Two New Papers on Business and Human Rights

A short piece on two recently released papers, both accessible in pdf format (first one in Spanish, second in English). Just click on the title.

I reproduce the abstracts by the authors.

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Sustainable Development and Multinational Enterprises: A Study of Land Grabbings from a Responsibility Viewpoint

> The international community has adopted sustainable development as one of its priority issues. Multinational corporations can however interfere or render it impossible through land grabbings, a complex phenomenon because on many occasions they reach a prominent role that can be seen, among their different appearances, as a real pathology of the above mentioned development.
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> After having been previously scrutinized with relation to a comment on the case Mubende-Neuman I entertain no doubt at all that such grabbings more often than not turn out to be diametrically opposed to the various targets that outline sustainable development, as have already been revealed, for instance, by Secretary General of the United Nations Ban Ki- Moon, along his consolidated report over the agenda in this regard after 2015.
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> I propose in here, then, after an **Introductory Section,** a presentation of the problem following recent cases, showing different conflict situations in selected sectors, **Section 2,** and others under which collective efforts have achieved or are in the process of attaining remedies in terms of justice, **Section 3.** I will put an end to my survey with some final reflections, **Section 4,** within which **I** will raise the relevant activity carried out by the human rights defenders, in this particular case deeply rooted in the communities and the land where they live and the great credit that deserves to us their continued and brave fight all around the world.

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Can arbitration become the preferred grievance mechanism in conflicts related to business and human rights?

International law demands that States provide victims of human rights violations with a right to remedy, also in the case of violations of human rights by legal entities. International law also provides some indications as to how State and non-State based dispute resolution mechanisms should be like, in order to fulfil the human rights standards of the right to remedy. Dispute resolution mechanisms of an initially commercial nature, such as arbitration or mediation, could become very useful grievance mechanisms to provide redress for victims of human rights abuses committed by multinational corporations. Still, there are problems to be solved, such as obtaining consent from the parties involved in the arbitration process. Such consent may be obtained by imitating other dispute resolution mechanisms such as ICSID arbitration.

First Issue of 2015'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 2015 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features three articles, two comments, and three reports.

Sergio M. Carbone, Professor Emeritus at the University of Genoa and *Chiara E. Tuo*, Associate Professor at the University of Genoa, examine the issue of third-

state defendants and the revised Brussels I Regulation in **“Non-EU States and Brussels I: New Rules and Some Solutions for Old Problems”** (in English).

> *The central purpose of this article is to critically assess the changes brought about by the new Brussels I Regulation as regards its scope of application vis-à-vis disputes connected with non-EU countries. Therefore, following an initial outline of the relevant amendments in the Recast, a critical evaluation of the latter against the background of both the ECJ case-law and national practice is presented. The reform is then assessed in the context of the original 2010 recast proposal presented by the EU Commission as well as of the views expressed in literature in relation thereto. The paper maintains that the Recast regime should undergo further revision with a view to implementing cross-border business transactions in the global economy and to satisfying the concomitant demand for greater certainty in international commercial litigation.*

Stefania Bariatti, Professor at the University of Milan, analyses the compatibility of recent Italian legislation aimed at the efficiency of the judiciary with the Brussels I and the Brussels Ia Regulations in **“I nuovi criteri di competenza per le società estere e la loro incidenza sull’applicazione dei regolamenti europei n. 44/2001 e n. 1215/2012”** (The New Jurisdiction Criteria for Foreign Companies and Their Impact on the Application of EU Regulations No 44/2001 and No 1215/2012; in Italian).

> *Since 2012, the Italian legislature has adopted several statutes aimed at reducing the costs and enhancing the efficiency of the judiciary also through the reduction of the number of courts competent to hear cases where one of the parties is a company having its seat abroad. The latest version of such provisions has been adopted with Decree-Law No 145 of 2013 that centralises these cases at eleven courts. This approach has been taken by other Member States in several fields, mainly invoking the goal of increasing consistency and uniformity of judgments and the specialization of judges to the benefit of all parties. These provisions raise significant questions of compliance with the principles enshrined in the Constitution and they do not seem to attain the goal of uniformity since they provide a double track for purely internal vs cross-border cases. But they appear to be also contrary to some provisions of the Brussels Ia Regulation, in particular where the Regulation directly designates*

