TDM Call for Papers: Special Issue on Africa

TDM is pleased to announce a forthcoming special issue on international arbitration involving commercial and investment disputes in Africa.

Africa's accelerating economic development is attracting a substantial increase in cross-border commerce, trade, and investment on the continent, and disputes arising from this increased economic activity are inevitably bound to follow. International arbitration will be the preferred method for resolving many of these disputes. Indeed, the growing focus on international arbitration to resolve commercial and investment disputes relating to Africa is reflected, among other ways, in the fact that the International Council on Commercial Arbitration (ICCA) will be holding its 22nd Congress for the first time in Africa in May 2016 in Mauritius.

To a great extent, the issues that arise in international arbitration in or relating to Africa will be no different than those that arise in arbitrations around the globe. Converging international arbitration procedures and the predictability and stability afforded by the New York Convention and Washington Convention help to ensure that this is the case. Yet party autonomy remains a core value of the international arbitral system, and, as such, regional approaches and local culture will continue to shape African-related arbitrations to a degree, just as they do elsewhere. Africa's rapid development is also likely to play a role in shaping international arbitration in this region.

This special issue will explore topics of particular interest and relevance to international arbitration in light of Africa's unique and evolving situation. The issue will focus on sub-Saharan Africa and will address issues pertaining to both commercial and investment arbitration. It will also likely explore alternative methods for resolving disputes, including litigation, mediation, and local dispute-resolution mechanisms.

Possible topics for submission to the special issue might include:

* The proliferation of international arbitral institutions in Africa and what the future holds for institutional arbitration on the African continent;

* The attitudes of African states and state-owned enterprises towards international commercial arbitration;

* Salient issues in the OHADA international arbitration framework;

* The influence of China and other Asian countries on international arbitration in Africa;

* Issues in enforcing arbitral awards in African states;

* Evolving attitudes in Africa towards bilateral investment treaties (BITs) and the extent to which BITs are (or are not) helping African states attract foreign direct investment;

* South Africa's draft investment law and other notable country-specific developments in Africa;

* Cultural issues impacting international arbitration in Africa;

* Empirical studies relating to international arbitration in Africa;

* Capacity building for arbitrators, judges, and practitioners in the region; and

* Alternative methods of resolving cross-border commercial and investment disputes in Africa.

We invite all those with an interest in the subject to contribute articles or notes on one of the above topics or any other relevant issue.

This special issue will be edited by Thomas R. Snider (Greenberg Traurig LLP), Professor Won Kidane (Seattle University Law School and the Addis Transnational Law Group), and Perry S. Bechky (International Trade & Investment Law PLLC).

Please address all questions and proposals to the editors at SniderT@gtlaw.com, kidanew@seattleu.edu, and pbechky@iti-law.com, copied to info@transnational-dispute-management.com.

Commercial Choice of Law in Context: Looking Beyond Rome (article)

A new article by Dr. Manuel Penadés Fons, London School of Economics, has been published at the Modern Law Review, (2015) 78(2) MLR 241–295.

Abstract

English courts are frequently criticised for their flexible approach to the finding of implied choice and the use of the escape clause in the context of the Rome I Regulation/Convention on the law applicable to contractual obligations. This paper argues that such criticism is misplaced. Based on empirical evidence, the article shows that those choice of law decisions are directly influenced by their procedural context and respond to the need to balance the multiple policy issues generated by international commercial litigation. In particular, English decisions need to be assessed in light of three distinct factors: the standard of proof required at different stages of the procedure in England, the national policy to promote England as a center for commercial dispute resolution and the incentives to export English law in certain strategic industries. The use of implied choice and the escape clause to achieve these ends constitutes a legitimate practice that does not frustrate the aims of the EU choice of law regime.

Coming soon: Yearbook of Private International Law Vol. XVI

(2014/2015)

This year's volume of the Yearbook of Private International Law is just about to be released. The Yearbook is edited by Professors Andrea Bonomi (Lausanne) and Gian Paolo Romano (Geneva) and published in association with the Swiss Institute of Comparative Law. This year's edition is the first volume to be published by Otto Schmidt (Cologne), ISBN 978-3-504-08004-4. It is 588 pages strong and costs 189,00 €. For further information, please click here.

