New SSRN eJournal on Private International Law

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Editors: Donald Earl Childress III, Associate Professor of Law, Pepperdine University School of Law, and Linda Silberman, Martin Lipton Professor of Law, Co-Director, Center for Transnational Litigation, Arbitration, and Commercial Law, New York University School of Law

Description: This eJournal includes working and accepted paper abstracts dealing with private international law, transnational litigation, and arbitration. The topics include private international law (conflict of laws), extraterritoriality, jurisdictional issues, enforcement of foreign judgments and arbitral awards, international commercial arbitration, and investor-state arbitration.

We hope our readers will find this eJournal useful.

“Judgments on Awards” in “Secondary Jurisdictions”: The

D.C. Circuit Decision in Commisimpex v. Congo

Over fifteen years ago, on the 40th anniversary of the of the New York Convention, Jan Paulsson wrote that it was high time for the Convention "to discover its full potential." *See* Paulsson, *Enforcing Arbitral Award Notwithstanding Local Standard Annulments*, 6 Asia Pac. L. Rev. 1 (1998). He "propose[d]" that "the annulment of an award by the courts in the country where it was rendered should not be a bar to enforcement elsewhere unless the grounds of that annulment were ones that are internationally recognized." In his view, an "enforcement judge . . mak[es] a decision which will have practical consequences on resources located in his or her jurisdiction," and need not take another enforcement court's assessment of local or even international standards as "controlling."

This week, before the United States Court of Appeals for the D.C. Circuit, we see somewhat of an opposite scenario. A party wins an international arbitration in Paris in 2000. It successfully enforces the award in London in 2009—thus making that award an English judgment. But the creditor is unable to collect on the judgment in England, and pivots west to the United States. But the three-year statute of limitations has run under the Federal Arbitration Act ("FAA"), meaning that the award can't be enforced there. The applicable statute of limitation for foreign judgments, however, is 10 years, so it seeks to enforce that instrument instead. Though Professor Paulsson says that each enforcement court must make its own decision on the enforceability of foreign arbitral awards, does the conversion of that award into a national court judgment take it out of the arbitration context altogether? Stated more bluntly, can a litigant "launder" the award in this manner?

Earlier this year, the District Court said no. In its view, enforcement of a judgment pregnant with an arbitral award "would create an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA and the New York Convention which it sought to codify. In its view, the "maneuver" attempted by the award-judgment-creditor here would "outsource[e]" the question of timeliness to litigants and foreign states and "upset the balance between promoting arbitration, on the one hand, and protecting potential

defendants' interest in finality," on the other.

Just last week, the D.C. Circuit disagreed. Siding with the United States as amicus curiae, and prior decisions of the Second Circuit—the only other court to address the issue—it observed that "the overriding purpose of [the] FAA . . . is to facilitate international commercial arbitration by ensuring that valid arbitration agreements are honored and valid arbitral awards are enforced. . . . [The purpose] is not undermined — and frequently will be advanced — through recourse to parallel enforcement mechanisms that exist independently of the FAA." "Although an arbitral award and a court judgment enforcing an award are closely related, they are nonetheless distinct from one another, and that distinction has long been recognized." In a nod to Professor Paulsson's view, the Circuit acknowledged that England is a "secondary jurisdiction" with respect to the French arbitral award, so its decisions "have 'no preclusive effect' in recognition proceedings in the United States." But in this context, the U.S. court is not being asked to "automatically to accord preclusive effect to the English Court's determinations on the Award under the Convention, but rather to assess the English Judgment under the separate (and clearly distinct) factors for judgment recognition under [state] law."

Parallel coverage by Ted Folkman is on Letters Blogatory today, too.

First Issue of 2014's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The first issue of 2014 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features three articles, one comment and two reports.

Alberto Malatesta, Professor at the University Cattaneo-LIUC in Castellanza, examines the interface between the new Brussels I Regulation and arbitration in **"Il nuovo regolamento Bruxelles I-bis e l'arbitrato: verso un ampliamento dell'*arbitration exclusion*"** (The New Brussels I-bis Regulation and Arbitration: Towards an Extension of the Arbitration Exclusion; in Italian).

