First Issue of 2012's Journal du Droit International

The first issue of French *Journal du droit international* (*Clunet*) for 2012 was just released. It contains five articles and several casenotes.
Four articles explore private international law issues.

In the first one, María Mercedes Albornoz and Jacques Foyer (both from Paris II University) compare the Interamerican Convention on the law applicable to international contracts with the Rome I Regulation (*Une relecture de la Convention interaméricaine sur la loi applicable aux contrats internationaux à la lumière du règlement « Rome I »*). The English abstract reads:

> *The substantive and formal changes undergone by the Rome Convention as a result of its transformation into a European Community Regulation have altered the terms of comparison between the Rome and Mexico systems on the law applicable to international contracts. An analytical re-reading of the Inter-American Convention in the light of the Rome I Regulation shows that even if the Rome system may continue contributing to the interpretation of the Mexico system, Rome I's introduction of new interpretive elements is limited.*

In the second article, Gian Paolo Romano (University of Geneva) wonders whether private international law fits within Emmanuel Kant's theory of justice (*Le droit international privé à l'épreuve de la théorie kantienne de la justice*).

> *Kant's legal writings are becoming increasingly popular and so is the idea that Law purports to ensure consistency of the domains of external freedom of the rational agents – in Kant's view : both individuals and States – so as to prevent or resolve conflicts, which are simultaneous and mutually incompatible claims asserted by two agents over the same domain of freedom. If it is commonly held that private international law is also centered around coordination, the Kantian account on how Law comes into existence, both at the national and international levels, suggests that what cross-border relations between private persons require is actually a twofold consistency, i.e. that of domains of external freedom of States, which freedom consists here in securing, through their national laws and adjudications, mutually consistent domains of external*

freedom of private persons which are parties to those relations. Positivism and natural law, liberty and necessity, universalism and particularism, multilateralism and unilateralism : those dualisms with which conflict of laws thinking and methodology has been grappling for some time also feature within the Kantian tradition and the way the latter manages to come to terms with them may assist the former in readjusting its paradigm. Which readjustment arguably mandates reconciling the contention that conflict of laws ultimately involves a conflict between States with the idea that conflicts between private persons are the only ones truly at stake here.

In the third article, Xavier Boucobza and Yves-Marie Serinet (both Paris Sud University) explore the consequences of a recent ruling of the Paris court of appeal on the application of human rights in international commercial arbitration (*Les principes du procès équitable dans l'arbitrage international*).

The affirmation of fundamental right to a fair hearing before the international arbitrator emerges clearly from the ruling handed down by the Paris Court of Appeals on November 17, 2011. The ruling states, in part, that arbitration decisions are not exempt from the principle according to which the right to a fair trial implies that a person may not be deprived of the concrete possibility of having a judge rule on his claims and, furthermore, that the principle of contradictory implies that all parties are in an equal position before the arbitrator. In light of of these principles, the decision taken in application of the rules of arbitration of the ICC to regard counter-claims as withdrawn because of the failure of the defendant to advance fees, constitutes an excessive measure because of the impecuniousness of the claimant.

The solution that emerges has positive implications from the point of view of the politics of arbitration. The guarantee of the right to arbitration, until now invoked in order to facilitate arbitration, has evolved into an actual duty, which is the corollary of the promotion of this form of settling claims. Ultimately, arbitration law can never be totally independent of and exempt from universally recognized fundamental principles.

Finally, Sandrine Maljean-Dubois (Centre National de la Recherche Scientifique) discusses the impact of international environmental norms on businesses (*La portée des normes du droit international de l'environnement à l'égard des*

entreprises).

> *International environmental law must reach enterprises to be effective. It nevertheless grabs hold of them only imperfectly. While enterprises are among the final addressees of international rules, its apprehension by international law is generally indirect, requiring the mediation of domestic law. It is commonplace to say that in an international society made from States enterprises are secondary actors, « non-prescribers ». Though they are thirds to interstate relations, enterprises are actively involved. And though they do not have an international or internationalized status, enterprises can all the same enjoy rights or be subjected to obligations stemming from the interstate society by means of international law. In practice, international law makes them enjoy more rights than it lays down obligations. In spite of this, regulatory constraints on enterprises are increasing. Their forms and terms are varied. Traditional, interstate sources of international law are but one of the many layers of the « normative millefeuille » gripping enterprises. Newer – rather global or transnational – sources also regulate their activities. Paradoxically, binding law (customary and conventional law) only binds weakly, since it binds mediately. On the contrary, incentive law actually manages to grab hold of and to compel enterprises, complementing more traditional rules and instruments and under pressure of citizens-consumers-unions-shareholders-investors.*