The new volume contains the following contributions:

Doctrine
Linda J. SILBERMAN
Daimler AG v. Bauman: A New Era for Judicial Jurisdiction in the United States
Rui Manuel MOURA RAMOS
The New Portuguese Arbitration Act (Law No. 63/2011 of 14 December on Voluntary Arbitration)
Francisco GARCIMARTÍN
Provisional and Protective Measures in the Brussels I Regulation Recast
Martin ILLMER
The Revised Brussels I Regulation and Arbitration – A Missed Opportunity?
Ornella FERACI
Party Autonomy and Conflict of Jurisdictions in the EU Private International Law on Family and Succession Matters
Gian Paolo ROMANO
Conflicts between Parents and between Legal Orders in Respect of Parental Responsibility

Special Jurisdiction under the Brussels I-*bis* Regulation
Thomas KADNER GRAZIANO
Jurisdiction under Article 7 no. 1 of the Recast Brussels I Regulation: Disconnecting the Procedural Place of Performance from its Counterpart in Substantive Law. An Analysis of the Case Law of the ECJ and Proposals *de lege lata* and *de lege ferenda*
Michel REYMOND
Jurisdiction under Article 7 no. 1 of the Recast Brussels I Regulation: The Case of Contracts for the Supply of Software

Jan VON HEIN
Protecting Victims of Cross-Border Torts under Article 7 No. 2 Brussels I*bis*: Towards a more Differentiated and Balanced Approach

Surrogacy across State Lines: Challenges and Responses
Marion MEILHAC-PERRI
National Regulation and Cross-Border Surrogacy in France
Konstantinos ROKAS
National Regulation and Cross-Border Surrogacy in European Union Countries and Possible Solutions for Problematic Situations
Michael WELLS-GRECO / Henry DAWSON
Inter-Country Surrogacy and Public Policy: Lessons from the European Court of Human Rights

Uniform Private International Law in Context
Apostolos ANTHIMOS
Recognition and Enforcement of Foreign Judgments in Greece under the Brussels I-*bis* Regulation
Annelies NACHTERGAELE
Harmonization of Private International Law in the Southern African Development Community

News from Brussels
Michael BOGDAN
Some Reflections on the Scope of Application of the EU Regulation No 606/2013 on Mutual Recognition of Protection Measures in Civil Matters

National Reports
Diego P. FERNANDEZ ARROYO
A New Autonomous Dimension for the Argentinian Private International Law System
Maja KOSTIC-MANDIC
The New Private International Law Act of Montenegro
Claudia LUGO HOLMQUIST / Mirian RODRÍGUEZ REYES
Divorce in the Venezuelan System of Private International Law
Maria João MATIAS FERNANDES
International Jurisdiction under the 2013 Portuguese Civil Procedure Code
Petra UHLÍROVÁ

New Private International Law in the Czech Republic

Forum
Chiara MARENGHI
The Law Applicable to Product Liability in Context: Article 5 of the Rome II Regulation and its Interaction with other EU Instruments
Marjolaine ROCCATI
The Role of the National Judge in a European Judicial Area – From an Internal Market to Civil Cooperation

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New book published in the MPI Luxembourg Book Series: Protecting Privacy in Private International and Procedural Law and by Data Protection. European and American Developments

Ensuring the effective right to privacy regarding the gathering and processing of personal data has become a key issue both in the internal market and in the international arena. The extent of one's right to control their data, the implications of the 'right to be forgotten', the impact of the Court of Justice of the European Union's decisions on personality rights, and recent defamation legislation are shaping a new understanding of data protection and the right to privacy. This book, edited by B. Hess and Cristina M. Mariottini, explores these issues with a view to assessing the status quo and prospective developments in this area of the law which is undergoing significant changes and reforms.