> *This article covers the "arbitration exclusion" as set out in the new EU Regulation No 1215/2012 of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, recasting the old "Brussels I" Regulation, No 44/2001. The new Regulation apparently retains the same solutions adopted by the latter by providing only for some clarifications in lengthy Recital No 12. However, a careful analysis shows that under the new framework the above "exclusion" is more far reaching than in the past and it impinges on some controversial and much debated issues. After reviewing the current background and the 2010 Proposal of the European Commission on this issue – rejected by the Parliament and by the Council –, this article focuses mainly on the following aspects: i) the actions or the ancillary proceedings relating to arbitration; ii) parallel proceedings before State courts and arbitration and the overcoming of the West Tankers judgment stemming from Recital No 12; iii) the circulation of the Member State courts' decisions ruling whether or not an arbitration agreement is "null and void, inoperative or incapable of being performed"; iv) the recognition and enforcement of a Member State judgment on the merits resulting from the determination that the arbitration agreement is not effective; v) the potential conflicts between State judgments and arbitral awards.*

Pietro Franzina, Associate Professor at the University of Ferrara, addresses the issue of lis pendens involving a non-EU Member State in **"Lis Pendens Involving a Third Country under the Brussels I-bis Regulation: An Overview"** (in English).

> *The paper provides an account of the provisions laid down in Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I-bis) to deal with proceedings concurrently pending in a Member State and in a third country (Articles 33 and 34). It begins by discussing the reasons for addressing the issue of extra-European lis pendens and related actions within the law of the*

European Union. Reference is made, in this connection, to the relevance accorded to third countries' proceedings and the judgments emanating therefrom under the Brussels Convention of 1968 and Regulation (EC) No 44/2001, as evidenced inter alia by the rule providing for the non-recognition of decisions rendered in a Member State if irreconcilable with a prior decision coming from a third country but recognized in the Member State addressed. The paper goes on to analyse the operation of the newly enacted provisions on extra-European lis pendens and related actions, in particular as regards the conditions on which proceedings in a Member State may be stayed; the conditions on which a Member State court should, or could, dismiss the claim before it, once a decision on the merits has been rendered in the third country; the relationship between the rules on extra-European and intra-European lis pendens and related actions in cases where several proceedings on the same cause of actions and between the same parties, or on related actions, have been instituted in two or more Member States and in a third country.

Chiara E. Tuo, Researcher at the University of Genoa, examines the recognition of foreign adoptions in the framework of cultural diversities in **"Riconoscimento degli effetti delle adozioni straniere e rispetto delle diversità culturali"** (Recognition of the Effects of Foreign Adoptions and Respect for Cultural Diversity; in Italian).

This paper focuses on the protection of cultural identities (or of cultural pluralism) in the context of proceedings for the recognition of the effects of adoptive relationships established abroad. The subject is dealt with in light of the case-law of the European Court of Human Rights (ECtHR) as it has recently developed with regard to Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which, as it is well known, enshrines the right to family life. According to the ECtHR's case-law, a violation of Art. 8 of the Convention may be ascertained when personal status legally and stably constituted abroad are denied transnational continuity. Thus, on the basis of said ECtHR jurisprudence, this paper raises some questions (and tries to provide for the related answers) with regard to the consistency therewith of the conditions that familial relationships created abroad must satisfy when their recognition is sought pursuant to the relevant provisions currently applicable within the Italian legal system.

In addition to the foregoing, the following comment is featured:

Sara Tonolo, Associate Professor at the University of Trieste, **“La trascrizione degli atti di nascita derivanti da maternità surrogata: ordine pubblico e interesse del minore”** (The Registration of Birth Certificates Resulting from Surrogacy: Public Policy and Best Interests of the Child; in Italian).

