Bamberski's Trial to Start this Week

The trial of André Bamberski will be held in Mulhouse on Thursday and Friday (French style: no need to spend several months on that).

Mr Bamberski is accused of ordering the kidnapping of Dr Dieter Krombach in Germany for delivering him to French authorities so that he could be tried, again, for the murder of Kalinka Bamberski in 1982.

A German court confirmed the decision of German prosecutors not to prosecute Dr Krombach in 1987. He was then sentenced in abstentia by a French court to 15 years of prison in 1995. As he could not be represented by a lawyer under the French criminal procedure of the time, he could successfully sue France before the European Court of Human Rights, and get the Court of Justice of the European Communities to agree that the civil ruling of the French criminal court should be denied recognition in Germany on that ground.

Bamberski did not give up on the idea of seeing Krombach in jail and had him eventually kidnapped in Germany in 2009, and delivered to French authorities. Germany protested, but Krombach was tried again, and sentenced, again, to 15 years.

Appeal to the French Supreme Court

Dr Krombach's last appeal to the French *Cour de cassation* was dismissed on 2 April 2014.

But, wait, how could a French court tolerate that criminals be delivered by kidnappers in the middle of the night? That´s all right, the Court ruled, as long as Krombach could get legal representation and the kidnappers were not French (special) officials. Real bad guys only please!

That was an easy one. Harder now: what about mutual trust? Answer: no mutual trust unless you are really obliged to trust the legal system of other Member states, and, well, there is such obligation only when a special provision of European law mandates so. Article 82 of the Treaty on the Functioning of the EU

is not enough for this purpose.

Dr Krombach´s lawyer announced his intention to bring the matter before the Court of Justice of the European Union, because “le juge français dicte sa loi à l’Europe”. But it seems he had only requested a referrence to the CJUE before the lower court, which rejected it.

And Now

Mr Bamberski´s own trial will now take place. Bamberski has already said that he has no regrets.

A movie on the life of Bamberski seems to be in the making, with Daniel Auteuil in the lead role.

UPDATE: Bamberski got a one year suspended sentence.

ELI UNIDROIT Launch Pilot Studies in Civil Procedure Project

The European Law Institute has announced that its joint project with UNIDROIT on civil procedure will move on as follows.

Background

In 2004, the ALI (American Law Institute) and UNIDROIT adopted and jointly publishedPrinciples of Transnational Civil Procedure. The aim of the work was to reduce uncertainty for parties litigating in unfamiliar surroundings and promote fairness in judicial proceedings through the development of a model universal civil procedural code. The Principles, developed from a universal perspective, were accompanied by a set of Rules of Transnational Civil Procedure, which were not formally adopted by either UNIDROIT or the ALI, but constituted the Reporters’ model implementation of the Principles, providing greater detail and illustrating how they might be developed. The Rules were to be considered either

for adoption or for further adaptation in various legal systems, and along with the Principles can be considered as a ‘model for reform in domestic legislation’.

ELI-UNIDROIT cooperation

ELI and UNIDROIT cooperation aims at adapting the ALI-UNIDROIT Principles from a European perspective in order to develop European Rules of Civil Procedure. This work will take as its starting point the 2004 Principles and aim to develop them in the light of: i) the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union; ii) the wider acquis of binding EU law; iii) the common traditions in the European countries; iv) the Storme Commission’s work; and v) other pertinent European sources.

At the first stage of the project, three working groups consisting of academics, judges and practitioners will be established. These working groups should conduct pilot studies to test the viability of the methodological approach and overall project design, whilst the ultimate outcome remains to cover, as a minimum, the full range of issues addressed in the 2004 ALI-UNIDROIT Principles.

The pilot projects will cover the following topics:

i. Service and due notice of proceedings
ii. Provisional and protective measures
iii. Access to information and evidence

On 28 February 2014 the ELI Council appointed the following persons as co-reporters for the above mentioned topics: Neil Andrews, Gilles Cuniberti, Fernando Gascon Inchausti, Astrid Stadler and Eva Storskrubb.

Issue 2014.1 Nederlands

Internationaal Privaatrecht

The first issue of 2014 of the Dutch journal on Private International Law *Nederlands Internationaal Privaatrecht* includes an analysis of the Brussels I Recast and the influence on Dutch legal practice, an article on Child abduction and the ECHR, and two case notes; one on the Impacto Azul case and one on the Povse case.

- Marek Zilinsky, 'De herschikte EEX-Verordening: een overzicht en de gevolgen voor de Nederlandse rechtspraktijk', p. 3-11. The English abstract reads:

From 10 January 2015 onwards the Brussels I Recast (Regulation No. 1215/2012) shall apply. Under the new regulation which replaces the Brussels I Regulation (Regulation No. 44/2001), the exequatur is abolished and some changes are also made to provisions on jurisdiction and lis pendens. This article gives an overview of the changes effected by the Brussels I Recast compared to the proposed changes in the Proposal for a new Brussels I Regulation (COM(2010) 748 final). The consequences of the new regulation for Dutch practice are also dealt with briefly.

- Paul Vlaardingerbroek, 'Internationale kinderontvoering en het EHRM', p. 12-19. The English abstract reads:

With the Neulinger/Shuruk decision in 2009, the European Court of Human Rights caused a great deal of misunderstanding and confusion among judges and academics, because in this case the ECHR seemed to protect the abductors of children and to allow them to benefit from their misconduct. After the Neulinger case some further ECHR decisions followed that seemed to compete with the fundamental purposes of the Hague Convention on child abduction, but in this paper I will try to show that in more recent cases the European Court has mitigated the hard consequences of the Neulinger/Shuruk decision and has given a new direction in how to proceed and decide when the two conventions seem to compete.

