, the Court held that no valid arbitration agreement had been concluded between Ms. Pechstein and the ISU, as Ms. Pechstein had no choice but to agree to the arbitration clause in favor of the CAS in order to participate to the "World Speed Skating Championship" organized by the ISU. According to the Munich court, the organization of professional sports by international sports federations like the ISU corresponds to a dominant position in the (sports) market, and the ISU had abused this dominant position by imposing the arbitration clause on the athlete. In addition, the Court held that the CAS appeal dispute resolution procedures do not correspond to the required minimum standards of a fair trial as the parties are not treated equally. In this respect the court relies on two arguments: First, parties to the CAS arbitration proceedings must select the arbitrators from a closed list; but only the sports federations (i.e., not the athletes) participate in its drawing up. Furthermore, the Court criticizes the nomination of the president of the arbitration tribunal, made by the CAS and not by the party-appointed arbitrators. Again, the Court denounces the influence of the sports' federation on the process, which entails an unequal treatment of the parties. In light of these arguments it is clear that the judgment is much more about the independence of sports arbitration than about German cartel law. Hence it may prove to be much further-reaching than appears at first sight.

(b) With regard to the recognition of the CAS arbitral award confirming the validity of the ban for doping, the Munich Court applied Art. V (2) (b) NY Convention to hold that the CAS award violated German cartel law pertaining to the German "public policy", and refused to grant recognition. In this respect, the court referred again to the lacking independence of the CAS from the international sports federations.

It must be noted that the "Pechstein-story" has not yet come to an end. A second appeal was filed with the German Federal Supreme Civil Court; a decision is expected in the next months. Moreover, this spring the European Court of Human Rights (pending case 67474/10, *Claudia Pechstein ./. la Suisse*) will decided on a complaint brought by Ms. Pechstein against Switzerland for an allegedly unsufficient review of the CAS by the Federal Tribunal.

In addition, a recent decision of the Court of Appeal Bremen of 30 December 2014 is also worth mentioning here. In the case under consideration a local football club, SV Wilhelmshaven, challenged a ban of the Regional Football Association, imposed on the local football club for the non-payment of a so-called "training compensation". This compensation corresponds to a payment due to a football club by another upon the transfer of an athlete; in the case at hand SV Wilhelmshaven had recruited an Italian football player from Argentina. The FIFA ordered the German club to pay to the Argentinian club the amount of 157.000 € "training compensation". The order was contested by the addressee but confirmed by an arbitral tribunal of the CAS. When the German club failed to pay the sum, the FIFA decreed the German club's relegation to a lower league. Once again, the club challenged this decision before the CAS, once again to no avail. Finally, the German Regional Football Association, being under the statutory obligation to enforce the FIFA decision, implemented the sanction. The SV Wilhelmshaven challenged the relegation before the Bremen Court of Appeal relying on the *Bosman* decision of the CJEU (Case C-415/93) and arguing the incompatibility of the "training compensation" with article 45 TFEU. The Bremen court held that the relegation was indeed incompatible with European Union law, hence it was void. Again, an arbitral award of the CAS was not recognized, this time for non-compliance with mandatory European Union law.

The *SV Wilhelmshaven* litigation may still be appealed before the German Federal Supreme Court. As with the *Pechstein* case it remains to be seen whether the Supreme Court will uphold the decision of the lower court. At any rate, the two

controversies clearly demonstrate that arbitration in sports law must, like all arbitration proceedings, abide by minimum standards of procedural fairness (*Pechstein*) and apply mandatory law (*SV Wilhelmshaven*). Otherwise, the awards will be successfully challenged in state courts, and the *de facto* immunity of sports law from state court interference (which is based on arbitration) will find its limits.

Call for papers: Extraterritorial application of EU Law

Erasmus+ Program/Jean Monnet Project:
EU Law between Universalism and Fragmentation: Exploring the Challenge of Promoting EU Values beyond its Border

Call for papers (Young researchers)

THE EXTRATERRITORIAL APPLICATION OF EU LAW

Vigo (Spain)

The Spanish Association of Professors of International Law and International Relations (AEPDIRI) is the beneficiary of a Jean Monnet project on the pressures experienced by EU law in a globalized world that become apparent in the conflicting trends towards universalism on the one hand and states' legal fragmentation on the other hand. Overall objective of the project is promoting research on EU policies from the viewpoint of the Association's research areas – public international law, private international law and international relations – with a view to enhancing EU values beyond its borders.