> *Nowadays surrogacy is a widespread practice for childless parents. Surrogacy laws vary widely from State to State. Some States require genetic parents to obtain a judicial order to have their names on the original birth certificate, without the name of the surrogate mother. Other States (e.g. Ukraine) allow putting the name of the intended parents on the birth certificate. In Italy all forms of surrogacy are forbidden, whether traditional or gestational, commercial or altruistic. Act No 40 of19 February 2004, entitled “Rules on medically-assisted reproduction”, introduces a prohibition against employing gametes from donors, and specifically incriminates not only intermediary agencies and clinics practicing surrogacy, but also the intended parents and the surrogate mother. Other penal consequences are provided by the Criminal Code for the registration of a birth certificate where parents are the intended ones, as provided by the lex loci actus (Art. 567 of the Italian Criminal Code, concerning the false representation or concealment of status). In the cases decided by the Italian Criminal Courts of First Instance (Milan and Trieste), the judges excluded the criminal responsibility of the intended parents applying for the registration of foreign birth certificates which were not exactly genuine (due to the absence of genetic ties for the intended mothers), affirming in some way that subverting the effectiveness of the Italian prohibition of surrogacy may be justified by the best interests of the child. Apart from the mentioned criminal problems, several aspects of private international law are involved in the legal reasoning of the courts in these cases: among these, probably, the one that the principle of the child’s best interests should have been read not like an exception to the public policy clause but like a basic value of this clause, in light, among others, of the case law of the European Court of Human Rights.*

Finally, this issue of the Rivista di diritto internazionale privato e processuale features two reports on recent German case-law on private international and procedural issues, and namely:

Georgia Koutsoukou, Research Fellow at the Max Planck Institute Luxembourg, **"Report on Recent German Case-Law Relating to Private International Law in Civil and Commercial Matters"** (in English).

Stefanie Spancken, PhD Candidate at the University of Heidelberg, **"Report on Recent German Case-Law Relating to Private International Law in Family Law Matters"** (in English).

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale. This issue is available for download on the publisher's website.

Gopalan on the Making of International Commercial Law

Dean Sandeep Gopalan (Newcastle Law School, Australia) has posted New Trends in the Making of International Commercial Law on SSRN.

> *This paper analyzes trends in the making of international commercial law including the impetus for generating conventions, the growth of regional conventions, and soft law.There has never been a better time to be an international commercial law scholar. After decades of being held hostage to state-centered ideas, international commercial law has finally broken through to become more solution oriented. Increasingly, nation states are becoming less important in the creation of international commercial law with the growth of regional organizations, non-state actors, and international arbitration. This is spurred on by the march of globalization and the need for international commercial law. The term "harmonization will be used as a surrogate to discuss the creation of international commercial law as it is the primary means by which international commercial law is created. This article seeks to explore two preponderant trends that have become visible in the making of international commercial law. In Part I, I shall describe the background. In Parts II and III, I will highlight the growing role of regional endeavors at harmonization, and the rise of non-binding instruments.*

Second Issue of 2014's ICLQ

The second issue of *International and Comparative Law Quarterly* for 2014 includes one short article on private international law.

Ben Juratowitch (Freshfields Paris), Fora Non Conveniens *for Enforcement of Arbitral Awards Against States*

> *In Figueiredo Ferraz v Peru the US Court of Appeals, Second Circuit, deployed the doctrine of forum non conveniens to decline to enforce an arbitral award against Peru. The award had been rendered in Peru and the successful party in the arbitration sought to enforce it against Peru's assets in New York. This article argues that, contrary to the Second Circuit's approach, when the merits of a dispute are decided in an arbitration seated in one jurisdiction and the arbitral award is then presented to a court in another jurisdiction for enforcement against the award debtor and its assets within the jurisdiction of that court, neither forum non conveniens nor any rule performing the same function should arise.*

Summer School in International Commercial Contracts in Italy

The School of Law of the University of Verona, Italy, in cooperation with the Center for International Legal Education (CILE) of the University of Pittsburgh, USA, will host a Summer School program in International Commercial Contracts, which will take place on June 3-6, 2014 at the School of law of the University of Verona.

