Moses on the Arbitration/Litigation Interface in Europe

Margaret Moses (Loyola University Chicago Law School) has posted Arbitration/Litigation Interface: The European Debate on SSRN.

> *Concerns over the interface between arbitration and litigation have been at the core of a debate in the European Union that has culminated in the issuance of the Recast Brussels Regulation (the "Recast"), effective January 2015. The Recast does not provide a fully transparent and predictable interface between international arbitration and cross-border litigation. Primarily, it does not prevent parallel proceedings, which occur when one party that had agreed to arbitrate nonetheless goes to court, while the other party proceeds with arbitration. These parallel proceedings undermine the effectiveness of arbitration because of the increased cost, inefficiency and delay, as well as the high risk of inconsistent judgments.*
>
> *Because of the global impact of international commercial arbitration, the significance of the European decision echoes beyond its borders. There is a need for a harmonized consensus on preventing parallel proceedings in order to promote predictability and confidence in the arbitration process. This article considers the reasons for the current European approach, the potential interpretations of the Recast's explanatory text, the problems it presents as to its expected application, and the interface between the Recast and the New York Convention.*
>
> *Although anti-suit injunctions could prevent parallel proceedings, the Court of Justice of the European Union has found that anti-suit injunctions are incompatible with the EU Brussels I Regulation (predecessor to the Recast). The Recast's regulatory regime, which governs jurisdiction of courts and recognition and enforcement of judgments in EU Member States, excludes arbitration. However, the exclusion must be viewed through the lens of an extensive explanation set forth in Recital 12 of the Recast. It is unclear how changes in the Recast, as interpreted in accordance with its explanatory Recital*

12, may impact the Court's decision.

The article concludes by proposing various means for encouraging flexible solutions to the problem of parallel proceedings and for achieving gradual harmonization.

Conference on a Lex Mediterranea of Arbitration

Lotfy Chedly (Faculty of Law of Tunis) and Filali Osman (University of Franche Comté) are hosting next week in Tunis a conference which will explore the prospect of a Lex Mediterranea of Arbitration, ie a law of arbitration common to the countries of the European Union and those surrounding the Mediterranean Sea.

The conference is the fourth of a wider project on the *Lex Mercatoria Mediterranea*, which has already generated three books (see picture).

Friday April 11

8h55– 10h45 : AXE I – INTRODUCTION A L'ARBITRAGE, SOURCES HISTORIQUES ET ARBITRAGE AU PLURIEL
Chair: Prof. Ali MEZGHANI

1- 8h55 : Rapport introductif : Pr. Lotfi CHEDLY, Faculté des sciences juridiques, politiques et sociales de Tunis.
2- 9h15 : Histoire et attentes d'une codification du droit dans les pays de la méditerranée, Pr. Rémy CABRILLAC, Faculté de droit de Montpellier.
3- 9h30 : Arbitrage conventionnel, arbitrage obligatoire, médiation, conciliation, transaction, sentence 'accord-parties', convention de procédure participative : essai de définition ? : Pr. Sylvie FERRE-ANDRÉ, Université Jean Moulin, Lyon 3.
4- 9h45 : Arbitrage v./Médiation : concurrence ou complémentarité ? : Pr. Charles JARROSSON, Université de Paris II.

5- 10h15 : L'arbitrage maritime : une lex maritima pour l'UPM : Pr. Philippe DELEBECQUE, Université Paris1, Panthéon Sorbonne.
6- 10h30 : L'arbitrage sportif : une lex sportiva pour l'UPM : Me Laurence BURGER, Avocat Perréard de Boccard.

10h45-11h45 : AXE II- PRINCIPE D'AUTONOMIE, INSTANCES JUDICIAIRES INSTANCE ARBITRALE
Chair: Pr. Mohamed Mahmoud MOHAMED SALAH

7- 10h45 : Le principe de l'autonomie de la procédure arbitrale : quelles limites à l'ingérence des juges étatiques ? : Pr. Souad BABAY YOUSSEF, Université de Carthage.
8- 11h00 : L'extension et la transmission de la clause d'arbitrage Me Nadine ABDALLAH-MARTIN, Avocat.
9- 11h45 : L'arbitrabilité des litiges des personnes publiques : entre autonomie de la volonté et prévalence du droit national prohibitif : Pr. Mathias AUDIT, Université Paris Ouest, Nanterre La Défense.