It is in the framework of this Jean Monnet project that AEPDIRI will organize an international Conference in Vigo (Spain) on **June 18/19, 2015** entitled ***The Extraterritorial Application of EU Law***. In order to draw the attention of young

researchers to this field of study, the AEPDIRI is pleased to make this call for papers.

While under public international law states cannot exercise their sovereign rights in the territory of another state without the concurrence of its consent, there are some areas of law in which this principle may experience exceptions or modulations. These are areas that show the complexity of this issue both in theory and in practice. Among the possible topics of research the following can be mentioned:

1. *Law of Treaties*: Despite the general principle of treaties' being binding on the territory of each contracting party, there are cases where these instruments may have application beyond that scope for various reasons such as containing provisions concerning third States, regulating an area beyond national jurisdiction, or because it is a human rights convention.

2. *Compulsory enforcement of International law*: In this framework it could fit both claw-back clauses adopted by other countries and sanctions.

3. *Competition law and its extraterritorial effect*: Reference could be made here to tensions with other jurisdictions such as those arising from extraterritorial application of US antitrust law and the corresponding European reactions, the conduct and effects tests, and so on.

4. *Data protection and intellectual property law*: Possible topics could be protection of intellectual property on the Internet, telecommunications and broadcasting, Internet communications and sale of private data, the role of state intelligence agencies in monitoring the activities of citizens, duties of carriers with particular reference to the agreement between the United States and the European Union on data registries on names of passengers (PNR), and so on.

5. *Environmental Law*: marine and air pollution caused by ships, protection of endangered species, illegal fishing, trading systems of emission rights, protecting the environment and tort law.

All those interested in presenting a paper on any of the items listed or other related issue should send their proposal by April 1, 2015. The proposal must contain, in addition to a title, a 5-line abstract and a 1-2 pages excerpt in word format. Proposals dealing with public international law and international relations

issues should be sent to Professor Montserrat Abad Castelos (mabad@der-pu.uc3m.es) and those on private international law issues to Professor Laura Carballo Piñeiro (laura.carballo@usc.es). A CV and a letter of recommendation must be attached as well.

Presentations can be made in Spanish or English and the papers will be published in either language in a book. The publishing house will be announced in due time.

The organization will be responsible for the costs of selected candidates' participation in the Conference, always within the limits of the allocated budget.

Arbitration and EU-Procedural Law: Two Advocate Generals of the CJEU Promote Diverging Views

Prof. Dr. Burkhard Hess, Director of the MPI Luxembourg, has very kindly accepted to have his view on two recent AG's opinions published in CoL. Comments are welcome.

Two recent opinions, the one rendered by AG Wathelet on December 8, 2014, in *Gazprom* (Case C-536/13), and the other one given by AG Jääskinen, on December 11, 2014, in *CDC* (Case C-352/13) address the interplay between arbitration and EU law, especially in the context of the Brussels I Regulation. Interestingly, the two opinions adopted different perspectives and, therefore, propose different solutions. Moreover, both cases relate to similar issues on the merits: the enforcement of mandatory Union law in the areas of cartel and of energy law. Accordingly, it appears that the two opinions are also based on diverging conceptions on the role of arbitration *vis-à-vis* mandatory Union law. Therefore, I would like to compare the opinions in order see how EU-law and arbitration should be delineated. As the two cases are currently pending in the CJEU, it is finally up to the Court to decide which direction should be taken.

The opinion in Gazprom: Giving preference to arbitration proceedings

Gazprom is about the admissibility of anti-suit injunctions rendered by an arbitral tribunal (seated in a EU Member State) against civil proceedings pending in civil courts within the European Judicial Area. On the merits, the case is of a highly political significance: it relates to the long-term supply of gas to 90% of the population of Lithuania by the Russian energy giant. According to a framework agreement of 1999 a Lithuanian company (Lietuvos dujos) whose majority was held by Gazprom and the minority by the government was in charge of buying gas from Gazprom and distributing it in Lithuania. In spring 2011, the Lithuanian Ministry of Energy initiated an investigation on price manipulation against Lieutuvos and its directors and tried to change the management. Under Lithuanian company law, it brought an action in the Lithuanian civil courts in order to secure the investigations against the company. As the shareholder agreement provided for arbitration under the Stockholm Chamber of Commerce, Gazprom initiated arbitration proceedings there. On 31 July 2012, the arbitral tribunal made a "final award" and ordered the Ministry of Energy to withdraw parts of its requests in the Lithuanian court. Finally, the Lithuanian court asked the ECJ whether these orders (which amounted to anti-suit injunctions) were compatible with its empowerment to decide on its jurisdiction under the Regulation Brussels I.

