Applying the UNIDROIT Principles in International Arbitration: An Exercise in Conflicts

Prof. Massimo Benedetelli (Professor of International Law, University 'Aldo Moro', Bari. ARBLIT, Milan, partner) has just drawn my attention to this piece of his, published in the Journal of International Arbitration 33, no. 6 (2016), pp. 653–686. The abstract reads as follows:

The International Institute for the Unification of Private Law, which recently celebrated its 90th anniversary, published in 1994 the Principles of International Commercial Contracts. Since then the UNIDROIT Principles have been more and more often referred to by arbitral tribunals when settling contractual disputes. As a non-binding instrument of soft law, however, the UNIDROIT Principles may play a very different function depending on whether they are used as "rules of law" for the regulation of a contractual relationship, are incorporated as terms of a contract governed by a state contract law, or are means to interpret and supplement the applicable contract law or the 1980 United Nations Convention on Contracts for the International Sale of Goods. Moreover, they can be applied pursuant to an express or implied choice made by the parties, either in the contract or after the dispute has arisen, or when the arbitral tribunal so decides by its own motion. In all such different scenarios different problems may arise for the coordination of the UNIDROIT Principles with sources of state law that have title to regulate the contractual relationship in dispute. Understanding such problems and finding a solution to them is essential in order to avoid the risk that the award may be later challenged or refused recognition. Such understanding could also foster the legitimacy of requests made by a party, or decisions taken by the arbitral tribunal, to apply the UNIDROIT Principles. It is submitted that private international law, taken as a technique for the coordination of legal systems, may offer a useful know-how to parties, counsel, arbitrators and courts for mastering such problems in a reasoned and sound way. This may result in enhancing the effectiveness of the UNIDROIT Principles, while balancing party autonomy with the sovereign interest of states in regulating international business.

Supreme Court of Latvia: Final Outcome of "flyLAL Lithuanian Airlines"

By Baiba Rudevska

On 23 October 2014 the European Court of Justice (hereinafter referred to as the "ECJ") delivered its judgment in the case "**flyLAL Lithuanian Airlines AS v. Starptautiska lidosta Riga VAS (Riga International Airport)**" (C-302/13). The request for a preliminary ruling was made by the Supreme Court of Latvia (*Latvijas Republikas Augstaka tiesa*) in proceedings concerning recognition and enforcement of a Lithuanian court's judgment (ordering provisional and protective measures) in the territory of Latvia. This request concerned the interpretation of Articles 1, 22(2), 34(1) and 35(1) of the 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 Regulation).

The ECJ answered the questions in the following way:

- Article 1(1) of the Brussels I Regulation must be interpreted as meaning that an action seeking legal redress for damage resulting from alleged infringements for EU competition law, **comes within the notion of "civil and commercial matters"**;
- Article 22(1) must be interpreted as meaning that an action seeking legal redress for damage resulting from alleged infringements of EU competition law, **does not constitute proceedings** having as their object the validity of the decisions of organs of companies within the meaning of that provision;
- Article 34(1) must be interpreted as meaning that **neither** the detailed rules for determining the amount of the sums which are the subject of the provisional and protective measures granted by a judgment in respect of which recognition and enforcement are requested, **nor** the mere

invocation of serious economic consequences constitute grounds for refusal of recognition and enforcement of a judgment based on **public policy** of the Member State in which recognition is sought.

On 20 October 2015 the Supreme Court of Latvia delivered its decision (which is final) in this case (No SKC 5/2015) deciding neither to recognise nor to enforce the judgment of the Lithuanian court in Latvia (two lower courts of Latvia had previously decided to recognise and to enforce the judgment). The legal ground for the non-recognition was the *public policy* clause of Article 34(1) of the Regulation.

Let us look at the main reasoning of the Supreme Court of Latvia in this case.

Reasoning No 1 (Article 1 of the Constitution of the Republic of Latvia)**: State security**. The defendant, "*Starptautiska lidosta Riga*" ("Riga International Airport"), also owns a property which is necessary for the purpose of the Latvian state security. If the judgment of the Lithuanian court is recognised and enforced in Latvia, then the preventive attachment order regarding this property will probably be enforced. From Article 1 of the Constitution of the Republic of Latvia it follows that property which is necessary for the state security interests cannot be transferred or subject to a private law burden that might, even hypothetically, hinder, weaken or otherwise threaten the fulfilment of the State functions in guaranteeing the security of the State and the society.