the competent court within a Member State. Hence the question of whether EU law establishes any limits to the power of the Member States to determine the territorial extension of the competence of national courts. The Court of Justice has provided some guidance on these issues in Sanders and Bradbrooke, where the protection of a maintenance creditor and of a minor were at stake. According to the Court, national legislatures should assure the effet utile of EU provisions, while at the same time ensure effective proceedings in cross-border situations, preserve the interests of the weaker party and promote the proper administration of justice. Within the "Brussels I system" such guidance may apply in cases where the position of the parties is unbalanced and the Regulation provides special fora in favour of the weaker party that are based upon proximity. Yet, one may ask whether the solution may differ according to the subject matter of the dispute. Moreover, the fact that the Italian legislature has declared that the fora established under Decree-Law No 145 of 2013 may not be derogated raises the further issue of their compatibility with Article 25 of the Brussels Ia Regulation.

Alfonso-Luis Calvo Caravaca, Professor at the University Carlo III of Madrid and *Javier Carrascosa González*, Professor at the University of Murcia, provide an assessment of interim and provisional measures under the Brussels Ia Regulation in **"Medidas provisionales y cautelares y reglamento Bruselas I-bis"** (Interim and Provisional Measures and the Brussels Ia Regulation; in Spanish).

This paper addresses the impact of Council Regulation No 1215/2012 on provisional and protective measures in civil and commercial matters. The paper shows that this Regulation definitively enhances the recognition and enforcement of those measures in the European Union. Provisional and protective measures attempt to reduce the risks of litigation when the debtor tries to hide or sell his assets, which is relatively easy in a globalized international society where free movement of goods and capitals is assured. Hence, Art 42(2) of Regulation No 1215/2012 provides that enforcement in a Member State of a judgment given in another Member State ordering a provisional or protective measure is possible only if the applicant provides the competent authority proof of service of the judgment ordering that provisional measure, in the case that provisional or protective measure was ordered without the defendant being summoned to appear. The new Regulation gives those measures wider possibilities of recognition and enforcement in the EU

even if they were adopted inaudita parte debitoris.

In addition to the foregoing, two comments are featured:

Francesca Capotorti, PhD candidate at the University of Milan, **"La nuova direttiva sul riconoscimento delle qualifiche professionali tra liberalizzazione e trasparenza"** (The New Directive on the Recognition of Professional Qualifications between Deregulation and Transparency; in Italian).

This article focuses on the most innovative features of Directive 2013/55/EU amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012. After having outlined the path that led to the adoption of the Directive and showed the need to modernise Union law in this area, this article analyses a) the European Professional Card; b) partial access; c) professional traineeship; d) common training principles; and e) the further most important revisions of Directive 2005/36/EC aiming at promoting the free movement of professionals. This paper also addresses the novelties introduced by Directive 2013/55/EU to ensure consumer protection and to increase transparency and administrative cooperation. Finally, this article shows that in most cases the European Court of Justice anticipated the results of the new Directive. Still, a Directive is deemed as necessary to clearly and completely regulate the efforts of modernisation in this area, which hopefully will be shared by the European Commission and Member States.

Petr Dobiáš, Senior fellow at the Charles University in Prague, **"The New Czech Private International Law"** (in English).

The new Act No 91/2012 Coll. on Private International Law was adopted in the Czech Republic on 25 January 2012 and came into force on 1 January 2014. The Act on Private International Law, which takes into consideration the developments in Czech, European and international legislation, was also created with the aim of removing deficiencies and obsolete elements of legislation contained in Act No 97/1963 Coll. on Private and Procedural International Law. In terms of its internal structure, the Act on Private International Law is divided into a total of nine parts which regulate the content of private international law and procedural international law. This article presents and analyses this new legislation, taking into consideration the

provisions of the relevant international conventions and secondary law of the European Union. Indeed, the new Act on Private International Law is a response to the new trends in private international law that stem as a result of the current and ongoing developments in international economic relations and in social relationships. As a result of such developments, further flexibility is asked of the domestic provisions of private international law, which must take into account the development of EU Regulations in this area of the law. As this article illustrates, the response to this demand is reflected in several of the provisions laid down in the Act on Private International Law, which emphasize the primacy of EU Regulations and international conventions.