As a starting point, it should be mentioned that the case-law of the CJEU regarding anti-suit injunctions seems to be well settled: In cases C-159/02 *Turner* and C-185/07 *Allianz* (*West Tankers*), the CJEU held that anti-suit injunctions rendered by a court of a EU-Member State against the proceedings pending in another EU-Member State are incompatible with two fundamental principles of EU procedural law. According to the first principle each court has to assess freely whether it has jurisdiction under the Regulation. Furthermore, anti-suit injunctions are incompatible with the principle of mutual trust according to which each court in the European Judicial Area relies, as a matter of principle, on the appropriateness of the judicial systems in other EU-Member States (on this principle, see recently, the Opinion 2/13 of the ECJ of December 18, 2014, on the Accession of the Union to the European Convention of Human Rights, at paras 181 – 195). However, the issue of whether anti-suit injunctions of an arbitral tribunal may impede the proper functioning of European procedural law has not been addressed so far.

In his opinion, AG Wathelet proposed to interpret the Regulation Brussels I in a different way. The Advocate General came to the conclusion that any proceeding where the validity of an arbitration agreement is contested is excluded from the scope of the Brussels I Regulation (para 125). In this respect, the AG proposed to qualify an anti-suit injunction a decision on the validity of the arbitration clause and, consequently, to exclude it from the realm of the Brussels I Regulation. Furthermore, the opinion proposes to reverse the decision of the Grand Chamber in case C-185/07 *Allianz/West Tankers* (paras 126 – 135). According to the Opinion of AG Wathelet, anti-suit injunctions issued by an arbitral tribunals do not create any problem of compatibility with EU law (para 140).

This result is based on the following arguments: Firstly, the AG denies any legal impact of an anti-suit injunction, being an instrument of English law (para 64), on the Lithuanian government because it could only enforced in England (para 65). Secondly, the Opinion refers to the new Brussels I Regulation 1215/2012 (although temporarily not applicable in the present case, see its Article 66 (1), at para 88). However, the Opinion proposes to apply the (old) Regulation Brussels I as to "be taken into account" (para 89). The AG refers to paragraph 2 of the Recital 12 of the Recast, according to which Art. 1 (2) lit d) of the Brussels I Regulation should be interpreted as excluding "that a ruling regarding the existence and the validity of an arbitration agreement could circulate under the (new) Regulation." According to AG Wathelet, the new Recital should be interpreted as a reinforcement of the arbitration exclusion, in light of which an anti-suit injunction should no longer give rise to the problems of compatibility which had been highlighted by the CJEU in case C-185/07 *Alliance*. Accordingly, under the Recast, anti-suit injunctions by state courts are generally permitted (at para 140). Furthermore, the Opinion proposes that the courts of EU Member States have to refrain from any decision-making when an arbitration clause is invoked unless the clause is considered as obviously void (at para 142). In this respect, it comes close to the French doctrine of the positive competence-competence of arbitral tribunals (paras 149, 151 ff.). Finally, the conclusions deny any application of the principle of mutual trust to arbitral tribunals – even to arbitral tribunal seated in the European union and applying mandatory EU law – because arbitral tribunal are not bound by the Brussels I Regulation (paras 153 ff). Eventually, the AG states that an anti-suit injunction cannot be qualified as a ground of non-recognition for a violation of public policy under article V (2)(b) NYC (paras 160 ff).