Contents:
Foreword, PEDRO CRUZ VILLALÓN

The Court of Justice of the EU Judgment on Data Protection and Internet Search Engines: Current Issues and Future Challenges, CHRISTOPHER KUNER
The CJEU Judgment in Google Spain: Notes on Its Causes and perspectives on Its Consequences, CRISTIAN ORO MARTINEZ
The CJEU's Decision on the Data Retention Directive, MARTIN NETTESHEIM
The CJEU's decision on the Data Retention Directive: Transnational Aspects and the Push for Harmonisation – A Comment on Professor Martin Nettesheim, GEORGIOS DIMITROPOULOS
The Protection of Privacy in the Case Law of the CJEU, BURKHARD HESS
Freedom of Speech and Foreign Defamation Judgments: From New York Times v Sullivan via Ehrenfeld to the 2010 SPEECH Act, CRISTINA M MARIOTTINI

Further information is available here (English) and here (German).

Professor Ron Brand on "The Continuing Evolution of U.S. Judgments Recognition Law"

Professor Ronald A. Brand, the Chancellor Mark A. Nordenberg University Professor and the Director of the Center for International Legal Education at the University of Pittsburgh School of Law, has just posted a new article to SSRN regarding the "Continuing Evolution of U.S. Judgments Recognition Law." It is available for download here. It generally deals with the history of such law from *Hilton v. Guyot* to the present day, demonstrates some of the problems indicated by recent cases, and comments on the federalism concerns that are delaying the ratification of the 2005 Hague Choice of Courts Convention in the United States. A more detailed abstract is below.

> *The substantive law of judgments recognition in the United States has evolved from federal common law, found in a seminal Supreme Court opinion, to primary reliance on state law in both state and federal courts. While state law*

often is found in a local version of a uniform act, this has not brought about true uniformity, and significant discrepancies exist among the states. These discrepancies in judgments recognition law, combined with a common policy on the circulation of internal judgments under the United States Constitution's Full Faith and Credit Clause, have created opportunities for forum shopping and litigation strategies that result in both inequity of result and inefficiency of judicial process. These inefficiencies are fueled by differences regarding (1) substantive rules regarding the recognition of judgments, (2) requirements for personal and quasi in rem jurisdiction when a judgments recognition action is brought (recognition jurisdiction), and (3) the application of the doctrine of forum non conveniens in judgments (and arbitral award) recognition cases. Recent cases demonstrate the need for a return to a single, federal legal framework for the recognition and enforcement of foreign judgments. This article reviews the history of U.S. judgments recognition law, summarizes current substantive law on the recognition and enforcement of foreign judgments, reviews recent decisions that demonstrate the three specific problem areas, and proposes a coordinated approach using federal substantive law on judgments recognition and state law on related matters in order to eliminate the current problems of non-uniformity and inefficient use of the courts.

"Judicial Education and the Art of Judging"–2014 University of Missouri Symposium Publication

Last fall, the University of Missouri Center for the Study of Dispute Resolution convened an international symposium entitled "Judicial Education and the Art of Judging: From Myth to Methodology." Panelists included judges, academics and judicial education experts from the United States, Canada and Australia.

The symposium arose out of the recognition that although there is a large and ever-increasing body of literature on matters relating to judicial appointments, judicial independence, judicial policy making and the like, there is an extremely limited amount of information on how someone learns to be a judge. The conventional wisdom in the common law world holds that judges arrive on the bench already equipped with all the skills necessary to manage a courtroom and dispense justice fully, fairly and rapidly. However, many judges have written about the difficulties they have had adjusting to the demands of the bench, and social scientists have identified a demonstrable link between judicial education and judicial performance. As a result, it is vitally important to identify and improve on best practices in judicial education.

The symposium sought to improve the understanding of judicial education by considering three related issue: (1) what it means to be a judge and what it is about judging that is different than other sorts of decision-making; (2) what the goal of judicial education is or should be; and (3) how judges can and should be educated. While most of the discussion took place within the context of common law legal systems, much of the material is of equal relevance to civil law systems.

Articles from this symposium are freely available here. The table of contents shows below.

Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote a Well-Functioning Judiciary and Adequately Serve the Public Interest? S.I. Strong
What Judges Want and Need: User-Friendly Foundations for Effective Judicial Education Federal Circuit, Judge Duane Benton and Jennifer A.L. Sheldon-Sherman
Judicial Bias: The Ongoing Challenge, Kathleen Mahoney
International Arbitration, Judicial Education, and Legal Elites, Catherine A. Rogers
Towards a New Paradigm of Judicial Education, Chief Justice Mary R. Russell
Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced, and Foreign Judges S.I. Strong
Judging as Judgment: Tying Judicial Education to Adjudication Theory, Robert G. Bone
Of Judges, Law, and the River: Tacit Knowledge and the Judicial Role, Chad M. Oldfather

Educating Judges—Where to From Here?, Livingston Armytage
Judicial Education: Pedagogy for a Change, T. Brettel Dawson

AG Wahl on the localisation of damages suffered by the relatives of the direct victim of a tort under the Rome II Regulation

This post has been written by Martina Mantovani.

On 10 September 2015, Advocate General Wahl delivered his opinion in Case C-350/14, *Florin Lazar*, regarding the interpretation of Article 4(1) of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II). Pursuant to this provision, a non-contractual obligation arising out of a tort is governed, as a general rule, by the law of "the place where the damage occurred", irrespective of the country in which the event giving rise to the damage occurred "and irrespective of the country or countries in which the indirect consequences of that event occur".

The case concerns a fatal traffic accident occurred in Italy.

Some close relatives of the woman who died in the accident, not directly involved in the crash, brought proceedings in Italy seeking reparation of pecuniary and non-pecuniary losses personally suffered by them as a consequence of the death of the woman, *ie* the moral suffering for the loss of a loved person and the loss of a source of maintenance. Among the claimants, all of them of Romanian nationality, some were habitually resident in Italy, others in Romania.

Before the Tribunal of Trieste, seised of the matter, the issue arose of whether, for the purposes of the Rome II Regulation, one should look at the damage claimed by the relatives in their own right (possibly to be localised in Romania) or

only at the damage suffered by the woman as the immediate victim of the accident. Put otherwise, the question was whether the prejudice for which the claimants were seeking reparation could be characterised as a "direct damage" under Article 4(1), or rather as an "indirect consequence of the event", with no bearing on the identification of the applicable law.

According to AG Wahl, a "direct damage" within the meaning of Article 4(1) does not cover the losses suffered by family members of the direct victim.

In the opinion, the Advocate General begins by acknowledging that, under the domestic rules of some countries, the close relatives of the victim are allowed to seek satisfaction in their own right (*iure proprio*) for the pecuniary and non-pecuniary losses they suffered as a consequence of the fatal (or non-fatal) injury suffered by the victim, and that, in these instances, a separate legal relationship between such relatives and the person claimed to be liable arises and co-exists with the one already set in place between the latter and the direct victim.

In the Advocate General's view, however, domestic legal solutions on third-party damage should not have an impact on the interpretation of the word "damage" in Article 4(1), which should rather be regarded as an autonomous notion of EU law. The latter notion should be construed having due regard, *inter alia*, to the case law of the ECJ concerning Article 5(3) of the 1968 Brussels Convention and of the Brussels I Regulation (now Article 7(2) of the Brussels I*a* Regulation), in particular insofar as it excludes that consequential and indirect (financial) damages sustained in another State by either the victim himself or another person, cannot be invoked in order to ground jurisdiction under that provision (see, in particular, the judgments in *Dumez and Tracoba, Marinari* and *Kronhofer*).

That solution, the Advocate General concedes, has been developed with specific reference to conflicts of jurisdictions, on the basis of considerations that are not necessarily as persuasive when transposed to the conflicts of laws. The case law on Brussels I, with the necessary adaptation, must nevertheless be treated as providing useful guidance for the interpretation of the Rome II Regulation.

Specifically, AG Wahl stresses that the adoption of the sole connecting factor of the *loci damni* in Article 4(1) of the Rome II Regulation marks the refutation of the theory of ubiquity, since, pursuant to the latter provision, torts are governed

by one law. The fact of referring exclusively to the place where the damage was sustained by the direct victim, regardless of the harmful effects suffered elsewhere by third parties, complies with this policy insofar as it prevents the splitting of the governing law with respect to the several issues arising from the same event, based on the contingent circumstance of the habitual residence of the various claimants.