Finally, this issue of the *Rivista di diritto internazionale privato e processuale* features three reports; one on restitution of cultural objects and two on recent German case-law on private international and procedural issues:

Sebastian Seeger, Assistant at the University of Heidelberg, **"Restitution of Nazi-Looted Art in International Law. Some Thoughts on *Marei von Saher v. Norton Simon Museum of Art at Pasadena*"** (in English).

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.

Intellectual Property in International and European Law (call for papers)

Utrecht Journal of International and European Law is issuing a Call for Papers for its upcoming Special Issue (82nd edition) on 'Intellectual Property in International and European Law'. With technological advancement and innovative practices occurring ever more frequently, individuals and undertakings often turn to intellectual property law to protect their ideas and seek remedies where appropriate (e.g. the recent *Apple v Samsung* design dispute). Recent developments in intellectual property are now a regular feature in popular media and a much-discussed topic amongst the general public. As such, the Utrecht Journal will be dedicating its 2016 Special Issue to 'Intellectual Property in International and European Law'.

The Board of Editors invites submissions addressing legal issues relating to intellectual property law from an international or European law perspective. Topics may include, but are not limited to: the influence of patenting on the competitive process; the use of IP holding companies to take advantage of favourable tax regimes; patent-trolls; copyright infringements; trademark protection; the ethics of IP (e.g. GMOs), etc. All types of manuscripts, from socio-legal to legal-technical to comparative will be considered. However, please note that any analysis solely limited to a national legal system will fall outside the scope of the Journal. An international or European legal dimension is imperative.

The Board of Editors will select articles based on quality of research and writing, diversity and relevance of topic. The novelty of the academic contribution is also an essential requirement. Prospective articles should be submitted online via the Journal's website (www.utrechtjournal.org/about/submissions) and should conform to the Journal style guide. Utrecht Journal has a word limit of 15,000 words including footnotes. For further information please consult our website or email the Editor-in-Chief at utrechtjournal@urios.org.

Deadline for submissions: **15 October 2015**

International Labour Law (paper)

A new working paper of Veerle Van Den Eeckhout on international labour law has been published on SSRN, entitled “The “Right” Way to Go in International Labour Law – and Beyond.”

The abstract reads as follows: The path to follow in (cases of) International Labour Law should be trodden with caution. In this paper, the author highlights several points of attention and issues in the current debate of international labour law. The author also positions some of the issues that are currently being raised in international labour law in similar and broader debates about future developments in Private International Law.

The paper is the written version of a contribution to the expert-meeting “Where do I belong? EU law and adjudication on the link between individuals and Member States”, organized in Antwerp on 7-8 May 2015.

Out Now: Calliess (ed.), Rome Regulations, 2nd ed. 2015

The second edition of “Rome Regulations: Commentary on the European Rules of the Conflict of Laws”, edited by *Gralf-Peter Calliess* (Chair for Private Law, Private International Law, International Business Law and Legal Theory, University of Bremen), has just been published by Wolters Kluwer (1016 pp, 250 €). The second edition provides a systematic and profound article-by-article commentary on the Rome I, II and III Regulations. It has been extensively updated and rewritten to take account of recent legal developments and jurisprudence in the field of determining the law applicable to contractual (Rome I) and non-contractual (Rome II) obligations. It also contains a completely new commentary

on the Rome III Regulation regarding the law applicable to divorce and separation. The aim of the book is to provide expert guidance from a team of leading German, Austrian and Swiss private international law scholars to judges, lawyers, and practitioners throughout Europe and beyond.

In her review of the first edition, my dear fellow conflictoflaws.net co-editor *Giesela Rühl* complained about a lack of diversity, pointing out that the circle of authors consisted exclusively of younger, male scholars (RabelsZ 77 [2013], p. 413, 415 in fn. 6). Well, not only have we male authors grown older since then; we now have quite a number of distinguished female colleagues on board, too: *Susanne Augenhofer*, *Katharina de la Durantaye*, *Kathrin Kroll-Ludwigs*, *Eva Lein* and *Marianne Roth*. For further details, see here.