If this line of reasoning was endorsed by the Grand Chamber, the case law of the CJEU regarding arbitration would change significantly. However, the conclusions are more directed towards the new Regulation 1215/2012 (temporarily not applicable) than to the case under consideration. Although I do not want to criticize the line of reasoning here in its entirety, I would briefly express the following doubts: First, the origins of anti-suit injunctions in English law do not say anything about their cross-border effects. However, the fact that they are more and more often used in international arbitration tells a lot about their impact on litigation (and there are cases where they had been enforced). Second, the legal value of a Recital should not be over-estimated. They are not part of the operative provisions of a Regulation and cannot be interpreted in a way that impedes the efficiency of the Regulation (see in this respect case C-43/13, *Pantherwerke*, para 20). Furthermore, in the legislative process, there was a consensus that the Recitals are not intended to change the status quo (see e.g. *Pohl*, IPRax 2013, 110; *Hartley*, ICLQ 2014, 861). In addition, Recital 12, 2nd paragraph itself does not address proceedings of a court confronted with an arbitration clause (and an injunction prohibiting a party from continuing litigation in its court room), but with the recognition of decisions on the validity of arbitration clauses. Finally, Recital 12 does not endorse the French concept of positive competence-competence. Quite to the contrary, the original proposal of the EU-Commission (elaborated by an expert group) providing for an explicit solution of this issue and designed to comply with specifics of French law was rejected by the Parliament and by the Council in the legislative process.

Yet, it remains to be seen whether the CJEU will endorse this "separation" of arbitration from litigation under the Brussels I Regulation. As a result, it may entail a considerable limitation of the effectiveness of the Brussels I system. The opinion mainly addresses the effectiveness of arbitration (paras 98, 148), the effectiveness of the Brussels I Regulation is only considered to the extent that it corresponds to the NYC (see para 142).

The opinion in CDC: Preserving efficient enforcement of EU-law in front of an arbitration clause

Only three days later, in case CDC, AG Jääskinen addressed the interpretation of an arbitration agreement (or of a jurisdiction agreement falling outside of the scope of Article 23 of Brussels I). "CDC" is about the decentralized enforcement

of EU-cartel law by actions for damages in the civil courts of EU-Member States. CDC SA is a Belgian corporation which bought claims from 32 pulp and paper companies which had sustained damages by buying hydrogen peroxyde from a Europe wide cartel between 1994 and 2000. CDC brought legal action against six members of the former cartel in the District Court of Dortmund; the jurisdiction of the court is based on articles 5 no 3 and 6 no 1 of the Brussels' I Regulation (2001). The damage claimed amounts of more than EUR 475 million (plus interests).

The defendants contest the jurisdiction of the Dortmund court inter alia by relying on jurisdiction and arbitration clauses found in the general terms of sales contracts on hydrogen peroxide. They assert that these clauses include action for cartel damages and apply to CDC which had acquired the damage claims by assignments. The German court asked the CJEU whether these clauses included damage claims for infringements of Article 101 TFEU.

To this question, AG Jääskinen gave the following answer: First, he explicitly held that the Dortmund court may interpret the scope of the arbitration clauses (para 98). Second, he stated that party autonomy includes the right to agree jurisdiction and arbitration clauses (para 119). This consideration applies especially when parties are aware of the claims which are included into these agreements. Furthermore, the scope of each clause has to be determined according to its wording. However, the Advocate General concluded that jurisdiction and arbitration clauses should not be interpreted in a way to impede the full effectiveness and the enforcement of mandatory cartel law (para 126). As a result, arbitration and jurisdiction clauses should be interpreted in a way that delictual claims for breaches of article 101 TFEU are excluded.

Again, I do not want to criticize these conclusions in detail (as I have to disclose my involvement in this case). However, the approach of AG Jääskinen seems to differ considerably from the views of AG Wathelet as the former is mainly addressing the efficiency of mandatory EU law (to be implemented by the national courts) and the latter is mainly concerned about the efficiency of arbitration. It remains to be seen what the CJEU will decide. It is to be hoped that the court will draw a fair line between arbitration and litigation bringing both in a balanced situation which permits the efficient enforcement of EU law in dispute resolution.

Issue 2014.4 Nederlands Internationaal Privaatrecht – Recognition and enforcement

The fourth issue of 2014 of the Dutch journal on Private International Law, ***Nederlands Internationaal Privaatrecht***, is dedicated to the Recognition and enforcement of foreign judgments, and focuses on gaps and flaws in the current framework and new pathways. It includes the following contributions:

Paulien van der Grinten, 'Recognition and enforcement in the European Union: are we on the right track?', p. 529-531 (Editorial)

Paul Beaumont, 'The revived Judgments Project in The Hague', p. 532-539.