> *The Summer School aims at providing participants with an in-depth*

understanding of drafting, managing and litigating international contracts. The course will deal with the different sources of law applicable to international contracts, relevant model contract clauses and selected types of contracts of particular relevance in international practice.

Target group and prerequisites for admission: The School is addressed to legal professionals and other business operators involved in international contract practice, but also open to 2nd-level degree and PhD students. A very good level of English is a fundamental prerequisite for admission.

Programme

The Law & Economics of International Contracts / International Sales Law
C. Gillette, NYU Law School

The Law Applicable to International Contracts / Case-Law on International Sales
F. Ferrari, University of Verona, NYU Law School

Transaction Planning Using Rules of Jurisdiction
R. Brand, University of Pittsburg School of Law

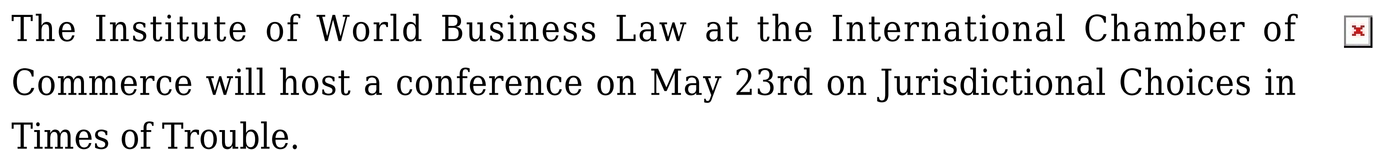
Negotiating and Drafting International Contracts
M. Torsello, University of Verona

International Commercial Arbitration
C. Giovannucci Orlandi, University of Bologna

For further information, please contact segreteria.master@ateneo.univr.it, cile@law.pitt.edu, or the Director of the course, Prof. Marco Torsello, at: marco.torsello@univr.it.

Deadline for registration: May 15, 2014. Registration fees: € 730,00.

ICC Conference on Jurisdiction Clauses



The Institute of World Business Law at the International Chamber of Commerce will host a conference on May 23rd on Jurisdictional Choices in Times of Trouble.

The following topics will be addressed:

Morning 09.30-13.00
Session I – Asymmetrical choices

The validity of unilateral optional clauses

- Overview of the jurisdictions which uphold unilateral option clauses and
- those that consider them void The resulting legal uncertainty
- Study of the causes, implications and solutions
- Is the situation the same if the option reserves the right to resolve disputes via recourse to an arbitral tribunal rather than courts?

Pr. Marie-Elodie Ancel, University Paris-Est Créteil Val de Marne
Dr. Anton Asoskov, Lomonosov Moscow State University
Pr. Alain Rau, University of Texas
Dr. Maxi Scherer, Queen Mary, University of London

Moderated by: Dr. Georges Affaki, Chairman of the Legal Committee of the ICC Banking Commission

Questions – Discussion

The limits to the parties' free choice of jurisdiction

- The requirement of an objective link between the choice of jurisdiction and the connection of the contract to a specific country
- Other formal requirements for the validity of jurisdictional choices (incorporation by reference, etc)
- News on the doctrine of forum non conveniens

- Debate on The Hague Convention on exclusive choice of court agreements: less favourable than the Brussels 1 bis Regulation but tendancy to favourize relations with third parties

Marie Berard, Clifford Chance LLP, United Kingdom
Pr. Diego Fernández Arroyo, Sciences Po Law School
Khawar Qureshi QC, McNair Chambers

Moderated by: Dr. Horacio Grigera Naón, Independent Arbitrator, United States

Questions – Discussion

Disparities in the choice of arbitrators

Pr. Eric Loquin, University of Burgundy
Paolo-Michele Patocchi, Patocchi & Marzolini, Switzerland

Moderated by: Pr. Pierre Mayer, Dechert LLP Paris

Questions – Discussion

Afternoon 14.30-17.45
Session II – The influence of national laws on jurisdictional choices

Applicable law

- Sulamerica and Arsanovia–is there a contrast between these two English cases and national laws opting for a substantive approach (rather than a conflict of law approach) to determine the validity of the arbitration clause?
- Debate on Article 25 of the Brussels 1 bis Regulation on the validity of the jurisdiction clause in substance (cf recital 20): as in Sulamerica, the DIP of the chosen court is applied, not the law governing the contract.