- Stephan Rammeloo, 'Multinationaal concern – Aansprakelijkheid van moedervennootschap voor schulden van dochtervennootschap: nationaal IPR ('*scope rule*') getoetst aan Europees recht (artikel 49 VWEU)', p. 20-26. Case notes European Court of Justice 20-06-2013, Case C-186/12 (*Impacto Azul*), The English abstract reads:

In June 2013 the CJEU delivered a preliminary ruling under Article 49 TfEU with regard to the exclusion, under national law, of an EU Member State from the joint and several liability of parent companies vis-à-vis the creditors of their subsidiaries in a crossborder context. Article 49 TfEU does not prohibit any such exclusion resulting from a self-

restricting unilateral scope rule under the national Private International Law of an individual EU Member State. The interpretative ruling of the Court does not, however, affect cross-border parental liability for company group members under Private International Law having regard to contractual or non-contractual (cf. tort, insolvency) liability.

- Monique Hazelhorst, 'The ECtHR's decision in *Povse*: guidance for the future of the abolition of exequatur for civil judgments in the European Union', p. 27-33. Case notes European Court of Human Rights 18 June 2013, decision on admissibility, Appl. no. 3890/11 (*Povse* v. *Austria*). The abstract reads:

The European Court of Human Rights' decision on admissibility in Povse is worthy of analysis because it sheds light on the preconditions for the abolition of exequatur for judgments in civil matters within the European Union. The abolition of this control mechanism is intended to facilitate the free movement of judgments among Member States on the basis of the principle of mutual recognition. Concerns have however been expressed about the consequences this development may have for the protection of fundamental rights. The Human Rights Court's Povse decision provides welcome guidance on the limits imposed by the European Convention on Human Rights on the abolition of exequatur. This case note analyses the preconditions that may be inferred from the decision. It concludes that the Human Rights Court's approach leaves a gap in the protection of fundamental rights which the accession of the EU to the Convention intends to fill.

Conflict of Laws in Israel and Palestinian Territories

Michael Karayanni (Hebrew University of Jerusalem) will shortly publish Conflicts in a Conflict – A Conflict of Laws Case Study on Israel and the Palestinian Territories.

Conflicts in a Conflict *outlines and analyzes the legal doctrines instructing the Israeli courts in private and civil disputes involving the Occupied Palestinian Territories of the West Bank and the Gaza Strip, since 1967 until the present day. In doing so, author, Michael Karayanni sheds light on a whole sphere of legal designs and norms that have not received any thorough*

scholarly attention, as most of the writings thus far have been on issues pertaining to international law, human rights, history, and politics. For the most part, Israeli courts turned to conflict of laws, or private international law to address private disputes implicating the Palestinian Territories. After making a thorough investigation into the jurisdictional designs of the West Bank and the Gaza Strip, both before and after the Oslo Peace Accords, ***Conflicts in a Conflict*** *comes to focus on traditional topics such as adjudicative jurisdiction, choice of law, and recognitions and enforcement of judgments. Related issues such as the foreign sovereign immunity claim of the Palestinian Authority before Israeli courts as well as the extent to which Palestinian plaintiffs were granted access to justice rights, are also outlined and analyzed.*

This book's compelling thesis is the existence of a close relationship between conflict of laws doctrines as they developed over the years and Israeli policies generally in respect of the Palestinian Territories. This study of the conflict of laws in a war setting and conflict of laws in a jurisdictionally ambiguous location, will greatly serve scholars and practitioners in similarly troubled and complex legal situations elsewhere.

First Issue of 2014's Journal of Private International Law

The first issue of the *Journal of Private International Law* for 2014 is out.

First Cornerstones of the EU Rules on Cross-Border Child Cases: The Jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation from C to Health Service Executive by *Anatol Dutta and Andrea Schulz*

Since the Brussels IIa Regulation became applicable for national courts in 2005, the Court of Justice of the European Union (CJEU) can be welcomed within the circle of the European family courts. The Court has so far dealt, in particular, with the part of Brussels IIa dedicated to child matters, in case C in 2007,

in Rinau in 2008, in A and Deticek in 2009 and in Povse, Purrucker I, McB,Purrucker II, Aguirre Zarraga and Mercredi in 2010. In 2012, a judgment concerning the cross-border placement of children followed in the case of Health Service Executive (HSE). Some aspects of these decisions are reviewed in this paper but not so as to present a comprehensive analysis of the Regulation. Rather the article shall provide – as a kind of series of interconnected case notes – the interested reader with a first overview on a rather dynamic area of EU family law as reflected in the case-law of the Court.

Reforming the European Insolvency Regulation: A Legal and Policy Perspective by G *McCormack*

This paper will critically evaluate the proposals for reform of the European Insolvency Regulation – regulation 1346/2000 – advanced by the European Commission. While criticised by some commentators as unsatisfactory, the Regulation – is widely understood to work in practice. The Commission proposals have been described as 'modest' and it is fair to say that they amount to a 'service' rather than a complete overhaul of the Regulation. The proposals will be considered under the following heads (1) General Philosophy; (2) Extension of the Regulation to cover pre-insolvency procedures; (3) Jurisdiction to open insolvency proceedings; (4) Co-ordination of main and secondary proceedings; (5) Groups of Companies; (6) Applicable law; (7) Publicity and improving the position of creditors. A final section concludes. The general message is that while there is much that is laudable in the Commission proposals, there is also much that has been missed out, particularly in the context of applicable law. The proposals reflect an approach that, in this particular area, progress is best achieved by a series of small steps rather than by a great leap forward. This is not necessarily an approach that is mirrored in other areas of European policy making.