14h30-15h15 : AXE III- INSTANCES JUDICIAIRES INSTANCE ARBITRALE
Chair : Pr. Laurence RAVILLON

10- 14h30 : Les interférences des conventions relatives aux droits de l'homme avec l'arbitrage : Catherine TIRVAUDEY, Université de Franche-Comté.
11- 14h45 : Les mesures provisoires dans l'arbitrage : comparaisons méditerranéennes : Pr. Mostefa TRARI TANI, Université d'Oran.
12- 15h00 : Arbitre(s), Arbitrage(s) et procès équitable : Pr. Kalthoum MEZIOU, Faculté des sciences juridiques, politiques et sociales de Tunis

15h15 -16h00 : AXE IV- LE DROIT APPLICABLE AU FOND DU LITIGE
Chair: Pr. Rémy CABRILLAC

13- 15h15 : La lex mercatoria au XXe siècle : une analyse empirique et comportementale : Pr. Gilles CUNIBERTI, Université du Luxembourg.
14- 15h30 : Les principes UNIDROIT : Pr. Fabrizio MARRELLA, Université de Venise.
15- 15h45 : L'amiable composition : Pr. Ahmet Cemil YILDIRIM, Université de Kemerburgaz –Istanbul-.

16h00-17h00 : AXE V – QUELS PRATICIENS, QUELLE(S) INSTITUTION(S),

QUELLE(S) ÉTHIQUE(S) ? L'ARBITRAGE DANS L'UPM ?
Chair: Pr. Louis MARQUIS

16- 16h00 : L'arbitrage institutionnel dans les pays de l'UPM: l'exemple du CCAT (Centre de conciliation et d'arbitrage de Tunis): Pr. Noureddine GARA, Faculté de Droit et de sciences politiques à Tunis.
17- 16h15 : Le développement de l'arbitrage institutionnel international dans trois pays maghrébins : Pr. Ali BENCHENEB, Université de Bourgogne
18- 16h30 : Quelle(s) éthique(s) pour un arbitre méditerranéen ? : Pr. Chiara GIOVANNUCCI ORLANDI, Université de Bologne
19- 16h45 : Quelle(s) règles du jeu pour les conseils dans un arbitrage méditerranéen ? : Me Jalal EL AHDAB, Avocat Ginestié.

Saturday April 12

8h30-9h30: AXE VI- ORDRE PUBLIC INTERNATIONAL, RECONNAISSANCE, EXÉCUTION
Chair: Pr. Ferhat HORCHANI

20- 8h30 : Quel (s) ordre(s) public international dans les pays de l'UPM ? :M. Mohamed Mahmoud MOHAMED SALAH, Faculté de droit de Nouakchott (Mauritanie)
21- 8h45 : Quel (s) régimes de reconnaissance et d'exécution des sentences arbitrales dans les pays de la rive sud de la Méditerranée ? : Pr. Riyad FAKHRI, Université Hassan 1 de Settat.
22- 9h00 : L'exécution des sentences internationales annulées dans leur Etat d'origine : jurisprudence méditerranéenne, Me Abdelatif BOULALF, Avocat BOULALF & MEKKAOUI.
23- 9h15 : L'exéquatur entre la Convention de New York et les droits des pays de l'UPM, M. Ahmed OUERFELLI, Magistrat.

9h30-11h45: AXE VII- INTERNATIONALISATION, EUROPÉANISATION, MÉDITERRANISATION
Chair: PR. CHARLES JARROSSON

24- 9h30 : Internationalité de l'arbitrage : critère économique, critères juridiques, effectivité ou caractère fictif ?: Pr. Sami JERBI, Faculté de Droit de Sfax.
25- 9h45 : La contribution de la Cour de Justice de l'Union européenne à l'européanisation du droit de l'arbitrage: Pr. Cyril NOURISSAT, Université Jean-