Reasoning No 2 (Article 91 and 105 of the Constitution of the Republic of Latvia)**: the insolvent Lithuanian company**. The Lithuanian company "flyLAL Lithuanian Airlines" is an insolvent company which has lodged a claim for an amount of EUR 58,003,824. This company has no property or assets to compensate the defendant's possible losses in the case if the claim later appears to be unsubstantiated. This creates an important disproportion of rights and of the provisional and protective measures applied in the case. Such possible damages sustained by the defendant may seriously endanger not only its economic activities but even its existence as a company.

Additional reasoning (Article 91 and 105 of the Constitution of the Republic of Latvia)**: the length of the main proceedings before the Lithuanian court.** The Lithuanian court had issued an order for sequestration, on a provisional and protective basis, of the movable/immovable assets and property rights of "Air

Baltic" and "*Starptautiska lidosta Riga*" ("Riga International Airport") seven years ago; until now the case has not yet been resolved and there is no further information about when this case could be resolved. For the provisional and protective measures this period of time is too long and might aggravate the violation of the defendant's property rights in this case. As the Lithuanian company is insolvent, there cannot be an adequate protective measure to secure the payment of damages. It can be considered as a potentially disproportionate interference with the defendant's property rights within the meaning of Articles 91 and 105 of the Latvian Constitution

In this case, the Supreme Court of Latvia has established that, **firstly**, state security constitutes one of the most important elements of the public policy of Latvia (Article 1 of the Constitution); **secondly**, fundamental rights laid down in the Constitution of the Republic of Latvia also is a part of the Latvian public policy. In this case these were the equal rights of the parties before the law and the courts (Articles 91 and 105 of the Constitution). For this reason such a judgment of the Lithuanian court is manifestly contrary to the Latvian public policy. Therefore the recognition and enforcement of the Lithuanian judgment in Latvia must be denied on the basis of Article 34(1) of the Brussels I Regulation.

For information:

Constitution of the Republic of Latvia:

Article 1 – "Latvia is an independent democratic republic".

Article 91 – "All human beings in Latvia shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind".

Article 105 – "Everyone has the right to own property. Property shall not be used contrary to the interests of the public. Property rights may be restricted only in accordance with law. Expropriation of property for public purposes shall be allowed only in exceptional cases on the basis of a specific law and in return for fair compensation".

Brexit, but rEEAmain? The Effect of Brexit on the UK's EEA Membership

Ulrich G. Schroeter, Professor of Law at the University of Mannheim (Germany) and Heinrich Nemeczek, Research Fellow at the University of Mannheim (Germany) and an Academic Visitor at the Law Faculty of the University of Oxford, have authored an article on "'The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area". Published in issue 7 [2016] of Kluwer's *European Business Law Review*, pp. 921–958, the authors analyze how the UK's withdrawal from the EU will affect the UK's status as Contracting Party to the EEA Agreement.

The authors have kindly provided us with the following abstract:

Until recently, most legal analyses of Brexit have assumed that the UK's EEA membership will be terminated ipso iure should the UK decide to withdraw from the EU. According to this view, the UK subsequently could (re-)apply for EEA membership should its government so choose – an option commonly referred to as the 'Norway option'.

Our article challenges the assumption that the UK's withdrawal from the EU will automatically result in its withdrawal from the EEA. In short, we reach the conclusion that the UK's EEA membership will continue despite of Brexit unless the UK government chooses to also unilaterally withdraw from the EEA in accordance with Article 127(1) of the EEA Agreement – a step it is not obliged to take. Its continuing EEA membership would mean that many rules of EU law would continue to apply in form of EEA law, including (subject to certain conditions) the much-discussed rules about the 'European passport' for UK financial institutions. In contrast, the Court of Justice of the EU would have no jurisdiction over the interpretation of EEA law in the UK. At the same time, the rules governing the free movement of workers are more flexible under EEA law

than under EU law, potentially allowing the UK to limit this freedom by way of unilaterally imposed 'safeguard measures'.