Actio Pauliana – "*Actio Europensis*"? Some Cross-Border Insolvency Issues by *Tuula Linna*

Actio pauliana grants protection to the creditors against detrimental transactions and it is an important tool in the European insolvency system. When an actio pauliana is an ancillary action to collective insolvency proceedings it usually falls outside the scope of the Brussels I Regulation. The

problem is that actio pauliana falls also outside the European Insolvency Regulation (EIR) if the insolvency proceedings to which it is related are not mentioned in Annex A of the EIR. These gaps are subjects to amendments in the Commission proposal for the EIR reform. When an actio pauliana falls within the scope of the EIR the lex concursus applies unless it is not possible to challenge the transaction according to the law which normally governs it. If this "veto" has succeeded the lex concursus is not applicable. In cross-border situations actio pauliana raises a number of complicated issues concerning jurisdiction, applicable law, recognition and enforceability.

Should the *Spiliada* Test Be Revised? by *Ardavan Arzandeh*

This article examines recent English authorities concerning the forum (non) conveniens doctrine. It seeks to demonstrate that, largely as a consequence of a disproportionately broad discretionary framework under its second limb, the doctrine's application has led to numerous problems. The article argues that, for both pragmatic and theoretical reasons, the status quo cannot be maintained. In this respect, its key contribution is to identify a doctrinal avenue through which to limit (rather than completely discard) the court's discretion at the second stage. The article's basic thesis is that the court's discretion under the doctrine's second limb should be curtailed in line with the doctrinal framework underpinning the protection of a person's right to a fair trial under Article 6(1) of the European Convention on Human Rights (as defined in expulsion cases).

European Perspectives on International Commercial Arbitration by *Louise Hauberg Wilhelmsen*

During the revision of the Brussels I Regulation several issues pertaining to the interface between arbitration and the Regulation were discussed. Some of the issues were parallel proceedings and conflicting decisions between courts and between courts and arbitral tribunals and the lack of a uniform rule on the law applicable to the existence and validity of an arbitration agreement. This article examines these issues in order to find out whether they are only European or also inherent in the international regulation of international commercial arbitration. The article examines to which extent these issues have already been addressed in the international regulation. Moreover, the article analyses the issues from a European perspective by analysing the interface between the

Brussels I Regulation and arbitration and by looking into the objectives of the EU judicial cooperation in civil matters. Finally, the article looks into what the future might hold for these two issues.

Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws by *Adewale Olawoyin*

The enforcement of a foreign judgment is the reward for often protracted and expensive transnational litigation. This post-judgment aspect of Private International Law is as important as the often-discussed pre-judgment considerations of choice of jurisdiction and choice of law. Regrettably, the position in Nigerian law on the enforcement of foreign judgments is far from coherent and certain. Indeed, it is in a lacunose and largely confused state. It is argued that a coherent and efficient legal regime for the enforcement of foreign judgments is a necessary adjunct to the heightened diverse global commercial relations of contemporary times between and amongst developing nations of Africa and between those African States and the international community at large. The extant state of affairs in Nigeria is the result of an admixture of a historical legacy of antedated laws, inefficient law revision processes and an inherently weak law reform system. The article conducts an audit of Nigerian law (statute and case law) in this area and the central argument is that there is a pressing need for a holistic law reform starting with a paradigm shift from Private International Law orthodoxy regarding the conceptual predicate of reciprocity as the basis of the statutory regime for the enforcement of foreign judgments at common law.

Review Article: Human Rights and Private International Law: Regulating International Surrogacy by *ClaireFenton-Glynn.*

ECHR Rules on Enforcement of

Judgments under Brussels I

On 25 February 2014, the European Court of Human Rights ruled in the case of *Avotinš v. Latvia* (application no. 17502/07) that the Brussels I Regulation imposes on Member States a duty to enforce judgments in civil and commercial matters, which triggers the Bosphorus presomption of compatibility of the actions of the enforcing state with the European Convention.

The judgment, which is only available in French, reveals a lack of knowledge of European private intenational law instruments by the members of the court.

The Court rules that the foundation of the Brussels I Regulation is mutual trust. That's of course correct. It then insists that under the Brussels I Regime, declarations of enforceability are granted almost automatically, after mere formal verification of documents. It thus concludes that under the Regulation, Member States are obliged to enforce foreign judgments, and should thus benefit as requested states from the Bosphorus presumption.

