Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (2/2014)

Recently, the March/April issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Moritz Renner/Marie Hesselbarth***: "Corporate Control Contracts and the Rome I Regulation"

The article deals with the law applicable to control contracts within a group of corporations in the sense of §§ 291 et seq. AktG. Here, the Rome I Regulation calls for a reassessment of current conflict-of-laws approaches. As the article seeks to show, applying the Rome I Regulation to corporate control contracts demands a contractual qualification of the latter. Interpreting the notions "contractual obligations" and "questions governed by the law of companies" according to EU law methods leads to an extensive definition of the former and a narrow scope of application of the latter provision. Two aspects merit special attention. First, a systematic comparison to the Brussels I Regulation has to be drawn. Under Brussels I, the ECJ has extensively interpreted the term "contractual relation", especially in contrast to company law questions. Secondly, primary EU law, namely the freedom of establishment, demands contractual freedom of choice for corporate control contracts. Domestic law provisions protecting creditors and minority shareholders can be applied as overriding mandatory provisions in the sense of art. 9 Rome I Regulation.

- ***Jürgen Stamm***: "A plea for the abandonment of the European account preservation order – Ten good reasons against its adoption"

The cross-border enforcement of claims shall be facilitated by the adoption of a European account preservation order. In view of the heterogeneous enforcement systems of the EU Member States this undertaking resembles the attempt to introduce a European enforcement law through the back door. In addition, the current draft of a Council Regulation considers neither the constitutional principles nor the system of the Council Regulation (EC) No.

44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The following article illuminates these aspects and makes suggestions to reduce obstacles to the cross-border enforcement of claims in the existing system of Council Regulation (EC) No 44/2001.

- ***Oliver L. Knöfel:*** "A new approach to EU Private International Law for seamen's employment agreements: with special reference to the employer's engaging place of business"

The article reviews a judgment of the European Court of Justice (Fourth Chamber) of 15 December 2011 (C-384/10), relating to the construction of Article 6(2)(b) of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations. Dealing with labour aboard a sea-going vessel, the ECJ ruled that the concept of "the place of business through which the employee was engaged" must be understood as referring exclusively to the place of business which engaged the employee and not to that with which the employee is connected by her actual employment. Thus, the ECJ approaches a modern classic of European conflicts law in employment matters, but unfortunately takes the wrong side in a long-standing controversy between a "contract test" and a "function test". The author analyses the relevant issues of cross-border labour in the transportation sector, explores the decision's background in EU private international law, and discusses its consequences for the coherency and justice of the system of connecting factors in Art. 6 Rome Convention/Art. 8 Rome I Regulation.

- ***Herbert Roth***: "Europäischer Rechtskraftbegriff im Zuständigkeitsrecht?"– the English abstract reads as follows:

The European Court of Justice has developed an autonomous conception of substantive res judicata concerning a special question of the international jurisdiction of the courts. The claim dismissing adjudication by first instance courts comprises, inter alia, the prejudicial question of the validity of a choice-of-forum clause, which shall be binding on the Court of recognition in accordance with Art. 33 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The decision must be rejected because the interests of

the parties are not taken into account sufficiently.

- ***Nils Lund***: "Der Rückgriff auf das nationale Recht zur europäisch-autonomen Auslegung normativer Tatbestandsmerkmale in der EuGVVO"– the English abstract reads as follows:

The ECJ's decision discussed in this article concerns two provisions of the Brussels I Regulation. In the first part of its ruling the ECJ has held that the concept of "civil and commercial matters" of Art. 1(1) includes an action for recovery of an amount unduly paid by a public body in compensation of an act of persecution carried out by a totalitarian regime. The second part of the decision, that is concerning Art. 6(1), clarifies that a "close connection" between the claims exists if the defendant's pleas have to be determined on a uniform basis and that the provision does not apply to defendants domiciled outside of the EU. Regarding the approach of the court to the interpretation of the terms "civil and commercial matters" and "close connection", this article concludes that the autonomous construction of the Regulation does in certain cases allow for the recourse on national law.