> *This article examines the Hague Judgments Project in three phases. First, the initial ambitious plans for a double convention or a mixed convention (combining direct rules of jurisdiction with rules on conflicts of jurisdiction, exorbitant fora and recognition and enforcement of judgments) that began in 1992 and ultimately failed in 2001. Second, the triumph of rescuing a Choice of Court Agreements Convention from the ashes of the failed mixed convention between 2002 and 2005. Third, the attempt since 2010 to revive the Judgments Project with the aim of securing at least a robust single convention on recognition and enforcement of judgments (possibly with indirect rules of jurisdiction) and with the possibility that at least some States will agree to go further and agree some rules on some or all of the following: conflicts of jurisdiction, declining jurisdiction, outlawing exorbitant fora and some direct rules of jurisdiction. In doing so the article examines the forthcoming adoption of the Hague Choice of Court Agreements Convention by the EU including its declaration excluding certain insurance contracts. Consideration will also be given to the possible ways of establishing in a new single convention what constitutes a sufficient connection between the case and the country which gave the judgment in that case to justify the judgment being recognised and*

enforced in Contracting States to the convention.

Patrick Kinsch, 'Enforcement as a fundamental right', p. 540-544. The abstract reads:

There is, under the case law of the European Court of Human Rights, a right to the enforcement of judgments obtained abroad. The nature of that right can be substantive and founded on the right to recognition of the underlying situation. It can also be procedural and derive from the fair trial guarantee of Article 6 of the Convention which includes a right to the effectiveness of judgments rendered by 'any court', a concept considered – without, in the author's opinion, a cogent justification in the present jurisprudence of the Court – as including foreign courts. Once there is a right to enforcement, there can be no interferences by national law with that right (and the national authorities can even have a 'positive obligation' to see to its effectiveness), unless the interference or the refusal to take positive measures is justified, in line with the principle of proportionality.

Ian Curry-Sumner, 'Rules on the recognition of parental responsibility decisions: A view from the Netherlands', p. 545-558.

Parental responsibility decisions are increasingly international in nature; international contact arrangements, determinations that the main place of residence will be abroad and the cross-border placement of children are nowadays commonplace instead of seldom. Unfortunately, the story oftentimes does not end after the judge has issued the decision. In many cases, cross-border recognition and/or enforcement of the judgment will be required. This article is devoted to providing an overview of those rules, focussing on the various international regimes currently in operation in Europe, as well as domestic rules applicable in the Netherlands. In doing so, a number of problem areas will be identified with respect to the current rules and their application.

Anatol Dutta and Walter Pintens, 'The mutual recognition of names in the European Union de lege ferenda', p. 559-562.

How could the harmony of decision regarding names be attained within the European Union – a harmony of decision which has been demanded by the

European Court of Justice in a number of cases? The following contribution presents the results of a working group which has made a proposal for a European Regulation on the law applicable to the names of persons harmonising the conflict rules of the Member States. This classic approach is, however, supplemented by a second element, which shall be the focus in this special issue on recognition and enforcement. The proposal establishes a principle of mutual recognition of names guaranteeing that every person has one name throughout Europe.

Mirjam Freudenthal, 'Dutch national rules on the recognition and enforcement of foreign judgments, Article 431 CCP', p. 563-572.

This paper discusses Article 431 CCP. Article 431 CCP states that no decision rendered by a foreign court can be enforced within the Netherlands unless international conventions or the law provides otherwise. According to Article 431 paragraph 2 CCP the matter of substance has to be dealt with and settled de novo by a Dutch court. As from its enactment in 1838 Article 431 CCP has been subject to critical discussions and was restricted by case law from the beginning of the 20th century. Since then recognition will be granted if the foreign judgment will meet a set of conditions. But, the enforcement of condemnatory judgments remained impossible. More recently, case law has introduced the pseudo-enforcement procedure, meaning that if the foreign condemnatory judgment meets the conditions for recognition a hearing on the substance according to Article 431 paragraph 2 CCP is not required. However, the disadvantage of this pseudo-enforcement procedure is the lack of legal certainty. A revision of the actual Dutch statutory rules on recognition and enforcement is very much needed.

Elsemiek Apers, 'Recognition and enforcement of foreign judicial decisions: Belgium's codification explored', p. 573-580.