> *49. La Cour relève que, selon le préambule du Règlement de Bruxelles I, ce texte se fonde sur le principe de « confiance réciproque dans la justice » au sein de l'Union, ce qui implique que « la déclaration relative à la force exécutoire d'une décision devrait être délivrée de manière quasi automatique, après un simple contrôle formel des documents fournis, sans qu'il soit possible pour la juridiction de soulever d'office un des motifs de non-exécution prévus par le présent règlement » (paragraphe 24 ci-dessus). À cet égard, la Cour rappelle que l'exécution par l'État de ses obligations juridiques découlant de son adhésion à l'Union européenne relève de l'intérêt général (Bosphorus Hava Yollar Turizm ve Ticaret Anonim irketi précité, §§ 150-151, et Michaud c. France, no 12323/11, § 100, CEDH 2012) ; le sénat de la Cour suprême lettonne se devait donc d'assurer la reconnaissance et l'exécution rapide et effective du jugement chypriote en Lettonie.*
>
> *50. Devant les juridictions lettonnes, le requérant soutenait que la citation de comparaître devant le tribunal de district de Limassol et la demande de la société F.H.Ltd. ne lui avaient pas été correctement communiquées en temps utile, de sorte qu'il n'avait pas pu se défendre ; par conséquent, selon lui, la reconnaissance de ce jugement devait être refusée sur la base de l'article 34,*

point 2, du Règlement. Dans son arrêt du 31 janvier 2007, le sénat de la Cour suprême a écarté tous ses moyens – et, donc, l'application de l'article 34, point 2, du Règlement – en déclarant que, le requérant « n'ayant pas fait appel du jugement, les arguments de son avocat selon lesquels [il] ne se serait pas vu dûment notifier l'examen de l'affaire par un tribunal étranger, n'ont aucune importance ». Cela correspond en substance à l'interprétation donnée à la disposition susmentionnée par la Cour de justice des Communautés européennes dans l'arrêt Apostolides c. Orams, aux termes duquel « la reconnaissance ou l'exécution d'une décision prononcée par défaut ne peuvent pas être refusées au titre de l'article 34, point 2, du règlement no 44/2001 lorsque le défendeur a pu exercer un recours contre la décision rendue par défaut et que ce recours lui a permis de faire valoir que l'acte introductif d'instance ou l'acte équivalent ne lui avait pas été signifié ou notifié en temps utile et de telle manière qu'il puisse se défendre » (paragraphe 28 ci-dessus).

This is the part of the reasoning of the court which is plainly wrong. It fails to discuss the relevance of the public policy exception and the margin of appreciation that it offers to requested states to verify whether the state of origin respected fundamental rights.

PRESS RELEASE

The case concerned the enforcement in Latvia of a judgment delivered in Cyprus concerning the repayment of a debt. The applicant, an investment consultant who had borrowed money from a Cypriot company, complained that the Cypriot court had ordered him to repay his debt under a contract without summoning him properly and without guaranteeing his defence rights.

Like the Senate of the Latvian Supreme Court, the Court noted that the applicant should have appealed against the Cypriot court's judgment. It took the view that the Latvian authorities, which had correctly fulfilled the legal obligations arising from Latvia's status as a member State of the European Union, had sufficiently taken account of Mr Avotinš'

PRINCIPAL FACTS

The applicant, Peteris Avotinš, is a Latvian national who was born in 1954 and lives in the district of Riga (Latvia).

On 4 May 1999 Mr Avotinš and F.H.Ltd., a commercial company registered in Cyprus, signed before a notary a formal acknowledgement of his obligation to repay a debt. Mr Avotinš declared that he had borrowed 100,000 United States dollars from F.H.Ltd. and undertook to repay that amount with interest before 30 June 1999. The document stated that it would be governed "in all respects" by the laws of Cyprus and that Cypriot courts would have jurisdiction to hear all disputes arising from it.

In 2003 F.H.Ltd. sued Mr Avotinš in the court of Limassol (Cyprus), declaring that he had not repaid his debt and seeking an order against him. On 24 May 2004, ruling in his absence, the Cypriot courts ordered Mr Avotinš to repay his debt together with interest and costs and expenses. According to the judgment, the applicant had been duly informed of the date of the hearing but had not appeared.

On 22 February 2005 F.H.Ltd applied to the court for the district of Latgale (Riga) seeking the recognition and enforcement of the Cypriot judgment of 24 May 2004. The company also called for an interim measure of protection.

On 27 February 2006 the Latvian court ordered the recognition and enforcement of the Cypriot judgment of 24 May 2004 and the registration of a charge against Mr Avotinš' property in the land register.

Mr Avotinš claimed that he had became aware, by chance, on 16 June 2006, of the existence of both the Cypriot judgment and the Latvian court's enforcement order. He did not attempt to challenge the Cypriot judgment before the Cypriot courts but appealed in the Regional Court of Riga against the Latvian enforcement order.

In a final judgment of 31 January 2007 the Senate of the Latvian Supreme Court upheld F.H. Ltd.'s claim, ordering the recognition and enforcement of the Cypriot judgment together with the registration of a charge against the applicant's property in the land register. On the basis of that judgment, the court of Latgale delivered a writ of execution and Mr Avotinš complied by repaying his debt. The registered charge on his property was lifted shortly afterwards.

The applicant complained that by enforcing the judgment of the Cypriot court, which in his view was clearly unlawful as it disregarded his defence rights, the Latvian courts had failed to comply with Article 6 § 1 (right to a fair hearing within a reasonable time).

The application was lodged with the European Court of Human Rights on 20 February 2007.

JUDGMENT

Article 6 § 1

The Court noted that the judgment on the merits had been delivered on 24 May 2004 by the Cypriot court and the Latvian courts had ordered its enforcement in Latvia. Having, by a partial decision on 30 March 2010, declared inadmissible the complaint against Cyprus as being out of time, the Court did not have jurisdiction to decide whether or not the court of Limassol (Cyprus) complied with the requirements of Article 6 § 1. It was nevertheless for the Court to decide whether, in ordering the enforcement of the Cypriot judgment, the Latvian judges complied with the provisions of Article 6 § 1 of the Convention.