Moulin, Lyon3.
26- 10h15 : Chari'a Islamiya et arbitrage : Pr. Fady NAMMOUR, Faculté de droit de l'Université Libanaise.
27- 10h30 : La difficile accession à l'harmonisation du droit de l'arbitrage dans les pays de la méditerranée : Me Nathalie NAJJAR, Avocat (Beyrouth, Liban)
28- 10h45 : Les travaux de la CNUDCI en matière d'arbitrage commercial international : Pr. Laurence RAVILLON, Université de Bourgogne.
29- 11h00 : L'avenir des Accords d'investissement dans une perspective méditerranéenne : Pr. M. Farhat HORCHANI, Faculté de Droit et des sciences politiques de Tunis.
30- 11h15 : L'arbitrage d'investissement, approche(s) méditerranéenne(s). : Pr. Sébastien MANCIAUX, Université de Bourgogne
31- 11h30 : Vers une lex mediterranea de l'arbitrage : le modèle québécois comme référence ? Pr. Louis MARQUIS, Université du Québec.

14h00-16h15: TABLE RONDE

Débats animés par Me Samir ANNABI et Pr. Riyad FAKHRI

- Mme le Pr. Chiara GIOVANUCCI ORLANDI,
- Me Javier ÍSCAR DE HOYOS,
- M. Badr BOULAL
- Me Sami KALLEL
- Me Monem KIOUA
- Me Sami HOUERBI,
- Me Abdelatif BOULALF
- Charles JARROSSON,
- Cyril NOURISSAT

15h30 : Propos conclusifs : Vers une lex mediterranea de l'arbitrage ? Filali OSMAN, Université de Franche-Comté

More details can be found here.

ECJ upholds National Law Precluding Intervention of Consumer Associations in Enforcement Proceedings of an Arbitration Award

By Anthi Beka, University of Luxembourg

On February 27th, 2014 the Court delivered its ruling in Case C-470/12 *Pohotovost' s.r.o. v Miroslav Vasuta*. The case forms part of the jurisprudential line of the Court on the procedural implications of the Unfair Terms Directive.

The legal issue raised was whether the important role assigned to consumer associations by the Unfair Terms Directive for the protection of consumers should be understood, in conjunction with articles 38 and 47 of the Charter, as precluding national procedural law which does not give standing to consumer associations to intervene in individual disputes involving consumers for the enforcement of a final arbitration award. The Court upholds the compatibility of Slovak procedural law. One more case is currently pending involving the same credit professional, *Pohotovost'*, on the same legal issue (Case C-153/13 *Pohotovost' s.r.o. v Jan Soroka*). In 2010 the Court had also delivered its Order in Case C-76/10 *Pohotovost' s.r.o. v Iveta Korckovska* .

Facts and questions referred

Pohotovost' applied for authorization to enforce a final arbitration award against the consumer. Its application was partially rejected, as far as the default interest and the costs on the recovery of the debt were concerned and upheld for the remaining debt. While the consumer did not appear in the proceedings, a Slovak consumer association sought leave to intervene. It claimed that the enforcement proceedings should be suspended, on grounds of lack of impartiality of the bailiff appointed by the company, but also, on the reason that the court did not properly apply its *ex officio* obligation to protect the consumer, in accordance with the

Pohotovost' Order (Case C-76/10) and the ruling in Case C-40/08 *Asturcom*. However, intervention of consumer associations at the stage of enforcement was not admissible under national procedural law. It was in this context, that the referring court asked for an interpretation of the Unfair Terms Directive in light also of articles 38 and 47 of the Charter.

The decision of the Court

Admissibility of the request

Serious doubts were raised as to whether the case was still *pending*. The company had already withdrawn its application for enforcement and appealed against the decision of the reference for preliminary ruling. The national court maintained its request and indicated that the case was still pending. The Court relied on this finding of its "*privileged interlocutor*" (Opinion AG Wahl [37]) and accepted jurisdiction. Reference to a recent Order of the Court in *BNP Paribas* (Case C-564/12) demonstrates the importance attached to the requirement of an **actual existence of a dispute**. The situation in that latter case was again very different from the Hungarian procedural system in *Cartesio* (Case C-210/06) that had been ruled incompatible with the Treaties.