Belgium's codification of private international law has led to a comprehensive Code containing a detailed set of rules and procedure for the recognition and enforcement of foreign judicial decisions and authentic acts. Increased transparency, the clarity of private international law concepts and harmonisation in a more globalised world with changing values were the main reasons for such a codification. Most of the rules on recognition and

enforcement are inspired by the Brussels Convention (now Brussels I Regulation), providing for an almost automatic recognition of foreign judicial decisions and a simplified exequatur procedure. Even though the Code provides a clear framework, in practice difficulties still arise, especially for the recognition of authentic instruments. This article explores the reasons behind Belgium's codification, describes the procedure for recognition and enforcement and provides a brief practical insight.

Call for Papers, Utrecht Journal of International and European Law

The Utrecht Journal of International and European Law is issuing a Call for Papers to be published in its 81st edition on 'General Issues' within International and European law. The Board of Editors invites submissions addressing any aspect of International and European law. Topics may include, but are not limited to, International and European Human Rights Law, International and European Criminal Law, Transnational Justice, Family Law, Health and Medical Law, Children's Rights, Commercial Law, Media Law, Law of Democracy, Intellectual Property Law, Taxation, Comparative Law, Competition Law, Employment Law, Law of the Sea, Environmental Law, Indigenous Peoples, Land and Resources Law, Alternative Dispute Resolution or any other relevant topic.

Authors are invited to address questions and issues arising from the specific area of law relating to their topic. All types of manuscripts, from socio-legal to legal technical to comparative, will be considered for publication.

The Board of Editors will select articles based on quality of research and writing, diversity and relevance of topic. The novelty of the academic contribution is also an essential requirement.

Prospective articles should be submitted online via the journal website, and should conform to the journal style guide (See here for full details). Utrecht

Journal has a word limit of 15,000 words including footnotes. For further information please consult the website or email us at utrechtjournal@urios.org.

Deadline for Submissions: 30 April 2015

Weller in Search of the Future of European Private International Law

Matthias Weller from the EBS Law School in Wiesbaden has posted a paper on "Mutual Trust: In Search of the Future of European Private International Law" on SSRN. The paper is forthcoming in the Journal of Private International Law. The pre-edited version can be downloaded here free of charge.

The abstract reads as follows:

> *What will EU justice policy look like in 2020? – This is the question the European Commission posed at the Assises de la Justice, "a forum to shape the future of EU Justice Policy" held at Brussels on 21-22 November 2013, under the leitmotif of "building trust in justice systems in Europe". In its press release of 11 March 2014, the Commission again referred to mutual trust as a cornerstone of judicial co-operation in the EU, and submitted several statements and memoranda with a view to the European Council on 26 and 27 June 2014. And indeed, the European Council confirmed that "the smooth functioning of a true European area of justice with respect for the different legal systems and traditions of the Member States is vital for the EU. In this regard, mutual trust in one another's justice systems should be further enhanced".*
>
> *This text seeks to establish firmer ground in the search for the future of European private international law as a cornerstone for the implementation of the European Union's vision of judicial co-operation in civil-matters. It unfolds*

possible meanings and functions of the rather opaque, yet almost omnipresent buzzword of mutual trust in the European policy-making on private international law. In a first step, the potential role of mutual trust in private international law in general will briefly be considered (II.). The main focus, of course, will be on European law (III.). The law of the European Union will be analyzed first on the level of primary law (1.). On this level, firstly, the rather abstract question will be addressed what to trust in (a.). Secondly, and more concretely, the functioning of the fundamental freedoms and their structural repercussions on European choice of law thinking will be considered insofar as it revolves around a mutual "recognition" of legal relationships (b.). On the level of secondary law (2.). it will be considered (a.) the normative system of judicial co-operation in civil matters in light of mutual trust, (b.) the operation of that normative system by the European Court of Justice in recent and telling cases, (c.) challenges for this normative system from European Human Rights as well as (d.) challenges from the Commission's 2014 proposal for reacting to systemic deficiencies in the administration of justice in a Member State. Finally (e.), suggestions will be submitted how these challenges could be integrated into the normative system. The last part (IV.) will sum up insights from the deconstruction of the multifaceted term of "mutual trust".

Recent Case Law of the ECtHR in Family Law Matters

The ERA (Trier) proposes a conference on recent case law of the ECtHR in family law matters, in Strasbourg, 18-19 February 2015.