- ***Reinhold Geimer:*** "Streitbeendigung durch Vergleich in Südafrika"
- ***Jan D. Lüttringhaus: "***Eingriffsnormen im internationalen Unionsprivat- und Prozessrecht: Von Ingmar zu Unamar" – the English abstract reads as follows:

Thirteen years after the landmark Ingmar case, the ECJ has again been asked to define the concept of overriding mandatory provisions and, in particular, to characterise national rules transposing Directive 86/653/EEC on commercial agents. Whereas in Ingmar the parties had chosen the law of a non-EU-Member State that did not provide for a level of protection required by European law, Unamar involves a scenario where the law designated by the parties is the law of a Member State which meets the minimum requirements laid down by Directive 86/653/EEC. The question brought before the ECJ in the case at hand is whether the court of another EU Member State may nonetheless apply its national provision as overriding mandatory rules on the grounds that the protection of a commercial agent under the lex fori goes beyond that provided for by the European Directive. Since the ECJ answers this question in the

affirmative, Unamar may have far-reaching consequences for the system of European private international law.

- ***Dirk Looschelders***: "Continuance or Extinction of Parental Responsibility after a Change of Habitual Residence"

Different legal systems provide very different rules for determining the parental responsibility of non-married parents. Therefore, if the habitual residence of the child changes, the joint responsibility of non-married parents established under the law of the child's former residence state may become extinct under the law of the new residence state. In order to avoid this unreasonable result, Article 16 (3) of the 1996 Hague Convention on the Protection of Children expressly rules that parental responsibility which exists under the law of the state of the child's habitual residence persists after a change of that habitual residence to another state. However, Article 16 (3) is not applied in German courts if the child's habitual residence changed before the Convention came into force in Germany on 1 st January 2011. In such cases, joint parental responsibility appears to cease.

The present decision of the Oberlandesgericht Karlsruhe shows that the problems usually can be solved by a judicial order awarding parental responsibility back to both parents. Nevertheless, with regard to cases of child abduction it is preferable to maintain joint parental responsibility on a continuing basis by limiting changes in the law governing parental care according to Article 21 EGBGB.

- ***Florian Eichel:*** "The application of s. 287 of the German Code of Civil Procedure (investigation and estimation of damages) within the scope of the Rome I and Rome II Regulations"

S. 287 of the German Code of Civil Procedure (dZPO) empowers a court to estimate a damage at its discretion and conviction, when the issue of whether or not damages have occurred is in dispute among the parties. The assessment is based on the court's evaluation of all circumstances. The court, therefore, may decide at its discretion whether or not – and if so, in which scope – any taking of evidence should be ordered as applied for, or whether or not any experts should be heard. Where the law to be applied is foreign law, the

question arises whether a German court may refer to s. 287 dZPO as lex fori or whether s. 287 dZPO has to be classified as substantive law preventing the court from estimating the damage when such a rule is unknown by the lex causae. Recently, two German district courts adopted a different view on this issue and, thus, produced different outcomes of two lawsuits with comparable facts. Whereas this question has been in dispute in the German doctrine of international civil procedure for decades, the Rome I/II Regulations set a new legal reference for this discussion: Due to the fact that s. 287 dZPO concerns both the law of assessment of damages and the law of procedure, not only Article 1(3) of each regulation, but also Article 12(1)(c) Rome I and Article 15(c) Rome II Regulation have to be considered. The essay argues that the application of a rule like s. 287 dZPO is neither affected by Articles 12(1)(c)/15(c) nor by Articles 18/22 Rome I/II Regulation and remains applicable pursuant to their Article 1(3).

- ***Andreas Fötschl***: "No Application of the Lugano Convention for Plaintiffs from Third States – The Decision of the Norwegian Highest Court in Raffels Shipping v. Trico Subsea AS"

The decision of the Norwegian Highest Court on 20 December 2012 deals with the question of whether a Norwegian court has jurisdiction over an international dispute, concerning a ship-broker's commission, between a plaintiff from Singapore and a defendant registered in Norway. This depended upon whether the Norwegian courts should apply the Lugano Convention in a case where the plaintiff is registered in a Third State and the dispute has no connection to the Contracting States, other than the fact that the seat of the defendant is located in the forum. The Norwegian Highest Court refused to apply the Lugano Convention and applied the Norwegian rules on international jurisdiction instead, which include a statutory requirement comparable to the doctrine of forum non conveniens.