Reasoning on the merits

The Court first reiterates its line of case-law on the obligation of national courts to raise *ex officio* the unfairness of contractual terms as a means to establish an effective balance between the parties and ensure the effectiveness of the protection under the Unfair Terms Directive. Particularly in the context of enforcement of an arbitration award this obligation arises in so far as the national rules of procedure confer on the courts powers to examine the incompatibility of an arbitration award with *national rules of public policy* (par. 42) (which was the case under Slovak law). With regard to the role of consumer associations for the protection of consumers, the Unfair Terms Directive requires that they are given the right to take an action for injunction against the use of unfair terms (*see* Case C-472/10 *Invitel*) (par.43). However this directive contains no provision on the role of consumer associations in individual disputes (par. 45). Thus, the question of a possible right of intervention in such disputes falls upon the national legal order of a Member State in accordance with the principle of procedural autonomy, framed nevertheless by the principles of equivalence and effectiveness

(par. 46). The Court was also asked to make an interpretation in light of articles 38 and 47 of the Charter. The reasoning followed is within the spirit of Case C-413/12 *Asociacion de Consumidores Independientes de Castilla y Leon*, where the procedural position of consumer associations was distinguished from that of individual consumers as not characterized by the same imbalance.

With respect first to **article 38 of the Charter**, the Court finds that since the Unfair Terms Directive "*does not expressly provide for a right for consumer protection associations to intervene in individual disputes involving consumers, Article 38 of the Charter cannot, by itself, impose an interpretation of that directive which would encompass such a right*" (par. 52). This part of the reasoning seems to confirm the qualification of article 38 of the Charter as a **principle** judicially cognisable under the conditions of article 52(5) Charter (Opinion AG Wahl, par.66; *see* Opinion AG Cruz Villalón Case C-176/12 *Association de médiation sociale*). As long as the Unfair Terms Directive – the legislation giving "*specific substantive and direct expression to the content of the principle*" (AG Cruz Villalón, par.63) contained in article 38 Charter – does not establish a right of intervention, such right cannot find a constitutional foundation alone in article 38 Charter.

Quid on article **47 of the Charter** on a right to effective remedy? Reliance on this right is assessed on the one hand for the consumer and on the other hand for the consumer association. As far as the consumer is concerned, the lack of an intervention right of consumer associations does not breach the right to an effective remedy "*to the extent that Directive 93/13 requires that the national court hearing disputes between consumers and sellers or suppliers take positive action unconnected with the actual parties to the contract*" (par. 53). This part of the reasoning appears to elevate the principle of an active judge to a component of effective judicial protection. Intervention of consumer associations is moreover "*not comparable to the legal aid which under Article 47 of the Charter must be made available, in certain cases, to those who lack sufficient resources*" (art. 53).

As far as the consumer association is concerned the refusal to grant it leave to intervene "*does not affect its right to an effective judicial remedy to protect its rights as an association of that kind, including its rights to collective action*" (par.54). Besides, consumer associations can acquire a procedural role in individual proceedings since under national law, they "*may directly represent consumers in any proceedings, including enforcement proceedings, if mandated*

to do so by the latter" (par. 55).

In consideration of the above the Court concludes that the Unfair Terms Directive read in conjunction with articles 38 and 47 of the Charter "*must be interpreted as not precluding national legislation which does not allow a consumer protection association to intervene in support of a consumer in proceedings for enforcement, against the latter, of a final arbitration award*".

It needs to be noted that Opinion AG Wahl drew also conclusions from the minimum harmonization character of the Unfair Terms Directive in that it would in any event not preclude Member States from providing "*supplementary action… to the court's unconnected, positive action required by that directive*" (par.72).

Athlete Trapped Between Arbitration and Courts

On February 26, 2014, the Regional Court of Munich rejected the lawsuit of the well known German speed skater Claudia Pechstein. Although the Regional Court decided that arbitration clauses for athletes are invalid because athletes are "forced" to sign them if they want to participate in sport competitions, she nonetheless dismissed the case on the merits, reasoning that the CAS award has *res judicata* effect.

A translation into English of the German press release concerning this interesting decision has been kindly provided by Franz Kaps, Research Fellow of the Max Planck Institute Luxembourg.