Dr. Georges Affaki
Pr. Julian D.M. Lew QC, Queen Mary, University of London; 20 Essex Street Chambers
Pr. François-Xavier Train, University Paris 10
Pr. Laurence Usunier,University Paris 13

Moderated by: Dr. Horacio Grigera Naón

Questions – Discussion

The law applicable to the arbitrability of the dispute

Pr. Carlos Alberto Carmona, Marques Rosado Toledo Cesar & Carmona – Advogados, Brazil
Pr. Hans van Houtte, President, Iran-United States Claims Tribunal

Moderated by*:* Yves Derains, Derains & Gharavi, France

Questions – Discussion

Choice of a tribunal and lis pendens

- The conflict between the EU Brussels Regulation 1 bis and other legislations – which solutions?
- What are the consequences of the ratification of The Hague Convention on the choice of court?

Pr. Arnaud Nuyts, University of Brussels (ULB)
Pr. Gilles Cuniberti, University of Luxembourg
Pr. Horatia Muir-Watt, Sciences Po Law School

Moderated by: Dr. Horacio Grigera Naón

Questions – Discussion

Conclusions: Georges Affaki and Horacio Grigera Naón

Closing remarks: Yves Derains

Polish Decisions on Submission to Jurisdiction

by Michal Kocur and Jan Kieszczynski of Wozniak Kocur, a Polish litigation

boutique law firm.

The Appellate Court in Lublin, Poland passed two separate decisions that stand by the principle that a challenge to international jurisdiction must be clear, substantiated and made right away in the defendant's first appearance before the court.

In decisions taken on 26 March 2013 (file no. I ACz 151/13) and on 8 October 2013 (file no. I ACz746/13), the court found that raising a defense of lack of jurisdiction based on an arbitration clause cannot be treated as contesting the court's international jurisdiction within the meaning of Article 24 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I).

The decision is particularly noteworthy as it deals with a controversial issue, as yet undecided by the Court of Justice of the European Union (ECJ).

Disputed jurisdiction

Both of the cases concerned the same dispute that emerged between two parties, a Polish and a French company, concerning the performance of a contract for the international sale of goods (Contract). The Polish company twice sued the French company for payment in the Polish courts. Both cases followed a similar pattern of procedural history, which will be outlined below.

In its statement of defense, the French company filed a motion to dismiss the case, taking the position that the dispute fell within the scope of the arbitration clause contained in the Contract. Apart from raising that jurisdictional defense, the defendant also went into the details of the merits of the case, rejecting the Polish company's claim for payment. The Polish court rejected the French company's jurisdictional defense. The court found that the arbitration agreement contained an exception that allowed the claimant to file a claim in a national court.

The French company appealed that decision. In its appeal, for the first time in the proceedings, the defendant raised a defense specifically invoking the lack of jurisdiction of Polish courts, and filed a motion to dismiss the case on

those grounds. The defendant argued that the place of delivery of goods had changed, in light of which French courts had jurisdiction to hear the case, not Polish courts.

In response to the above, the claimant argued that the defendant's challenge to the jurisdiction of Polish courts had not been presented in the statement of defense, and was therefore overdue.According to the claimant, as the Polish courts' international jurisdiction was not contested in due time, the dispute was submitted to Polish courts in accordance with Article 24 Brussels I. Submission under Article 24 Brussels I exists when a defendant enters an appearance before the court, unless the appearance was entered in order to contest international jurisdiction:

> *Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.*

The defendant disagreed. It argued that the statement of defense contained a jurisdictional defense based on the arbitration agreement, and that this defense alone was sufficient to properly contest international jurisdiction in the meaning of Article 24 Brussels I.