- ***Friedrich Niggemann:*** "Eine Entscheidung der Cour de cassation zu Art. 23 EuGVVO – Fehlende Einigung, fehlende Bestimmbarkeit des vereinbarten Gerichts oder Inhaltskontrolle?" – the English abstract reads as follows:

In its decision of 29.9.2012 the French Cour de cassation held that a choice of

forum clause is void which provides for the exclusive jurisdiction of the courts at a bank's seat (Luxembourg), but allows the bank to sue its client at any other jurisdiction. The court found that the clause fails to correspond to the sense and purpose of Art. 23 of the Brussels I Regulation; it only binds the client and contains an element of arbitrary ("un element potestatif") in favor of the bank. Clauses of this kind are frequent in banking contracts and financing transactions. The Cour de cassation uses terminology of French law, which gives rise to the question whether it abides by the principle of autonomous interpretation. Further it appears to introduce into Art. 23 of the Brussels I Regulation an element of appreciation of equal rights of the parties.

- ***Hilmar Krüger:*** "Zur Anerkennung nicht begründeter ausländischer Entscheidungen in der Türkei"
- ***Hilmar Krüger:*** "Zum obligatorischen Gebrauch der türkischen Sprache in Schiedsverträgen"
- ***Florian Heindler:*** "Precedence of the 1996 Hague Child Protection Convention over the Brussels IIbis Regulation when leaving the EU"

The annotated judgement focuses on the question of international jurisdiction for parental responsibility cases. If the habitual residence of a child changes during a pending procedure in Austria, and the new place of habitual residence is in Australia (contracting state to the Hague Convention 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children), Art. 5 no. 2 Hague Convention 1996 shall be applied. Thus, Australian institutions have jurisdiction and contradicting Austrian decisions shall be annulled by Austrian courts. Judgements rendered before the change of the habitual residence remain in force, however, they can be replaced by courts at the child's new place of habitual residence. Contrary to Art. 5 no. 2 Hague Convention 1996, Art. 8 no. 1 Brussels IIa Regulation stipulates jurisdiction of the Member State court "over a child who is habitually resident in that Member State at the time the court is seized" (perpetuatio fori). Neglecting this provision, the Austrian Supreme Court (OGH) applied Art. 5 no. 2 Hague Convention. Hence, the decision of the appellate court had to be set aside, because jurisdiction was denied without establishing at which date the habitual residence in Australia commenced.

- ***Hilmar Krüger:*** "Zum Problem der Brautgabe im türkischen Recht"
- ***Tong XUE***: "New Rules from the Supreme People's Court: The first Judicial Interpretation of the Chinese Choice of Law Rules Act"

On 10 December 2012, the Supreme People's Court promulgated the Interpretation on issues concerning the application of the Act of the People's Republic of China on Application of law in Civil Relations with Foreign Contacts, which came into effect as of 7 January 2013. This Interpretation reconstructs the sources of law of Chinese conflict of laws rules and gives a number of detailed regulations on various specific issues, such as preliminary question, mandantory rules, party autonomy, habitual residence and proof of foreign law. Beginning with a short introduction to the background of these judicial rules this article will deliver a detailed insight into these new rules with moderate analysis.

- ***Erik Jayme:*** "Der internationale Rechtsverkehr mit den lusophonen Ländern – Jahrestagung der Deutsch-Lusitanischen Juristenvereinigung in Hamburg"

New Papers on Business and Human Rights

"Business, Human Rights And Children: The Developing International Agenda", by O. Martin-Ortega and R. Wallace, has been published in *The Denning Law Journal* 2013, vol 25, pp 105 – 127. The following excerpt illustrates the contents:

> "The instruments analysed in this article are part of an important trend: the development of a comprehensive response to the risks children's rights face from business activities. Until recently international focus has been somewhat ad hoc and sector-specific. This has been evidenced by the concentration on the regulation of child labour and economic exploitation of children and the consequences of the privatisation of public services on their rights. The