Press Release 03 /14

Case law of the Regional Court of Munich I in Civil Matters

No compensation for speed skater after doping suspension

In today's decision the Regional Court of Munich I (Case Number 37 O 28331/12)

rejected the suit of a well-known German speed skater. The claimant had requested the declaration that the doping suspension imposed on her was unlawful, as well as the payment of approximately € 3.5 million in damages, a reasonable compensation for personal suffering of € 400.000, and the acknowledgement to reimburse future damages. The defendants were the German (defendant 1) and the International Skating Union (defendant 2) .

The background:

In 2009 the claimant was suspended for 2 years by the Disciplinary Commission of the defendant 2, after discovering elevated reticulocyte counts in her blood. The claimant had signed with both defendants athlete's agreements in which an arbitration agreement was included. The claimant appealed to the Court of Arbitration for Sport (CAS) and the CAS confirmed the lawfulness of the suspension.

The reasoning of the court:

The appeal before the Regional Court of Munich was not prevented by the arbitration plea of the defendants based on the agreements signed by the athlete: the arbitration clauses concluded between the parties were considered to be invalid, as they had not been voluntarily accepted by the claimant. At the time of the conclusion of the arbitration agreements there was a structural imbalance between the claimant and the defendants; the latter being in a monopoly position, the claimant had no other choice than to sign the arbitration agreements – otherwise, she would not have been allowed to participate in competitions and would thus have been hampered in the exercise of her profession.

However, a decision of the court on the question whether the doping suspension was unlawful was prevented by the *res judicata* effect of the decision of the International Court of Sport (CAS). The 37th Civil Chamber of the Regional Court could not and was not allowed to determine whether the doping suspension was lawful. The *res judicata* of the arbitration award had to be recognized, as at the time of the referral to the CAS there was no structural imbalance between the parties anymore. The competition was over and in the proceeding before the CAS the claimant was represented by lawyers. The alleged errors in the composition of the arbitral tribunal or the selection of the arbitrators were not raised in the proceedings before the CAS. A correlating complaint would have been required

and reasonable. The invalidity of the arbitration agreement does therefore not preclude the recognition of the arbitral award: despite her knowledge about the lack of voluntary conclusion of the arbitration agreement, the claimant appealed to the CAS and did also not reprimand this defect. In addition, the decision by the CAS does not violate fundamental constitutional principles.

The alleged damages and pain and suffering claims were not subject in the proceedings before the CAS. To this extend the lawsuit was admissible. These claims were unfounded, because in order to determine whether such claims actually exist, it would be necessary to assess whether the doping suspension was justified, but with respect to this question the court is bound by the observations of the CAS and therefore had to assume that the suspension was lawful without any further inquiry.

(Judgment of the Regional Court of Munich I, Case Number: 37 O 28331/12; the decision is not final)

Author of the Press Release: Judge at the District Court of Munich I Dr. Stefanie Ruhwinkel – spokeswoman.

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.

French Conference on Parallel Proceedings and Decisions in International Arbitration

The students and alumni in International Law of the University Panthéon-Assas

will organize a conference on Parallel Proceedings and Contradictory Decisions in International Arbitration on March 21st, 2014 in the premises of the International Chamber of Commerce in Paris.

The morning will be dedicated to Investment Arbitration. The afternoon will focus on Commercial Arbitration and International Private Law. Speeches will be in French.

This event is organized by three students associations of the masters' degree in International Private Law and International Business Law, International (Droit International Privé et Droit du Commerce International), in International Relations and Trade Law (Droit des Relations Economiques Internationales) and of the Institut des Hautes Etudes Internationales of the University Panthéon-Assas, in collaboration with two research centers, namely the Centre de Recherche de Droit International (CRDI) and l'Institut des Hautes Etudes Internationales (IHEI).

Matinée : Droit des Investissements (9h45-12h30)

– Développement des procédures parallèles et facteurs de désordres procéduraux en arbitrage d'investissement: Walid BEN HAMIDA (Université d'Evry Val-Essonne)

– La contrariété de décisions en arbitrage d'investissement, risques et conséquences: Fernando MANTILLA SERRANO (Shearman & Sterling LLP Paris)

– Retour sur la pertinence de la distinction « contract claims » et « treaty claims » : Ibrahim FADLALLAH (Université Paris-Ouest Nanterre la Défense)

– Procédures Parallèles : aspects procéduraux et solutions institutionnelles : Eloïse OBADIA (Derains & Gharavi Washington D.C.)