The solution proposed would additionally favour, he contends, other objectives of the Regulation. In particular, this would preserve the neutrality pursued by the legislator who, according to Recital 16, regarded the designation of the *lex loci damni* to be a "fair balance" between the interests of all the parties involved. Such compromise would be jeopardised were the victim's family member systematically allowed to ground their claims on the law of the place of their habitual residence. The preferred reading would moreover ensure a close link between the matter and the applicable law since, while the place where the initial damage arose is usually closely related to the other components of liability, the same cannot be said, generally, as concerns the domicile of the indirect victim.

In the end, according to AG Wahl, Article 4(1) of Regulation No 864/2007 should be interpreted as meaning that the damages suffered, in their State of residence, by the close relatives of a person who died as a result of a traffic accident occurred in the State of the court seised constitute "indirect consequences" within the meaning of the said provision and, consequently, the "place where the damage occurred", in that event, should be understood solely as the place in which the accident gave rise to the initial damage suffered by the direct victim.

Van Den Eeckhout on Regulatory Competition and on International Employment Law

The up-date version of two papers of Veerle Van Den Eeckhout has been

published on SSRN.

The first up-dated paper, entitled “Choice and Regulatory Competion: Rules on Choice of Law and Forum”, analyzes the Rules of Private International Law from the perspective of “Choice and Regulatory Competition”. The up-dated version is to be found here.

The second up-dated paper, entitled “The “Right” Way to Go in International Labour Law – and Beyond”, discusses several current issues in international employment law. The up-dated version is to be found here.
The final papers will be published each in the books of the conferences in the context of which they have been written (a conference in Maastricht and in Antwerp respectively).

An Event to Celebrate the 50th Anniversary of the 1965 Hague Service Convention and the 45th Anniversary of the 1970 Hague Evidence Convention (Washington DC)

The official program for the November 2 event in Washington DC can be found here, as well as the online RSVP link.

The event will feature remarks by Dean William Treanor, Georgetown University Law Center, an Opening Presentation by Christophe Bernasconi, Secretary General, Hague Conference on Private International Law, and a Keynote speech by the Hon. Rimsky Yeun, Hong Kong Secretary of Justice. The day will also feature panels concerning the operation of the Conventions in theory And

practice, the work of the national Central Authorities, comparative insights from both common law and civil law lawyers, and consideration of the critical challenges that will face the Conventions over the next half-century.

The conference will be held on the campus of Georgetown University Law Center, 600 New Jersey Ave., NW, Washington D.C., on the 12th floor of the Gewirz Building.

The sponsor of this event is the Center on Transnational Business and the Law, Georgetown University Law Center. The event is co-sponsored by the Hague Conference on Private International Law, the American Branch of the International Law Association, the American Society of International Law, the ABA Section of International Law and the International Law Institute. Contributing co-sponsors include: Covington & Burling LLP, Jones Day, and Winston & Strawn

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Schlosser/Hess EuZPR

The fourth edition of the *EU-Zivilprozessrecht: EuZPR* by Prof. Peter Schlosser and Prof. Burkhard Hess, updated and thoroughly reworked, has just been released.

The book is an answer to a well-known fact : in a ever-closer European Union mutual recognition and enforcement of judgments in the individual Member States is becoming increasingly important. In this very timely published, easy to handle commentary, the essential elements of the *EU Zivilprozessrechts* to date are comprehensively commented, with a look to the practice. The following instruments are to be found therein, annotated provision by provision: the Brussles I bis Regulation; the Regulation on the European enforcement order; the Regulation on the European order for payment; the small claims Regulation; the Regulation establishing a European Account Preservation Order procedure; the Regulation on the service of documents; the Regulation on the taking of evidence; the Hague Convention on the service of documents, as well as the one on the taking of evidence.

The book approach makes of it a very valuable tool for lawyers and notaries with an international-oriented practice, judges and other judicial authorities. Of course, also for academics.

Data sheet: in German; 623 pp. Format (B x L): 12,8 x 19,4 cm

ISBN 978-3-406-65845-7

For further information on the book and to order it on line click here.