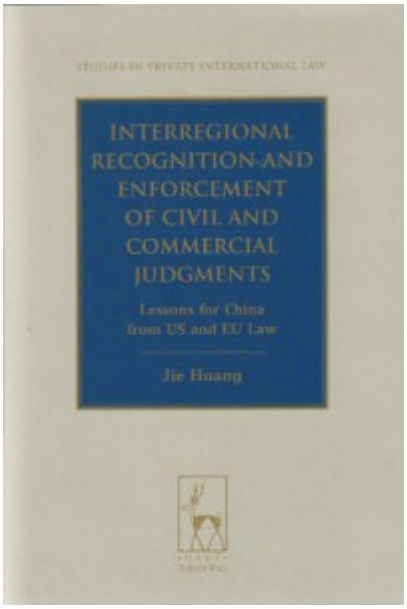
> international legal instruments regulating these spheres placed the responsibility in the fulfilment of the rights of the child exclusively on states. However, both the CRB Principles and General Comment 16 acknowledge a responsibility of business vis-à-vis children's rights beyond that of the state (…). Whilst only states have direct obligations with regards to children's rights, increased recognition of business responsibilities in instruments such as the ones analysed here, contribute to (…) the creation of fertile ground for increased demands on business. This may lead to indirect obligations in international law and the development of direct obligations in national systems.
>
> The CRB Principles and General Comment 16 are also important because they are based on the conception of children as rights bearers. This goes beyond the traditional perception, in the context of business activities, that children are mainly objects of protection from economic exploitation and abuse as members of the labour force or recipients of welfare services."

Still in the domain of business and human rights, another recent (and critical) publication of Prof. Zamora Cabot is worth mentioning – this time on the USSC Daimler decision: "Decisión del Tribunal Supremo de los Estados Unidos en el caso Daimler Ag v. Bauman et al.: Closing the Golden Door" (Papeles *El tiempo de los derechos*, 2014, 2).

To download click here (in Spanish).

New Book on Interregional Enforcement of Judgments

Jie Huang, who is is an Associate Professor of Law and Associate Dean at Shanghai University of International Business and Economics School of Law and Director of China Association of Private International Law, has published Interregional Recognition and Enforcement of Civil and Commercial Judgments – Lessons for China from US and EU Law (Hart publishing).



Judgment recognition and enforcement (JRE) between the US states, between EU Member States, and between mainland China, Hong Kong and Macao, are all forms of 'interregional JRE'. This extensive comparative study of the three most important JRE regimes focuses on what lessons China can draw from the US and the EU in developing a multilateral JRE arrangement for mainland China, Hong Kong and Macao.

Mainland China, Hong Kong and Macao share economic, geographical, cultural, and historical proximity to one another. The policy of 'One Country, Two Systems' also provides a quasi-constitutional regime for the three regions. However, there is no multilateral JRE scheme among them, as there is in the US and the EU; and it is harder to recognise and enforce sister-region judgments in China than in the US and the EU. The book analyses the status quo of JRE in China and explores its insufficiencies; it proposes a multilateral JRE arrangement for Chinese regions to alleviate current JRE difficulties; and it also provides solutions for the macro and micro challenges of establishing a multilateral arrangement, drawing upon the rich literature on JRE regimes found in the US and the EU.

Shill on Boilerplate Shock

Gregory Shill (Denver Sturm College of Law) has posted Boilerplate Shock on SSRN.

> *No nation was spared in the recent global downturn, but several Eurozone countries arguably took the hardest punch, and they are still down. Doubts about the solvency of Greece, Spain, and some of their neighbors are making it more likely that the euro will break up. Observers fear a single departure and sovereign debt default might set off a "bank run" on the common European currency, with devastating regional and global consequences. What mechanisms are available to address — or ideally, to prevent — such a disaster?*
>
> *One unlikely candidate is boilerplate language in the contracts that govern sovereign bonds. As suggested by the term "boilerplate," these are provisions that have not been given a great deal of thought. And yet they have the potential to be a powerful tool in confronting the threat of a global economic conflagration — or in fanning the flames.*
>
> *Scholars currently believe that a country departing the Eurozone could convert its debt obligations to a new currency, thereby rendering its debt burden manageable and staving off default. However, this Article argues that these boilerplate terms — specifically, clauses specifying the law that governs the bond and the currency in which it will be paid — would likely prevent such a result. Instead, the courts most likely to interpret these terms would probably declare a departing country's effort to repay a sovereign bond in its new currency a default.*
>
> *A default would inflict damage far beyond the immediate parties. Not only would it surprise the market, it would be taken to predict the future of other struggling European countries' debt obligations, because they are largely governed by the same boilerplate terms. The possibility of such a result therefore increases the risk that a single nation's departure from the euro will bring down the currency and trigger a global meltdown.*
>
> *To mitigate this risk, this Article proposes a new rule of contract interpretation that would allow a sovereign bond to be paid in the borrower's new currency under certain circumstances. It also introduces the phrase "boilerplate shock"*

to describe the potential for standardized contract terms drafted by lawyers — when they come to dominate the entire market for a given security — to transform an isolated default on a single contract into a threat to the broader economy. Beyond the immediate crisis in the Eurozone, the Article urges scholars, policymakers, and practitioners to address the potential for boilerplate shock in securities markets to damage the global economy.