The Court observed that the fulfilment by the State of the legal obligations arising from its membership in the European Union was a matter of general interest. The Senate of the Latvian Supreme Court had a duty to ensure the recognition and the rapid and effective enforcement of the Cypriot judgment in Latvia.

Mr Avotinš had argued before the Latvian courts that the summons to appear before the court of Limassol and the statement of claim by the company F.H.Ltd. had not been properly served on him in a timely manner, with the result that he had not been able to defend himself. Consequently, the Latvian courts should have refused the enforcement of the Cypriot judgment.

The Court observed that, in its final judgment of 31 January 2007, the Senate of the Latvian Supreme Court had declared that Mr Avotinš had not appealed against the Cypriot judgment. Mr Avotinš had indeed not sought to lodge any appeal against the Cypriot court's judgment of 24 May 2004. Mr Avotinš, an investment consultant who had borrowed money from a Cypriot company and had signed a recognition of debt governed by Cypriot law with a clause conferring jurisdiction on the Cypriot courts, had accepted his contractual liability of his own free will: he could have been expected to find out the legal consequences of any non-payment of his debt and the manner in which proceedings would be conducted before the Cypriot courts.

The Court took the view that Mr Avotinš had, as a result of his own actions,

forfeited the possibility of pleading ignorance of Cypriot law. It was for him to produce evidence of the inexistence or ineffectiveness of a remedy before the Cypriot courts, but he had not done so either before the Senate of the Latvian Supreme Court or before the European Court of Human Rights.

Having regard to the interest of the Latvian courts in ensuring the fulfilment of the legal obligations arising from Latvia's status as a member State of the European Union, the Court found that the Senate of the Latvian Supreme Court had sufficiently taken account of Mr Avotinš' rights.

There had been no violation of Article 6 § 1 in the present case.

Enhancing Mutual Trust – Codification of the European Conflict of Laws Rules: Some of the EU Commission's Visions for the Future of EU Justice Policy

By Matthias Weller

Prof. Dr. Matthias Weller, Mag.rer.publ., Chair for Civil Law, Civil Procedure and Private International Law, EBS University of Economics and Law; Director of the Research Center for Transnational Commercial Dispute Resolution, EBS Law School

On 11 March 2014 the European Commission presented its vision for the future EU justice policy until 2020. In its Press Release "Towards a true European area of Justice: Strengthening trust, mobility and growth", the Commission identifies three key challenges after the forthcoming end of the European Council's Stockholm Programme on 1 December 2014: Enhancing mutual trust, facilitating

mobility and contributing to economic growth. Against the background of the "Assises de la Justice" held in Brussels in November 2013 the Commission, by outlining its own vision of the future EU justice policy, intends to further feed the discussion on the way to the European Council on 24 June 2014. The most comprehensive document is the Communication on the EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union (COM [2014] 144 final of 11 March 2014.

In this document the Commission, after summarizing the development of the European area of freedom, security and justice from Maastricht via Amsterdam and Nice to Lisbon as well as from the European Councils at Tampere via The Hague to Stockholm, further substantiates what it means by the three key challenges identified in its press release:
Firstly, "mutual trust" is evoked as the "bedrock upon which EU justice policy should be built", namely by "building bridges between the different justice systems", in particular by mutual recognition. Whereas the European legislator has so far simply postulated a sufficient degree of mutual trust amongst the Member States in order to justify obligations for mutual recognition in respect to the judicial cooperation in civil matters, the European Commission now is acknowledging that mutual trust must be strengthened or even built in the first place – a view that has up to now been taken only in respect to criminal matters. But with only 24% of people trusting their own national justice system for example in Slovenia, or 25% in Slovakia, it appears hardly possible to continue presuming a sufficient level of trust, let alone mutual trust.

In this context, the Commission suggests a new framework to safeguard the rule of law in the European Union. In its Communication to this proposal, the Commission explains that this framework is to operate as a "pre-Article 7 TEU procedure" addressing "systemic threats" to the rule of law consisting of three stages, namely a "rule of law warning" to be issued by the Commission to the respective Member State, a "rule of law recommendation" and on the third level a monitoring of the implementation of the recommendations before resorting to the "nuclear option" of Article 7 TEU that allows under certain conditions the suspension of (mainly voting) rights of Member States under the Treaties. The Commission makes crystal clear that its initiative is not meant to deal with individual breaches of fundamental rights or any miscarriage of justice in a particular case. Infringements of the rule of law other than "systemic" ones are to

be taken care of – as before – by the national judicial systems including those provided for by the European Convention on Human Rights.

However, if some national judicial systems are perceived by the public or even evaluated by the Commission under its proposed pre Article 7 TEU procedure not to be sufficiently trustworthy, there is a problem both conceptually for building bridges through mutual recognition to the judicial system of such a Member State as well as for the individual suffering or threatened to suffer from a (non-systemic) violation of the rule of law in his / her particular case. One answer to the individual's problem obviously is allowing exceptions to mutual recognition, i.e. public policy-clauses. Therefore, if the Commission is now acknowledging that there may be the need to strengthen mutual trust in respect to certain Member States, it would be contradictory to further pursue at the same time limitations or even deletions of public policy clauses as it was proposed for the Brussels I Recast. Rather, the Commission itself should trust the Member States that they do not misuse public policy exceptions. Mutual trust does not only operate horizontally but also vertically. It is difficult enough for the aggrieved party to argue and prove a case of violation of public policy. An obvious question not raised by the Commission in this context would be whether initiating pre Article 7 proceedings should affect in any way obligations of other Member States to recognize judicial acts from the Member State addressed by the Commission (possibly depending on the nature of observations made by the Commission), for example by reducing the degree of probability for public policy violations that must be shown in order to benefit from this exception of recognition.