"This book does what it promises, which is to provide judges and practitioners with easy access to the contents and interpretation of provisions of the Rome I and II Regulations. The thoroughness of the commentaries on most of the provisions also makes it a recommended read for scholars needing a quick orientation regarding several provisions, or wanting to make sure they have not missed out on important background information. A welcome addition to the various topic-based treatises regarding Rome I and II Regulations, the book has succeeded in its goal of furthering the valuable German tradition in terms of the European discourse." (*Xandra Kramer*, review of the first edition, Common Market L. Rev. 2014, p. 335, 337)

ArbitralWomen/TDM Special Issue and Event on Diversity in International Arbitration

ArbitralWomen, Transnational Dispute Management and Ashurst are hosting an event in London on 2 July 2015 for the launch of the TDM Special Issue on "Dealing with Diversity in International Arbitration." The event will be followed by

a drinks reception.

This Special Issue will analyse discrimination and diversity in international arbitration. It will examine new trends, developments, and challenges in the use of practitioners from different geographical, ethnic/racial, religious backgrounds as well as of different genders in international arbitration, whether as counsel or tribunal members. The launch of the Special Issue will be followed by the launch of the AW New Website.

Download the brochure here.

OGEL and TDM Special Issue: Focus on Renewable Energy Disputes

With renewable energy disputes seemingly everywhere these days, OGEL and TDM have published a special joint issue focusing on these disputes at the level of international, European and national law. Below is the table of contents:

> *Introduction – Renewable Energy Disputes in the Europe and beyond: An Overview of Current Cases*, by K. Talus, University of Eastern Finland
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> *Renewable Energy Disputes in the World Trade Organizatio*n, by R. Leal-Arcas, Queen Mary University of London, and A. Filis
>
> *Aggressive Legalism: China's Proactive Role in Renewable Energy Trade Disputes?*, by C. Wu, Academia Sinica, and K. Yang, Soochow University (Taipei)
>
> *Mapping Emerging Countries' Role in Renewable Energy Trade Disputes*, by B. Olmos Giupponi, University of Stirling
>
> *Green Energy Programs and the WTO Agreement on Subsidies and*

Countervailing Measures: A Good FIT?, by D.P. Steger, University of Ottawa, Faculty of Law

EU's Renewable Energy Directive saved by GATT Art. XX?, by J. Grigorova, Paris 1 Pantheon Sorbonne University

Retroactive Reduction of Support for Renewable Energy and Investment Treaty Protection from the Perspective of Shareholders and Lenders, by A. Reuter, GÖRG Partnerschaft von Rechtsanwälten

Renewable Energy Disputes Before International Economic Tribunals: A Case for Institutional 'Greening'?, by A. Kent, University of East Anglia

Renewable Energy Claims under the Energy Charter Treaty: An Overview, by J.M. Tirado, Winston & Strawn LLP

Non-Pecuniary Remedies Under the Energy Charter Treaty, by A. De Luca, Università Commerciale Luigi Bocconi

Joined Cases C-204/12 to C-208/12, Essent Belgium, by H. Bjørnebye, University of Oslo, Faculty of Law

Ålands Vindkraft AB v Energimyndigheten – The Free Movement Law Perspective, by S.L. Penttinen, UEF Law School, University of Eastern Finland

Recent Renewables Litigation in the UK: Some Interesting Cases, by A. Johnston, Faculty of Law, University College (Oxford)

The Rise and Fall of the Italian Scheme of Support for Renewable Energy From Photovoltaic Plants, by Z. Brocka Balbi

The Italian Photovoltaic sector in two practical cases: how to create an unfavorable investment climate in Renewables, by S.F. Massari, Università degli Studi di Bologna

Renewable Energy and Arbitration in Brazil: Some Topics, by E. Silva da Silva, CCRD-CAM / Brazil-Canada Chamber of Commerce, and N. Sosa Rebelo, Norte Rebelo Law Firm