Second PIL Workshop at Nanterre University

The University of Paris Ouest Nanterre la Defense will host its second private international law workshop on 19 March 2014.

Professor Géraud de la Pradelle (Emeritus Nanterre University) and Mr. Elie Kleiman (Freshfields) will discuss attachment of sovereign assets in France after the 2013 judgments of the French Supreme Court in the *NML v. Argentina* case.

Professor Mathias Audit (Nanterre University) will act as a discussant.

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ECJ Rules on Lis Pendens and

Submission to Jurisdiction

On February 27th, 2014, the Court of Justice of the EU delivered its ruling in Cartier Parfums Lunettes v. Ziegler (case 1/13).

The issue before the court was whether the lis pendens rule in the Brussels I Regulation also applies when the jurisdiction of the court first seized was founded in a submission to its jurisdiction.

The court held that it does.

> *38 It follows that the system established by Regulation No 44/2001, as is clear from Articles 24 and 27 thereof, was devised in order to avoid prolonging the length of time for which proceedings were stayed by the court second seised, when, in reality, the jurisdiction of the court first seised may no longer be challenged, as set out in paragraph 36 above.*
>
> *39 Such a risk does not arise where, as in the case in the main proceedings, the court first seised has not declined jurisdiction of its own motion and none of the parties has contested its jurisdiction prior to or up to the time when a position is adopted which is regarded under national procedural law as the first defence.*
>
> *40 In the second place, as regards the purpose itself of Regulation No 44/2001, it must be recalled that one of the aims of that regulation, as is clear from recital 15 in the preamble thereto, is to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given where a number of courts have jurisdiction to hear the same dispute. It is for that purpose that the European Union legislature intended to put in place a mechanism which is clear and effective in order to resolve situations of lis pendens. It follows that, in order to achieve those aims, Article 27 of Regulation No 44/2001 must be interpreted broadly (Overseas Union Insurance and Others, paragraph 16).*
>
> *41 It must be stated that an interpretation of Article 27(2) of that regulation, according to which, in order to establish the jurisdiction of the court first seised within the meaning of that provision, it is necessary that that court has impliedly or expressly accepted jurisdiction by a judgment which has become final would, by increasing the risk of parallel proceedings, deprive the rules*

intended to resolve situations of lis pendens, laid down by that regulation, of all their effectiveness.

42 Furthermore, as is clear from the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1) and the case-law of the Court on Article 21 thereof, which corresponds to Article 27 of Regulation No 44/2001, the aim of the rule on lis pendens is also to avoid negative conflicts of jurisdiction. That rule was introduced so that the parties would not have to institute new proceedings if, for example, the court first seised of the matter were to decline jurisdiction (see Overseas Union Insurance and Others, paragraph 22).

43 Where the court first seised has not declined jurisdiction of its own motion and no objection of lack of jurisdiction has been raised before it, the fact that the court second seised declines jurisdiction cannot result in a negative conflict of jurisdiction since the jurisdiction of the court first seised can no longer be contested.

Ruling:

Article 27(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, except in the situation where the court second seised has exclusive jurisdiction by virtue of that regulation, the jurisdiction of the court first seised must be regarded as being established, within the meaning of that provision, if that court has not declined jurisdiction of its own motion and none of the parties has contested its jurisdiction prior to or up to the time at which a position is adopted which is regarded in national procedural law as being the first defence on the substance submitted before that court.

Is Private Enforcement of Competition Law Still an Option in Germany?

Some thoughts on the judgment of LG Düsseldorf from December 17th, 2013, 37 O 200/09 (Kart), by Polina Pavlova, Max Planck Institute Luxembourg.