Secondly, the Commission wants to enhance mobility of EU citizens, inter alia by further removing obstacles and "practical and legal difficulties" in respect to e.g. cross-border family matters

Thirdly, the Commission intends to promote economic growth. Interestingly, the envisaged "structural reforms … to be pursued so as to ensure that justice systems are capable of delivering swift, reliable and trustworthy justice" appear to be understood as part of that strategy for economic growth rather than primarily as a core element of the rule of law.

Most interestingly, of course, is the Commission's vision on how to address these challenges:

One core element is the “codification of existing laws” which is perceived to “facilitate the knowledge, understanding and the use of legislation, the enhancement of mutual trust as well as consistency and legal certainty while contributing to simplification and the cutting or red tape”. The Commission, having adopted since 2000 “a significant number of rules and civil and commercial matters as well as on conflict of laws”, suggests that “the EU should examine whether codifications of the existing instruments could be useful, notably in the area of conflict of laws”. It seems that the Commission proclaims the idea of codification in particular for the numerous –existing and forthcoming – instruments on the conflict of laws. From a continental perspective this would certainly be strongly welcomed because a codification would provide the chance to remove inconsistencies such as e.g. different rules on choice-of-law agreements in different instruments and would motivate for systematic thinking about complementing such a codification with rules on general issues like, for example, the handling of preliminary questions or of the characterization or the interpretation of recurrent connecting factors. It would be an interesting question whether not only the Rome instruments but also the Brussels instruments should be part of such a codification. Since the newest instruments contain both jurisdictional rules as well as choice of law-rules, a possible codification should include all European instruments on private international law.

Complementing the codification of European conflict of laws rules would perfectly fit in the second tool by which the Commission envisages to address the challenges for the EU Justice Agenda which is – “complementing” existing EU law where appropriate, so far proposed by the Commission for the service of documents and the taking of evidence.
Last not least, the Commission considers “facilitating citizens’ lifes” in all areas where mobile citizens still encounter problems. For example, “related to civil status records, the EU should assess the need for further action such as rules on family names to complement existing proposals to facilitate the acceptance of those public documents which are of particular practical relevance when citizens or business make use of their free movement rights”. Is the Commission thinking of codifying the recent case law of the ECJ in *Garcia Avello, Grunkin Paul* and the following judgments? This would again perfectly fit in the tool box for addressing the challenges for the EU Justice Agenda that consists of – codifying and complementing. Why not complementing by codifying? In that case, the question arises how rules on this area of conflict of laws in direct light of the primary

rights of the mobile citizens from Articles 20 and 21 TFEU could be formulated. Methodically, the Commission holds all doors open: “Complementing” may include “mutual recognition” as well as “traditional harmonization”.

Colangelo on International Law and False Conflicts

Anthony Colangelo (Southern Methodist University – Dedman School of Law) has posted International Law in U.S. State Courts: Extraterritoriality and “False Conflicts” of Law on SSRN.

> *With the U.S. Supreme Court recently cutting back the reach of federal jurisdiction over causes of action arising abroad for violations of international law, questions have arisen about the ability of state law to provide the vessel through which plaintiffs may bring suits alleging such violations. Here litigants and courts must address two key questions: First, to what extent may state law implement or incorporate international law as a rule of decision? And second, to what extent may state law incorporating international law authorize suits for causes of action arising abroad? The second question is both especially urgent because it involves a potential alternative avenue for litigating foreign human rights abuses in U.S. courts, and especially vexing because it juxtaposes different doctrinal and jurisprudential conceptualizations of the ability of forum law to reach inside foreign territory.*
>
> *Against this backdrop, I want to make a few points. First, there is nothing wrong as a general matter with state law incorporating international law. Second, the idea of state law having broader extraterritorial reach than federal law is nonetheless in tension with federal foreign affairs preemption. And third, this tension basically disappears when the state law incorporating international law presents what’s called a “false conflict” of laws among the relevant jurisdictions’ laws. Here the fields of private international law and conflict of laws gain salience and supply a doctrinally and historically grounded mechanism for entertaining claims arising abroad in U.S. courts. More concretely, if state law incorporating international law is fundamentally the same law as that operative in the foreign jurisdiction, there is no conflict of laws and the sole applicable law applies.*

> *In sum, ever-tightening constraints on federal extraterritoriality have generated multilayered tensions with traditional and contemporary fields of conflict of laws and private international law. At present, the flashpoint for these tensions promises to be claims alleging international human rights violations abroad in state court. The concept of "false conflicts" of law can remove the flashpoint's ignition source. False conflicts hold immense jurisprudential, doctrinal, and practical potential to handle these multilayered tensions with an equally multilayered concept capable of capturing principles not only of conflict of laws but also of federal extraterritoriality, foreign affairs, and due process. False conflicts should be the starting point for any evaluation of international human rights claims in state court under state law.*

The paper will be presented in the joint American Society of International Law Annual Meeting and International Law Association Biennial Meeting, and will be published in the *American Society of International Law Proceedings*.