In summary, 'Brexit' and 'rEEAmain' are in no way irreconcilable. The result may affect the negotiation positions during the upcoming Brexit negotiations in accordance with Article 50 of the TEU, as a continuing EEA membership could be viewed as an attractive alternative to a 'hard Brexit', for both businesses in the UK and the rest of the EEA.

The EEA Agreement as a 'mixed agreement'

It is an important feature of the EEA Agreement that, on the 'EU side', it neither comprises only the EU nor only its Member States as Contracting Parties, but rather the EU and each of its individual Member States, including the UK. The UK is, therefore, not merely an EEA Member because of its membership in the EU, but because the EEA Agreement's Preamble explicitly lists the UK as a separate Contracting Party. Any modification or termination of this Contracting Party status would require a basis in treaty law.

In this regard, a source of uncertainty is that the EEA Agreement does not contain any specific provision addressing the effect, if any, of a EU Member State leaving the EU. Article 50 of the TEU fails to indicate that a withdrawal from the EU would have any consequence for the withdrawing State's membership in the EEA. As we demonstrate in detail in our article, a 'Brexit' notification in accordance with Article 50 of the TEU can also not be interpreted as also resulting in a withdrawal from the EEA, inter alia because such a result would affect treaty rights of the three EFTA States within the EEA – Iceland, Liechtenstein and Norway – that are not parties to the TEU.

As far as some provisions in the EEA Agreement only refer to 'EC Member States' and/or 'EFTA States', we argue in some detail that these terms are to be interpreted as referring to EU States and non-EU States within the EEA in accordance with both the EEA Agreement's purpose and past treaty practice under the Agreement.

No Right of Other EEA Contracting Parties to Suspend Operation or Terminate the EEA Agreement in Relation to the UK

The UK's withdrawal from the EU does not entitle other EEA Contracting

Parties to suspend operation or terminate the EEA Agreement in relation UK, neither under the EEA Agreement nor under customary public international law. Under customary treaty law as codified in the 1969 Vienna Convention on the Law of Treaties (VCLT), the UK for once has committed no 'material breach' of the EEA Agreement (Article 60 of the VCLT), as Brexit is merely the use of a right explicitly granted to the UK by a different treaty, namely Article 50 of the TEU. Also, Brexit does not constitute a fundamental change according to the clausula rebus sic stantibus doctrine enshrined in Article 62 of the VCLT as the EEA Agreement's core elements can still be performed. Although the UK's withdrawal from the EU will create certain difficulties because the country's representation in organs like the EFTA Court or the EFTA Surveillance Authority requires clarification, these changes neither radically modify the obligations still to be performed under the EEA Agreement nor imperil the existence or vital development of other EEA Contracting Parties.

Post-Brexit situation ('rEEAmain')

In our article, we further outline the consequences that Brexit would have for the future application of the EEA Agreement. Because the UK's Contracting Party status would remain unaffected, UK companies would still have access to the EEA internal market. Inter alia, the legal capacity of UK companies with their 'real seat' elsewhere within the EEA would continue to be recognised in all other EEA States under the EEA Agreement's freedom of establishment. The same would, of course, apply in the 'opposite direction', giving continued freedom of establishment in the UK for companies from elsewhere in the EEA.

The freedom of movement for workers under Article 28 of the EEA Agreement may be unilaterally limited by the UK by way of appropriate safeguard measures in accordance with Article 112 of the EEA Agreement (e.g. a quota system), if 'serious economic, societal or environmental difficulties' are arising – a possibility that does not exist under EU law. (It is foreseeable that the interpretation of the legal prerequisites will give rise to disputes.) In any case, safeguard measures taken by the UK may come at a price, as other EEA Contracting Parties would be authorized to take proportionate 'rebalancing measures' in order to remedy any imbalance between rights and obligations under the EEA Agreement created by the safeguard measures.