– La concurrence des instances arbitrales : que disent les principes du contentieux international ? Yves NOUVEL (Université Panthéon-Assas)

Après-midi : Arbitrage Commercial International

– Propos introductifs : M. Philippe LEBOULANGER (Leboulanger & Associés)

– La prévention des contrariétés de décisions arbitrale et étatique : Claire DEBOURG (Université Paris-Ouest Nanterre la Défense)

– De l'utilisation des « anti-suit injunctions » par le juge et l'arbitre : Jacob GRIERSON (McDermott Will & Emery Londres et Paris)

– L'exclusion de l'arbitrage dans le Règlement Bruxelles I refondu : Laurence USUNIER (Université Paris XIII Nord)

– Les contrariétés de décisions dans le contrôle des sentences arbitrales : Sylvain BOLLEE (Université Paris 1)

– Une illustration récente : l'affaire Planor Afrique : Alexandre REYNAUD (Betto Seraglini)

– Les procédures parallèles dans le règlement d'arbitrage et de médiation de la Chambre de Commerce Internationale : Thomas GRANIER (Cour internationale d'arbitrage de la CCI)

– Un remède, la concentration du contentieux devant l'arbitre (extension et transmission de la convention d'arbitrage) : Jean-Pierre ANCEL (Président de chambre honoraire à la Cour de cassation)

– Propos conclusifs : Daniel COHEN (Université Panthéon-Assas)

Venue : ICC, 33/43, Avenue du Président Wilson, 75116 Paris

Admission is free. Registration is possible by sending an email at : elise.grandgeorge@u-paris2.fr , message in which you should indicate your presence for the morning, the afternoon or the day and your name and phone number.

LSE/PILAGG Conference on the Idea of Arbitration

On 13 February, the London School of Economics and Sciences Po PILAGG will host a common conference in London at the occasion of the publication of *The Idea of Arbitration* (OUP 2013) by **Jan Paulsson** (U Miami / LSE)

Debating Jan Paulsson's Idea of Arbitration

5:40 pm Welcome

5:50 pm Panel 1
Should arbitrators be allowed to apply the law and decide issues of public policy? Discussants: **Horatia Muir Watt** (Science Po) and **Jan Kleinheisterkamp** (LSE)

6:40 pm Panel 2
Jurisdictional contests: Who decides them? When? And with what degree of finality? Discussants: **Bernard Rix** (20 Essex Street) and **Charles Poncet** (CMS); moderator: **Tariq Baloch** (3VB)

7:30 pm Panel 3
Images in a Crystal Ball Discussants: **VV Veeder** (Essex Court Chambers) and **Derek Roebuck** (IALS); moderator: **Catherine Rogers** (U Penn)

8:20 – 8:30 – Closing remarks by Jan Paulsson

To register, please email to Law.TL.Project@lse.ac.uk

ERA / MPI Conference on Arbitration and EU Law

The Academy of European Law (ERA) and the Max Planck Institute Luxembourg will co-organize a conference on Arbitration and EU Law in Trier, Germany, on March 10 and 11, 2014.

Monday, 10 March 2014

I. AFTER THE RECAST OF BRUSSELS I
Moderator: *Stefania Bariatti*

09:30 Consequences and interpretation of the arbitration exception

10:00 *West Tankers*, antisuit injunctions and beyond: recent developments and latest case law
Alexander Layton

10:30-11:00 Discussion

11:30 Brussels I and the New York Convention: recognition and enforcement of judgments and awards
Catherine Kessedjian

12:00 Discussion

Moderator: *Catherine Kessedjian*

12:15-13:00 Panel discussion: How to ensure the effective coordination of judicial and arbitration proceedings?
• *Massimo Benedettelli*
• *Alexander Layton*

II. THE CROSS-OVER BETWEEN INSOLVENCY AND ARBITRATION
Moderator: Burkhard Hess

14:00 Effects of insolvency in arbitral proceedings taking into account the Insolvency Regulation and the proposals for its review
Stefania Bariatti

14:30 Effects of foreign insolvency on arbitration seated in Switzerland
Martin Bernet