The UNCITRAL Rules on Transparency in Investor-State Treaty-based Arbitration

Many thanks to Ana Koprivica, research fellow of the MPI Luxembourg

In July 2013 the United Nations Commission on International Trade Law (UNCITRAL) adopted the Rules on Transparency in Investor-State Arbitration.

The Rules shall enter into force on 1st April 2014 and apply to all investor-state disputes initiated under UNCITRAL Arbitration Rules pursuant to international investment agreements concluded prior to or after this date.

At the outset it should be noted that the range of potentially applicable rules in international investment arbitration today is extremely wide and provides the parties with a lot of room to tailor their procedure in accordance with their specific needs. Consequently, they also make it possible for the parties to limit or constrain transparency in the dispute between them. This triggers the concerns of not having a proper mechanism to safeguard transparency. To that end, the

UNCITRAL Working Group II (Arbitration and Conciliation) adopted two approaches when drafting the Rules: one would be the possibility for States to offer to arbitrate disputes under those arbitration rules that *require* transparency (which has so far only been a theoretical possibility) and the other, the option for States to conclude a new treaty which would supplement or replace the already existing investment treaties and require arbitration pursuant to rules requiring transparency. The first approach is reflected in the newly adopted Transparency Rules, whilst the second will possibly result in the adoption of the Transparency Convention, the second reading of which took place two weeks ago in New York at the 60th UNCITRAL session.

Main Features

The New Transparency Rules have become an integral part of the UNCITRAL Arbitration Rules, but they are also made available as a stand-alone instrument for application in disputes that are governed by other arbitral rules. The main aim of the Rules is to make proceedings transparent. In that respect, the provisions mandating disclosure and openness (Articles 2, 3, 6 and 7) and those that govern participation by non-disputing parties (Articles 4 and 5) appear to be the most important features of the Rules.

Access to Documents

As soon as the arbitral proceedings commence, i.e., once there is evidence respondent has received the notice of arbitration (which itself is subject to automatic mandatory disclosure), a basic set of facts will be disclosed: names of the parties, economic sector involved and the underlying treaty (Art.2). The Rules further distinguish between the mandatory automatic disclosure that certain documents are subject to (all statements and submissions by the disputing parties and non-disputing State parties or third persons; transcripts of hearings; and orders, decisions and awards of the arbitral tribunal); mandatory disclosure on request of any person (witness statements and expert reports), and the disclosure of other documents (such as exhibits) which depend on the exercise of the particular tribunal's discretion (Article 3). To balance the Transparency Rules' provisions on disclosure, Article 7 specifies that disclosure is subject to exceptions for confidential or protected information. It further lists four categories of such information. Whether and what information will fall under the exceptions will be an issue to be decided on a case-by-case basis. Tribunals are

also permitted to restrain or limit disclosure when necessary to protect the "integrity of the process", which is only intended to *restrain* or *delay* disclosure in exceptional circumstances.

Amicus Curiae and Submissions from non-disputing Parties

In line with standard practices by tribunals, the Transparency Rules now expressly affirm the authority of investment tribunals to accept submissions from *amicus curiae*, while incorporating detailed rules and guidelines under Article 4. This however concerns "written submissions" and does not address other forms of participation, such as statements at hearings. The Transparency Rules also require that tribunals accept submissions on issues of treaty interpretation from non-disputing State parties to the relevant treaty, provided that the submission does not "disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party" (Article 5). In addition to this, the tribunal may accept submissions on other matters relevant to the dispute from non-disputing State parties to the underlying treaty.

Open hearings

The most noteworthy feature of the Transparency Rules is contained in Article 6 and concerns the openness of the hearings. The tribunal is granted authority to determine how to make hearings open, including the option of facilitating public access through online tools. The disputing parties—alone or together—**cannot veto** open hearings. There are, however, three limitations to this: (1) protection of confidential information; (2) protection of the "integrity of the arbitral process"; and (3) logistical reasons.

Significance of the Rules and Open Questions

In what seems to be a great struggle to achieve full transparency for investor–State treaty-based arbitration, the UNCITRAL Transparency Rules represent a huge and important contribution, by making openness a rule rather than an exception and shifting the presumption of confidentiality, much more suitable for commercial arbitration, towards transparency. It seems that the Rules should in the first place bring some advantage to investors by enabling them to assess the risk to their investments in different host States to a more accurate extent, as their application would introduce more consistency and more cohesion, which is something that international investment arbitration still lacks. On the

other hand, there is also a fear of the so-called "re-politicisation" of the investor-State disputes as well as the possibility that the investors would rather have their disputes resolved in private. It remains to be seen how this would affect the attractiveness of the UNCITRAL Rules.

Further, granting the right of public access to hearings and documents is important for the institutions' perceived legitimacy. By having more consistent decisions and therefore forming more consistent reasoning in arbitral awards, the whole arbitration system would ensure legal certainty, promotion of effective democratic participation, good governance, accountability, predictability and the rule of law which investors and host States would consequently benefit from. This is of the utmost importance when vital public concerns are involved such as environmental issues or human rights. Under previous versions of the UNCITRAL Arbitration Rules, disputes between investors and States were often not made public, even where vital public concerns were involved or illegal or corrupt business practices were uncovered. In other settings, this level of transparency may also be used as a "scare technique" and a means to extract a settlement from another party.