On December 17th, 2013, the District Court Düsseldorf dismissed a claim for damages against the participants in the German cement cartel. The case at issue can be regarded as a pilot one in the area of private cartel law enforcement in Germany. The judgment, although a first instance one, is the result of a long lasting litigation. In April 2009, the Federal Court of Justice confirmed the admissibility of the claim. Particularly against this background, the dismissal on the merits by the Regional Court came as a surprise.

The case started originally in 2003, when the German Federal Cartel Office issued record fines against the participants in the German cement cartel which had been operating since 1988. In 2005, Cartel Damage Claims (CDC), a Belgian publicly held corporation, brought an action for damages against the former cartel members. The Belgian corporation had been established with the aim of bringing the present lawsuit as a plaintiff in German courts. The corporation acquired the claims of 36 companies who had purchased cement from producers participating in the anti-competitive agreement. CDC bought each claim at a modest price and additionally arranged for the cartel victims to receive a share of the damages obtained in case of success of the action. The claims were assigned to CDC; their total value amounted to 131 million Euro. In an interlocutory judgment from 2007, subsequently upheld by all instances, the District Court of Düsseldorf confirmed the admissibility of the lawsuit.

On the merits, however, the District Court dismissed the claim because of invalidity of the assignments to CDC; as a result, CDC had no standing to sue. According to the District Court, the assignments initially performed before July 1st, 2008 were invalid due to the violation of the German Act on the Prohibition of Legal Advice. This Act, which dates back to 1935, has no equivalent in other

European legislations. Its purpose was to guarantee the quality of legal advice, i.a. by preventing debt-collection agencies from taking advantage of consumers. The constitutionality of the Act has repeatedly been questioned on the grounds that it restricts severely the constitutional guarantee of professional freedom. However, the German Federal Constitutional Court has given its support to the Act in several decisions, arguing it protects the general public against unprofessional legal advice. Similar doubts regarding the fundamental freedom of services under Article 49 TFEU were dispelled by the ECJ in case C- 3/95, *Reisebüro Broede v. Sandker*.

Under Section 1 of the Act of 1935, professional collection of debts required special (and not easy to obtain) authorisation by the competent authority. Initially, CDC had not applied for such authorisation. Therefore, the Regional Court of Düsseldorf decided that there had been a breach of law which, under Section 134 of the German Civil Code, entailed the invalidity of the assignments. In July 2008, the Legal Advice Act was replaced by the Legal Services Act. The current Act essentially pursues the same purpose as its predecessor and sets similar requirements in order to ensure the sufficient qualification of providers of legal services; it nonetheless permits and facilitates the provision of legal services by registered entities. CDC registered under the new Act, and all claims for damages were assigned a second time to it. However, even though the Legal Services Act allows the assignment of claims to registered entities, the District Court denied once more the validity of the operation, this time by asserting it was against public policy (Section 138 of the German Civil Code).

The District Court based its reasoning on the assumption that in the event of losing, the plaintiff would not have the funds required to reimburse the legal costs of the defendants. The argument must be read together with the German procedural "loser pays" rule (Section 91 of the Code of Civil Procedure), according to which the losing party is obliged to cover the full costs of the litigation, including the lawyer's statutory fees incurred by the winning party. Therefore filing a claim entails a financial risk, particularly high in cases like the one at issue (a claim for more than 130 million €). According to the District Court, pushing forward an undercapitalised legal entity as a plaintiff transfers the risk to the defendant; an outcome that was evident for both CDC and the assignors. As a result, the Court concluded that the assignments of the claims violated the good morals and were null and void.

This statement comes as a surprise. It is worth noting that, at the beginning of the proceedings, the plaintiff had formally applied for a reduction of the value of the dispute in order to cut down the costs of the litigation. As the litigation costs in Germany are calculated according to the value of the claim, the diminution of the value of the dispute narrows the litigation risks for both parties. Usually, German courts are not empowered to reduce the value of the litigation unless it is explicitly provided by law; however, this is the case in cartel matters where the court may – at its discretion – reduce the amount of the dispute in order to facilitate private enforcement of competition law.