15:00-15:30 Discussion

III. PROCEDURE, MINIMUM STANDARDS AND HUMAN RIGHTS

16:00 Innovative systems for dispute resolution in sport – and in other areas?
Dirk-Reiner Martens

16:30 Procedural minimum standards and the applicability of Article 6 ECHR in arbitration
Massimo Benedettelli

17:00-17:30 Discussion

Tuesday, 11 March 2014

IV. INVESTMENT ARBITRATION
Moderator: *Alexander Layton*

09:30 Compatibility of bilateral investment treaties (BITs) with EU law
Luca Radicati di Brozolo

10:00 Investment arbitration under extra-EU BITs
Patricia Nacimiento

10:30-11:00 Discussion

Moderator: *Luca Radicati di Brozolo*

11:30 Recent developments in investment arbitration
Maxi Scherer

12:00 Discussion

12:15 Panel discussion: Challenges and opportunities for investment arbitration
• *Patricia Nacimiento*
• *Maxi Scherer*

13:00 Lunch and end of the conference

Collective Arbitration (by Stacie I. Strong)

It is my pleasure to announce the publication of two works of Professor Stacie I. Strong, Associate Professor of Law, Senior Fellow, Center for the Study of Dispute Resolution, University of Missouri.

Class, Mass, and Collective Arbitration in National and International Law, has just been published by Oxford University Press. The book considers class, mass and collective arbitration as a matter of domestic and international law, providing arbitrators, advocates and scholars with the tools they need to evaluate these sorts of procedural mechanisms. The discussion covers the best-known decisions in the field – Stolt-Nielsen S.A. v. AnimalFeeds International Corp. and AT&T Mobility LLC v. Concepcion from the U.S. Supreme Court as well as Abaclat v. Argentine Republic from the world of investment arbitration – while also considering specialized rules on large-scale arbitration promulgated by the American Arbitration Association (AAA), JAMS and the German Institution of Arbitration (DIS). The text introduces dozens of previously undiscussed judicial opinions and covers issues ranging from contractual (or treaty-based) silence and waiver to regulatory concerns and matters of enforcement. The entire timeline of class, mass and collective arbitration is covered, beginning with the devices' historical origins and continuing through the present and into the future. Lawyers in a wide variety of jurisdictions will benefit from the material contained in this text, which is the first full-length monograph to address large-scale arbitration as a matter of national and international law.

The second work is an article entitled *Collective Consumer Arbitration in Spain: A Civil Law Response to U.S.-Style Class Arbitration*, published in 30 *Journal of International Arbitration* 495 (2013). Prof. Strong analyses the Spanish approach, which establishes a statutory form of large-scale arbitration that arises in the post-dispute context. According to the author, because this mechanism is built largely on express rather than implied consent, it could act as a model for reformers in other jurisdictions. In particular, it could provide an answer to the

various problems that are anticipated to develop in the United States following the recent Supreme Court decisions in Oxford Health Plans LLC v. Sutter and American Express Co. v. Italian Colors Restaurants.

Niedermaier on Arbitration and Arbitration Agreements Between Parties of Unequal Bargaining Power

Tilman Niedermaier, LL.M. (University of Chicago) has authored a book on "Arbitration Agreements and Agreements on Arbitral Procedure Between Parties of Unequal Bargaining Power. A Comparison of German and U.S. Law With Consideration of Further Legal Systems." (Originial German title: "Schieds- und Schiedsverfahrensvereinbarungen in strukturellen Ungleichgewichtslagen. Ein deutsch-U.S.-amerikanischer Rechtsvergleich mit Schlaglichtern auf weitere Rechtsordnungen").

The book is in German. The official English abstract reads as follows:

> *The German Arbitration Law of 1998 is particularly intended to meet the requirements of international commerce. One characteristic of international commercial disputes is a balance of power between the parties. However, structural imbalances between parties do occur not only in domestic and non-commercial disputes. In the recent years, issues raised by such imbalances in arbitration have received increasing attention in case law and legal scholarship in the United States.*
>
> *Tilman Niedermaier compares the law in Germany and the United States. Taking into account recent developments in EU law, he assesses to what extent the interests of parties with unequal bargaining power in arbitration can be safeguarded under German law.*

More information is available on the publishers website.