In relation to this, it will be exciting to see some practical developments, more precisely: the potential change in the way parties draft their pleadings as a consequence of the higher level transparency imposed on them, or the limitation concerning the number or types of documents parties may submit and refer to, resulting from the intention to avoid potential disclosure requests.

In terms of the applicability of the Rules, it should be noted that even though they apply automatically to claims brought under a treaty concluded after 1st April 2014, parties will still have the possibility to opt out from transparency provisions. It will be interesting to see what the outcome of discussions on the Transparency Convention draft will be, since the impact of the Transparency Rules still largely hinges on the political outcome. It is also not certain what kind of an impact this will have on the attractiveness of investment arbitration under UNCITRAL Arbitration Rules and on arbitration under treaties which contain a reference to UNCITRAL Transparency Rules as opposed to those initiated under contracts that contain no such disclosure requirements.

It is further submitted that the Rules leave less room for the abuse of proceedings by reducing the scope of procedural arguments surrounding access to documents.

Indeed, by providing a detailed list of documents subject to disclosure, the Transparency Rules will undoubtedly diminish the possibility for such arguments. Nevertheless, the Rules still leave open the likelihood for such discussion in relation to witness statements, expert reports and exhibits, as these are not to be automatically disclosed. Needless to say, when there is discretionary power of tribunals to restrict disclosure in order to protect confidential or protected documents and the integrity of the arbitral process the potential abuse of such powers is often an issue. In any case, it remains to be seen how frequently and in what circumstances the tribunals will exercise this power.

Therefore, the UNCITRAL Arbitration Rules represent a big step in the direction of increasing transparency. Their biggest achievement seems to be the shift in the underlying presumption toward openness, whereas in other terms they do not seem to introduce much novelty compared to some other international investment arbitration rules. The question that is yet to be answered in the future is if by balancing the public interest and the principle of confidentiality in arbitration we have gone one step too far and have let the former prevail over the latter to a too great an extent.

Vacancies at the Hague Conference

The Permanent Bureau of the Hague Conference is seeking to fill two positions

1

Diplomat Lawyer, with excellent knowledge of private international law

The ideal candidate will possess the following qualifications:

- Excellent law school education in private law, including all aspects of conflicts of laws, preferably in the common law tradition; familiarity with comparative law (substantive and procedural law); good knowledge of public international law (in particular, the law of treaties and human rights law).
- Excellent drafting capabilities (*e.g.*, dissertation, law review or other publication experience will be taken into account).
- At least 10 to 15 years experience (in practice of law, academia, or an international organisation); experience with international negotiations an advantage.
- Excellent command, preferably as native language and both spoken and written, of English; good command of French and knowledge of other languages desirable.
- Personal qualities to contribute to:
    - good, pleasant and co-operative working atmosphere both within the Permanent Bureau and with representatives of Members, non-Member States and other Organisations;
    - the effective administration of the Permanent Bureau;
    - the proper representation of the Hague Conference to other international organisations.

The person appointed will be expected to take a leadership role in respect of particular areas of work within the Permanent Bureau, most likely in the field of family law and child protection (in particular the*Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the*Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*).

Requirements:

- While the job is located in The Hague, it requires regular travel to both near and distant countries.
- Medical clearance is required.
- Finalists will be required to undergo a professional assessment administered by an external consultant.
- For more information on the process of appointment for a diplomat lawyer (Secretary) see Article 5 of the Statute of the Organisation.

Duration of the appointment: initially three years (with a six-month probationary period).

Salary: The position contemplated for the staff member corresponding to the profile would be either grade A3 or A4 of the Co-ordinated Organisations scale for the Netherlands, depending on qualifications and experience.

Entry on duty: between July and September 2014.

Applications: Written applications with a *curriculum vitae*, including publications and contact information for three references, should be addressed by email (secretariat@hcch.net) to the Secretary General of the Hague Conference on Private International Law, **before 1 April 2014**.

2

Legal Officer (full-time)

He or she will work mainly in the area of international legal and administrative co-operation and be part of a small team, under the direction of the Secretary General. The Legal Officer will primarily carry out work relating to the relevant Hague Conventions (in particular the Apostille, Service, Evidence, and Access to Justice Conventions).

Duties will include comparative research, preparation of research papers and other documentation, assistance in the preparation (including proof-reading) of materials for publication (in particular Practical Handbooks), assistance in answering requests from States for information relating to the relevant Conventions, assistance in the preparation of meetings (including Special Commission meetings), assistance in the preparation of and participation in conferences, seminars and training programmes, and such other work as may be required by the Secretary General from time to time.

The successful applicant will possess the following qualifications:

- a good knowledge of private international law, particularly in the areas of legal and administrative co-operation and international civil procedure, familiarity with comparative law and public international law is desirable;
- excellent language skills (oral and drafting) in at least one official language of the Hague Conference (English or French), as well as a good

working knowledge of the other (knowledge of a third language is an asset);
- sensitivity with regard to different legal cultures;
- two to four years of relevant subject-matter experience in private practice, public service or academia.

Starting date: May 2014.

Grade (Hague Conference adaptation of Co-ordinated Organisations scale): A/1 subject to relevant experience.

Deadline for applications: 15 March 2014.

Applications should be made by e-mail, with Curriculum Vitae, letter of motivation and contact details for at least two references, to be addressed to the Secretary General, at: secretariat@hcch.net.