Our interpretation should not be misunderstood as indicating that no difficulties

would arise under a 'rEEAmain' scenario. Such difficulties would indeed appear, primarily because certain institutional arrangements in the EEA Agreement and related agreements do not explicitly envisage an EEA Contracting Party that is neither a member state of the EU nor of the EFTA. If the UK does not accede to the EFTA Agreement and the Surveillance and Court Agreement, EEA law within the UK would have to be supervised and interpreted solely by British domestic courts and authorities. Also, the issue of financial contributions by the UK would arguably necessitate a renegotiation of protocols to the EEA Agreement: After Brexit, the UK will no longer contribute to the EU budget, but neither Article 116 of the EEA Agreement nor Protocols 38–38c explicitly provide for an obligation of the UK to contribute to the EEA Financial Mechanism. As it is difficult to argue that the UK would profit from its continuing EEA membership without contributing to the connected Financial Mechanism, the exact amount of the UK's contribution would need to be fixed through an adjustment of the Protocols 38–38c.

Private International Law: Embracing Diversity (Save the date!)

It is my pleasure to announce this conference, to be held on February 24th 2017 at the University of Edinburgh, to celebrate Private International Law as ethics of engaging the other. Exploring a variety of private international law themes, this one-day conference will bring together world-renowned academics and experienced private international lawyers from a wide range of jurisdictions and institutions. The experts will discuss topics such as international jurisdiction, international judicial cooperation, cross-border family issues, cross-

border consumer protection, private international law of succession and labour migration, from a range of national and regional perspectives; and reflect on the role of international treaties, international institutions and national courts in the efficient management of legal diversity.

Venue: St. Trinnean's Room, St. Leonard's Hall – University of Edinburgh, EH16 5AY

Click here for the programme.

Registration is required – Register at: www.law.ed.ac.uk/events Attendance Fee: £40.00 per attendee.

The international protection of vulnerable adults: recent developments from Brussels and The Hague

On 10 November 2016, the French MEP Joëlle Bergeron submitted to the Committee on Legal Affairs of the European Parliament a draft report regarding the protection of vulnerable adults.

The draft report comes with a set of recommendations to the European Commission. Under the draft, the European Parliament, among other things, 'deplores the fact that the Commission has failed to act on Parliament's call that it should submit … a report setting out details of the problems encountered and the best practices noted in connection with the application of the Hague Convention [of 13 January 2000 on the international protection of adults], and 'calls on the Commission to submit … before 31 March 2018, pursuant to Article 81(2) of the Treaty on the Functioning of the European Union, a proposal for a regulation designed to improve cooperation among the Member States and the

automatic recognition and enforcement of decisions on the protection of vulnerable adults and mandates in anticipation of incapacity'.

A document annexed to the report lists the 'principles and aims' of the proposal that the Parliament expects to receive from the Commission.

In particular, following the suggestions illustrated in a study by the European Parliamentary Service, the regulation should, *inter alia*, 'grant any person who is given responsibility for protecting the person or the property of a vulnerable adult the right to obtain within a reasonable period a certificate specifying his or her status and the powers which have been conferred on him or her', and 'foster the enforcement in the other Member States of protection measures taken by the authorities of a Member State, without a declaration establishing the enforceability of these measures being required'. The envisaged regulation should also 'introduce single mandate in anticipation of incapacity forms in order to facilitate the use of such mandates by the persons concerned, and the circulation, recognition and enforcement of mandates'.

In the meanwhile, on 15 December 2016, Latvia signed the Hague Convention of 2000 on the international protection of adults. According to the press release circulated by the Permanent Bureau of the Hague Conference on Private International Law, the Convention is anticipated to be ratified by Latvia in 2017.

Conflict of Laws and Silicon Valley

See here for a fascinating post by Professor Marketa Trimble (UNLV Law). From the post:

> Now that conflict of laws has caught up with Silicon Valley and is forcing internet companies to rethink the problems that occupy this fascinating field of law, conflict-of-laws experts should catch up on the internet: they should better educate themselves about internet technology; they should prepare law students for a practice in which the internet is a common, and not a special or unusual, feature; and they should prevent conflict of laws from becoming a fragment of larger trade negotiations in which multifaceted, intricate, and crucial conflict-of-laws policy considerations can easily be overlooked or ignored.