Inequality of objections

The issue whether raising an objection against jurisdiction based solely on an arbitration agreement is tantamount to contesting the jurisdiction of a Member State's court has not yet been decided by the ECJ. The issue is controversial. In Poland, some scholars refer to a position presented in German language publications that a defense of the lack of jurisdiction based on an arbitration agreement by the same token contests jurisdiction in the meaning of Article 24 Brussels I.

In both of the cases at hand, the Appellate Court in Lublin rejected the defendant's view and found that it had international jurisdiction as the cases fell under the rule of submission to jurisdiction.

The court held that a jurisdictional defense based on an arbitration clause did not contest the Polish courts' international jurisdiction in the meaning of Article 24 Brussels I. According to the court, the defendant's properly contested international jurisdiction too late and by that time the cases must have been treated as having been submitted. In the written reasons of the decisions, the court stated that a challenge against jurisdiction based on an arbitration agreement and a challenge against international jurisdiction are two separate challenges. It is not possible to assume that raising a defense of lack of jurisdiction due to an arbitration agreement is effective with regard to international jurisdiction.

The Appellate Court's decision was correct. An objection to jurisdiction based on an arbitration agreement and an objection to international jurisdiction are based on different legal and factual grounds. This is exemplified by the case at hand. The lack of jurisdiction due to the arbitration agreement was claimed under the provisions of the Polish Code of Civil Procedure, and the dispute centered around the interpretation of the arbitration clause. The defense of lack of international jurisdiction was made under the provisions of Brussels I and on the basis of a disputed place of delivery of the goods. If different facts and different legal provisions have to be presented to substantiate either of the two defenses, one cannot treat them as synonymous in their effect.

Importance of submission

The analyzed decision of the Appellate Court in Lublin is also in line with the rules of examining jurisdiction enshrined in Brussels I.

Brussels I provides for an examination of the jurisdiction by the court's own motion only in exceptional situations. That is the case, for example, in Article 22 point 1, which provides for the exclusive jurisdiction of the court in which a property is situated in cases concerning rights in rem in immovable property. Apart from such exceptions, the court only examines its jurisdiction if the jurisdiction is challenged by the defendant. Such challenges must be properly substantiated and raised in the first appearance before the court, i.e. usually, in the statement of defense.

This principle is interconnected with another rule, namely, the rule of submission of jurisdiction if no challenge is made by the defendant at the beginning of

proceedings.

Both of the rules make perfect sense, both from the perspective of case management and legal certainty. If the courts were to examine jurisdiction by their own motion at every stage of the case, jurisdiction could be questioned very late in the proceedings, even before the court of last instance. That would lead to the obstruction of justice and deprive the parties of the right to have their case decided in due time.

Finding identity between a jurisdictional defense based on an arbitration agreement and a defense of lack of international jurisdiction would be contrary to the above rules. It would demand from the court to examine a challenge based on an arbitration agreement way beyond the legal reasoning and facts presented in that challenge. In such a case, if the court decided that the challenge based on an arbitration agreement should be dismissed, then the court would have to examine whether it has international jurisdiction, essentially, by its own motion. It would be the court that would be obliged to establish whether there were any other circumstances, apart from the arbitration agreement, that could potentially affect its jurisdiction to hear the case. This would not be a reasonable solution. Instead, the Brussels I rules discipline the parties to promptly decide whether they question the international jurisdiction of the court where they have been summoned. Those rules also prohibit them from second-guessing their jurisdictional defenses.

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.*

New Czech Act on Private International Law

By Petr Briza, co-founding partner of Briza & Trubac, a Czech law firm focusing on cross-border litigation and arbitration, among others.

Regular readers of this blog might recall this post that referred to my article at Transnational Notes about the new Czech Act on Private International Law. The article provided a short general description of the new law that entered into effect on January 1, 2014. In this post I would like to introduce in more detail some provisions of the act, especially those that are not preceded by the EU legislation and thus will govern cases heard by Czech courts. Also, below you will find the link to the English translation of the full text of this new act on private international law.

Introductory remarks

For general comments on the new law I refer to my post at Transnational Notes. Here I will only shortly sum up couple of the main facts.