Participants will have the opportunity to attend a hearing of the Grand Chamber.

The spotlight is centered on Article 8 (respect for family life) in conjunction with Article 14 (prohibition of discrimination) and Article 12 (right to marry).

Key topics

To be understood taking into account that case law of the ECtHR concentrates not only on the legal implications but also on social, emotional and biological factors.

- International child abduction
- Balancing the children's rights, parents' rights and public order
- Adoption
- Surrogacy parenthood
- Recognition of parent-child relations as a result of surrogacy
- Child custody and access rights within parental authority
- Recognition of marriage and civil unions in same-sex relationships

Who should attend?

Lawyers specialised in family law, human rights lawyers, judges dealing with family law matters, ministry officials, representatives of NGOs and child's rights organisations.

For further information click here.

Conference Report: Minimum Standards in European Procedural Law

As reported earlier on this blog, Matthias Weller (EBS Law School) and Christoph Althammer (University of Regensburg) hosted a conference on "Minimum Standards in European Pocedural Law" in Wiesbaden on November 14 and 15. Here is a brief report.

By Jonas Steinle, LL.M., Doctoral Student and Fellow at the Research Center for Transnational Commercial Dispute Resolution, EBS Law School, Wiesbaden, Germany)

The European Area of Justice has developed dynamically in the last years through the implementation of a wide range of different legal instruments, and a core technique of these instruments is mutual recognition. The number of Member States has also increased. This leads to the fundamental question whether and to what extent there should be a (larger) core of harmonized European procedural law in the future as one cornerstone for strengthening the mutual trust in the judicial systems of the Member States in order to better justify mutual recognition. European Procedural law can only be (further) developed if there is some sort of common ground (*Leitbild*)amongst the Member States in procedural issues. Once such common ground is sufficiently established, national procedural laws can be measured against this standard, and the more a national law or rule departs from the common ground, the more it is put under pressure for justification. This approach mirrors the test applied by the European Court of Human Rights when it comes to controlling national rules for which there is not yet a clear autonomous standard apparent from the guarantees under the European Convention on Human Rights.

The conference, organized by *Prof. Matthias Weller* (EBS University Wiesbaden) and *Prof. Christoph Althammer* (University of Regensburg) and hosted by the Research Center for Transnational Commercial Dispute Resolution (http://www.ebs-tcdr.de/) at the EBS Law School in Wiesbaden, dealt with a number of perspectives for and on such common ground.

The conference started with three reports on the German (*Prof. Christoph Althammer*), French (*Prof. Frédérique Ferrand,* University Jean Moulin, Lyon) and English legal system (*Prof. Matthias Weller*) as to their various forms of minimum standards and guiding principles. As a starting point, *Christoph Althammer* gave some insights into the German traditional procedural standards (*Prozessmaximen*) as classic legislative driven requirements and how they are derived from superior rules of law. *Frédérique Ferrand,* on the other hand, discussed the particular role of the Court of Cassation (*Cour de Cassation*) in the French civil procedure system. *Matthias Weller* highlighted the strong pressure on the parties for going into mediation rather than litigating their claims at state courts and in general punitive elements. As a conclusion of the first day of the

conference, *Prof. Thomas Pfeiffer* (University of Heidelberg) presented a synthesis on the various national reports.

On the second day of the conference, *Prof. Michael Kubiciel* (University of Cologne) and *Prof. Andreas Glaser* (University of Zurich) provided insights in minimum standards in criminal procedural and administrative law as a point of comparison. These presentations were followed by two reports on areas of strongly Europeanized procedural rules, first by *Prof. Friedemann Kainer* (University of Mannheim) on European influences and standards in competition law, in particular in private enforcement litigation, and *Prof. Mary-Rose McGuire* (also University of Mannheim) on litigation in intellectual property law. It became clear that a strong "effet utile" from European substantive law influences in many ways procedural law but sometimes generates specific solutions that may not count as a general European standard.

As a final presentation, *Prof. Burkhard Hess* (Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law) summarized the outcome of the various perspectives during the second day of the conference by making reference *inter alia* to the *acquis communautaire* and he provided a far-reaching perspective on the future of European procedural law.

After the various sessions there were intense debates amongst many prominent international civil procedure law experts in the audience. All presentations will be published with Mohr Siebeck. A follow-up event is being planned.