Droit des Contrats Internationaux, 1st edition

This book authored by M.E. Ancel, P. Deumier and M. Laazouzi, and published by Sirey, is the first manual written in French solely devoted to international contracts examined through the lens of judicial litigation and arbitration. It provides a rich and rigorous presentation in light of the legal instruments recently adopted or under discussion in France, as well as at the European and international levels.

After an introduction to the general principles of the matter, the reader will be able to take cognizance of the regimes of the most frequent contracts in the international order: business contracts (sale of goods and intermediary contracts), contracts relating to specific sectors (insurance, transport), contracts involving a weaker party (labor and consumer contracts) or a public person.

Advanced students, researchers as well as practitioners will find in this volume the tools enabling them to grasp the abundant world of international contracts, to identify the different issues and to master the many sources of the discipline.

The ensemble is backed up by a highly developed set of case law and doctrinal references, updated on August 15, 2016.

More information about the book in traditional format is available here, and here for the e-book format.

Marie-Elodie Ancel is a professor at the University Paris Est Créteil Val de Marne (UPEC), where she heads two programs in International Business Litigation and Arbitration.

Pascale Deumier is a professor at the Jean Moulin University (Lyon 3), where she is a member of the Private Law Team and coordinates the research focus on the Sources of Law.

Malik Laazouzi is a professor at the Jean Moulin University (Lyon 3), where he heads the Master 2 of Private International and Comparative Law.

Research Assistant Position at the BIICL, London

The BIICL is seeking to appoint three Research Assistants on a 0.8 FTE basis for paid internships of four months each, with the possibility of extension for a further month.

Research Assistants are expected to undertake various core tasks, including:

* Assisting in the coordination and organisation of research activities;

* Contributing to the production of high quality research in their areas including, where appropriate, assisting with desk-based research, literature reviews, data analysis, drafting of proposals and submissions, report writing and drafting of articles, social media content etc.

* Assisting in the management and co-ordination of events;

* Attending meetings with external groups/partners, including government, legal profession and NGOs; and

* Working as part of a team with other researchers.

Research Assistants will each be assigned to a Supervisor in their legal areas. For this round of applications, we are particularly looking to appoint in the areas of:

* Public International Law;

* Private International Law and/or Competition Law; and

* Rule of Law

New Book for Spanish-English Speaking Lawyers

Lawyers who speak both Spanish and English may be interested in a new book written by Professors S.I. Strong of the University of Missouri, Katia Fach Gómez of the University of Zaragoza and Laura Carballo Piñeiro of the University of Santiago de Compostela. *Comparative Law for Spanish-English Lawyers: Legal Cultures, Legal Terms and Legal Practices / Derecho comparado para abogados anglo- e hispanoparlantes: Culturas jurídicas, términos jurídicos y prácticas jurídicas* (Edward Elgar Publishing Ltd., 2016), is an entirely bilingual text that seeks to help those who are conversationally fluent in a second language achieve legal fluency in that language. The book, which is aimed primarily at private international and comparative lawyers, is appropriate for both group and individual study, and provides practical and doctrinal insights into a variety of English- and Spanish-speaking jurisdictions. The book is available in both hard copy and electronic form, and Elgar is currently offering a discount on website sales. See here for more information.

SAVE THE DATE: Brexit and Family Law, 27 March 2017

archa joint seminar of the Child & Family Law Quarterly and Cambridge Family Law

27 March 2017, at Trinity College, University of Cambridge

The withdrawal of the UK from the European Union will precipitate important change in the field of international family law. EU law has increasingly come to define key aspects of both jurisdiction and recognition & enforcement of judgments on divorce, maintenance, and disputes over children, including international child abduction, and provided new frameworks for cross-national cooperation. At this seminar, international experts and practitioners will discuss the impacts of 'Brexit' on family law, from a range of national and European perspectives, and reflect on the future of international family law practice in the UK.

Booking will open soon. CPD points will be available.

Please visit www.family.law.cam.ac.uk/ to join the Cambridge Family Law mailing list in order to receive an email when booking opens.