The act (published under No. 91/2012 Coll.) is part of the private law recodification whose main pillars are the new Civil Code (No. 89/2012 Coll.) and the new Business Corporations Act (No. 90/2012 Coll.). The act has 125 sections divided into 9 parts: (1) General Provisions (§ 1 – 5), (2) General Provisions of Procedural International Law (§ 6 – 19), (3) General Provisions of Private International Law (§ 20 – 28), (4) Provisions Concerning Individual Types of Private-Law Relations (§ 29 – 101), (5) Judicial Cooperation in Relations with Foreign States (§ 102 – 110), (6) Insolvency Proceedings (§ 111 – 116), (7) Arbitration and Recognition and Enforcement of Foreign Arbitral Awards (§ 117 – 122), (8) Transitional and Final Provisions (§ 123 – 124) and (9) Entry into Force (§ 125).

Now I will turn to the provisions that might be of interest for foreign readers.

General issues (§ 1-5 and 20-25)

The law regulates general issues of private international law, such as public

policy (ordre public) exception, overriding mandatory rules, renvoi, qualification (characterisation), preliminary questions or application of foreign law. Unlike the previous “old” act (No. 97/1963 Coll.), the law does not define “ordre public”; instead it only introduces public policy (public ordre) exception as such (§ 4). It is expected that Czech courts will interpret the notion of ordre public in line with § 36 of the old act that defined ordre public as “such principles of the social and state system of the Czech Republic and its law that are necessary to insist on unconditionally.” The old law did not contain provisions on overriding mandatory norms; the new act regulates them in § 3 (lex fori overriding mandatory norms) and in § 25 (foreign overriding mandatory norms). While § 3 in fact merely acknowledges the existence of lex fori provisions that are always applicable, § 25 dealing with third state overriding mandatory norms resembles to some extent controversial Article 7 para 1 of the Rome Convention. The new act also regulates circumvention (abuse) of law (§ 5) that may relate both to the conflict rules and the rules on jurisdiction. Characterisation should be usually made under Czech law (§ 20). Foreign law is to be ascertained and applied ex officio (§ 23).

Jurisdiction, recognition and enforcement of foreign judgments

As already suggested, the importance of the act lies in the areas outside the scope of the EU law and/or international conventions/agreements. In cases where neither the Brussels I regulation nor the Lugano Convention (or another international agreement) is applicable, jurisdiction in general civil and commercial matters will be governed by § 6 of the act. Under this provision Czech courts have international jurisdiction if they have local jurisdiction (venue) under the Czech Civil Procedure Code (see §§ 84-89a of the Civil Procedure Code – No. 99/1963 Coll.) – one of possible jurisdictional grounds under Czech law is, e.g., an asset location in the territory of the Czech Republic.

The recognition and enforcement of third state (non-EU, non-Lugano) judgments in general commercial and civil matters is governed by §§ 14-16. Apart from traditional grounds for the refusal of recognition (ordre public, res judicata, lis pendens, fair trial) there is mandatory requirement of (material) reciprocity for cases where the decision is against Czech citizen/entity. Also, for a third country judgment to be recognized in the Czech Republic the foreign court has to have jurisdiction under a base of jurisdiction under which Czech courts may assert jurisdiction, unless the defendant voluntarily submitted to the foreign court’s jurisdiction (see § 15 (1) a)).

Conflict rules and rules on jurisdiction in specific matters

In this part I will again mention especially those conflict rules and provisions on jurisdiction that fall outside the scope of the EU legislation.

The primary connecting factor for legal capacity of natural persons is place of habitual residence (§ 29 para 1). However, in case of a name the primary connecting factor is the citizenship with habitual place of residence being a subsidiary connecting factor (see § 29 para 3). Capacity and internal matters of legal entities are governed by the law of the place of incorporation (§ 30).