Renewable Energy in the EU, the Energy Charter Treaty, and Italy's

Withdrawal Therefrom, by A. De Luca, Università Commerciale Luigi Bocconi

Excerpts of these articles are available here and here

New German Festschriften on private international law

A voluminous *Festschrift* in honour of Gerhard Wegen has recently been published: Christian Cascante, Andreas Spahlinger and Stephan Wilske (eds.), Global Wisdom on Business Transactions, International Law and Dispute Resolution, Festschrift für Gerhard Wegen zum 65. Geburtstag, Munich (CH Beck) 2015; XIII, 864 pp., 199 €. Gerhard Wegen is not only one of the leading German M & A lawyers and an internationally renowned expert on commercial arbitration, but also a honorary professor of international business law at the University of Tübingen (Germany) and a co-editor of a highly successful commentary on the German Civil Code (including private international law). This *liber amicorum* contains contributions both in English and in German on topics related to international business law, private international and comparative law as well as various aspects of international dispute resolution. For conflictoflaws.net readers, contributions on *Unamar* and mandatory rules (Gunther Kühne, p. 451), international labour law (Stefan Lingemann and Eva Maria Schweitzer, p. 463), problems of characterization in international insolvency law (Andreas Spahlinger, p. 527) and marital property law in German-French relations (Gerd Weinreich, p. 557) may be of particular interest. Moreover, a large number of articles is devoted to international commercial arbitration (pp. 569 et seqq.). For the full table of contents, see here.

Another recent *Festschrift* has been published in honour of Wulf-Henning Roth, professor emeritus at the University of Bonn: Thomas Ackermann/Johannes Köndgen (eds.), Privat- und Wirtschaftsrecht in Europa, Festschrift für Wulf-Henning Roth zum 70. Geburtstag, Munich (CH Beck) 2015; XIV, 744 pp., 199 €.

Although Roth is generally recognized as one of the leading German conflicts scholars of his generation, this *liber amicorum* is focused mainly on substantive private and economic law, both from a German and a European perspective. Nevertheless, readers interested in choice of law may discover some gems that deserve close attention: Wolfgang Ernst deals with English judge-made case-law as the applicable foreign law (p. 83), Johannes Fetsch analyses Article 83(4) of the EU Succession Regulation (p. 107), Peter Mankowski looks at choice-of-law agreements in consumer contracts (p. 361), Heinz-Peter Mansel publishes a pioneering study on mandatory rules in international property law (p. 375), and Oliver Remien presents a survey on the application of the law of other Member States in the EU (p. 431). For the full table of contents, see here.

New Edition of the Séminaire de Droit Comparé et Européen, Urbino

The summer Séminaire de Droit Comparé et Européen is a common venture of Italian and French jurists taking place in Urbino (Italy) since 1959 – this edition makes therefore the number 57. The underlying idea is to provide for a place and time for the gathering of jurists, mainly, but not only, from European countries, and thus contribute to the development of knowledge of Comparative, International (both public and private) and European law.

This year's seminar will be held in August, 17th to 29th, counting with speakers from various countries and institutions, among which Prof. M.E. Ancel, C. Nourissat, A. Giussani, A.R. Markus, L. Mari or I. Pretelli. Practitioners -lawyers, mediators, arbitrators and notaries- are also involved. Presentations may be in French, English or Italian; a summarized translation may be asked for.

The whole program as well as email addresses for further information is downloadable here.

Interlocutory Injunction Upheld Against Non-Party (Google Inc.)

The British Columbia Court of Appeal has upheld an interlocutory injunction made against Google Inc., a non-party, in litigation between Equustek Solutions Inc. and Datalink Technologies Gateways Inc. The decision is available here.

The plaintiffs alleged that the defendants had counterfeited their product. In an effort to prevent the defendants from selling the counterfeit product, which was being done over the internet, the plaintiffs sought and obtained an interlocutory injunction against Google Inc., a Delaware corporation based in California, ordering it to exclude a list of certain web sites from search results. The aim was to stop customers from finding the defendants. Google Inc. appealed the injunction on several grounds.

The court concluded that it had *in personam* jurisdiction over Google Inc. because it conducted business in the province: it advertised to residents of British Columbia and it actively obtained data for use in its search engines in British Columbia. It held that the fact that Google Inc. was a non-party did not prevent the making of the injunction as against it. It also held that the fact that the injunction had extraterritorial effects, requiring Google Inc. to take steps outside British Columbia, was not a valid objection. On these issues the court reviewed several leading United Kingdom cases, including *The Siskina*, *Channel Tunnel Group* and *South Carolina Insurance*. It also commented favourably on the recent decision in *Cartier International AG v British Sky Broadcasting Limited*, [2014] EWHC 3354 (Ch.). Key Canadian authorities relied on include *MacMillan Bloedel*, *BMWE* and *Minera Aquiline Argentina*.

The decision is likely to be important on the question of what it means to carry on

business over the internet.