As the Czech Republic is not a party to 1978 Hague Convention on Agency, the act will be applicable to relations between the principal and third person (these matters fall outside the EU law, which is applicable to principal-agent and agent-third person relations). Apart from a general rule on agency with multiple connecting factors (§ 44), there is a special rule on „proxy" ("die Prokura" in German) and similar specific types of agency (§ 45).

In the area of family law (§ 47 – 67) one might want to take a look at the conflict rule on divorces (§ 50), as the Czech Republic is not bound by the Rome III regulation. Property regimes of spouses shall be governed by the law of the state in which both spouses are habitually resident; otherwise by the law of the state of which both spouses are citizens; otherwise by the Czech law (§ 49 para 3). The conflict rules, rules on jurisdiction and recognition of foreign judgments in matters of establishment and contesting of parentage are contained in § 53-55. International adoption is governed by § 60-63, registered partnerships and similar unions by § 67.

In the area of rights in rem § 70 para 2 is especially worth noting; it brings about an important change compared to the previous law by assigning the transfer (creation and extinguishment) of ownership under the law governing the contract on the basis of which the ownership is being transferred. § 73 regulates conflict rules for trusts, including the recognition of foreign trusts in the territory of the Czech Republic; the applicable law is the law of the closest connection with the trust, unless the settlor selects the applicable law. Succession is governed by § 74-79, although the importance of these provisions will be largely diminished by the EU regulation on succession, (fully) coming into force in August 2015.

The field of obligations (§ 84 – 101) is largely covered, except for promissory

notes and bills of exchange (§ 93 – 100), by the EU legislation. One of few provisions of the act from this area that should be fully applicable is § 101 on non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation. These shall be governed by the law of the state in which the violation (the act giving rise to damage) occurred, unless the injured person chooses one of (up to) three other laws the provision offers for choice.

Insolvency, arbitration and assistance from the Ministry of Justice

The act also deals with those aspects of international insolvency not covered by the EU Insolvency Regulation (§ 111). As regards applicable law, the act in principle extends the regime of the regulation also to the cases falling outside the regulation's scope (§ 111 para 3). In cases not covered by the regulation, Czech courts may conduct insolvency proceedings if the debtor has an establishment in the Czech Republic provided it is requested by the creditor with habitual residence or seat in the Czech Republic or the creditor?s claim arose in connection with the establishment?s activities. They can also extend jurisdiction based on the regulation to the debtor's assets in a foreign state other than a Member State of the European Union provided the foreign state attributes effects to the proceedings in its territory. Foreign judgments in the insolvency matters shall be recognized under the condition of reciprocity provided in a foreign state in which it was handed down the debtor has a centre of main interests and provided the debtor?s assets in the Czech Republic are not a subject of pending insolvency proceedings.

The arbitration matters are largely covered by international agreements to which the Czech Republic is a party, namely the New York Convention and the European Convention on International Commercial Arbitration, thus the impact of the act is limited. Still, apart from the recognition and enforcement of foreign arbitral awards (§120 – 122), the act also regulates the conditions under which a foreigner may be designated as arbitrator (§ 118). An admissibility of an arbitration agreement shall be assessed under the Czech law and its material validity shall be governed by the law of the state in which an arbitral award is to be issued.

Finally, there is one specific feature of the act worth mentioning: given the complexity of international matters the act provides an opportunity for courts to consult the Ministry of Justice in cases covered by the act (§ 110). It goes without

saying that such a consultation is optional and the Ministry's opinion is by no means binding upon the court.

Concluding remarks

I will not repeat my conclusion about the act from my post in Transactional Notes, instead I give you an opportunity to make your own conclusions about the act and its potential added value (not only practical but also in comparative perspective): in order to make the new act available to readers from around the world, my law firm has provided for the English translation of the act. You can download it free of charge via this link.

Those who would like to explore the act, its context and related case law may be interested in the commentary I have co-authored together with my colleagues from the Ministry of Justice, Czech Supreme Court and a notary. Unfortunately, it is only in Czech; the same goes for this commentary written by other team of authors.

Any comments or questions regarding the act or its translation are welcome either under the post or at petr.briza@brizatrubac.cz .