In the cement cartel case CDC's application for a reduction of amount of the litigation had been surprisingly dismissed – it seems that the Court was uncomfortable with the business model of CDC, aiming at increasing the value of litigation by bundling claims for damages from different victims of the cartel. When evaluating the litigation risks, the District Court relied on the information given by the plaintiff on its financial situation when it had sought the reduction of the amount of the litigation. Accordingly, the District Court held that CDC's own submissions regarding its inability to pay the costs of the litigation at the beginning of the proceedings indicated that the plaintiff would be unable to compensate the litigation costs of the other parties. As a consequence, the Court decided that the assignment of the claims deteriorated the procedural situation of the defendants with regard to the (future) compensation of their litigation costs, and, therefore, it was void. The final outcome of the reasoning of the Court is a shift of the legal framework for encouraging private enforcement to its contrary: first the plaintiff was denied a reduction of the cost risk; then, the claim was dismissed because of the plaintiff's inability to carry that risk. In this respect the line of argument of the District Court seems paradoxical.

Furthermore, it is worth stressing that considerations of EU competition law are completely absent from the Court's reasoning. Again, this line of argument must be criticized: the plaintiff had based its claim for compensation on a general tort provision of the German Civil Code (Section 823 para 2 BGB) in conjunction with Article 81 TEU (now: Article 101 TFEU). Yet the District Court only relied on the infringement of German cartel law by a domestic cartel, i.e., it did not address the right of cartel victims to compensation that derives directly from the TFEU. According to the case-law of the ECJ since *Courage v. Crehan*, victims of cartel infringements are entitled to a full and efficient compensation. However, the

District Court did not consider these principles of Union law when it assessed the legality of the assignment to CDC under Section 138 of the German Civil Code.

All in all, the decision of the District Court shows a remarkable reluctance with regard to the private enforcement of cartel damages. It should be noted that the business model of the plaintiff (CDC) has been challenged in other civil courts in Europe (see recently the interlocutory judgment of the District Court of Helsinki from July 4th, 2013), but it has never been declared illegitimate. Decisions as the one by the Regional Court of Düsseldorf, even first instance ones, could make Germany less attractive as a forum for efficient cartel law enforcement. As a result, plaintiffs will shop to other jurisdictions like the Netherlands, Finland or the United Kingdom. However, it still remains to be seen whether the Court of Appeal and the Supreme Federal Civil Court will uphold the judgment of the first instance.

"Intellectual Whiplash": One Day, Two International Cases, And Two Different Results At The U.S. Supreme Court

On December 2, 2013, the case of *BG Group v. Argentina* was argued at the Supreme Court. As the argument neared its end, Justice Anthony M. Kennedy quipped to Argentina's counsel: "Your – your whole argument gives me intellectual whiplash." Last Wednesday, when the Court released its decisions in *BG Group* and *Lozano v. Montoya Alvarez*, the same might be said back to the Court. I'm not the first commentator to feel this way.

Lozano concerned the Hague Convention on Civil Aspects of Child Abduction, which in essence says that if one parent unilaterally takes their child to another country, and the child is found within a year, the child must be automatically

returned home. Otherwise, a court must consider the best interests of the child, who may have developed ties in the new country. But what to make of the clandestine parent and a child whose location could not be discovered for 16 months? Is there a principle of "equitable tolling" under the Convention, according to which the one-year period should only begin after the child's location can be ascertained? This is certainly a familiar doctrine under U.S. law—equity tolls statutory limitations periods all the time. So as not to reward a clandestine parent, the father in the Lozano case wanted the same principle applied to his case.

The Supreme Court refused this request. The Convention, they said, was not a federal statute—it was a "contract between . . . nations"—so it would be "particularly inappropriate to deploy this background principle of American law" when interpreting it. Interpreting the Convention to preclude equitable tolling is more consistent with its text; if the drafters of the Convention had wanted the one-year period to start when the left-behind parent actually discovered where the child was, they could have easily said so. Because they didn't, the uniquely common law notion of equitable tolling could not justify the father's suit for automatic return.

The notion of a treaty as a contract pervaded the *BG Group* decision, too. On their face, the two cases had some similarities. Both involved UK parties with rights under an international treaty. The similarities, however, ended there. Lonzano was a father seeking the return of his foreign-domiciled daughter. BG Group was a British multinational oil and gas company who had invested in an Argentine gas distribution company, and whose investment was harmed by Argentine emergency legislation. BG Group filed a Notice of Arbitration against Argentina under the UK-Argentina Bilateral Investment Treaty ("BIT"), and sited the arbitration in the United States under the UNCITRAL Rules.

But Article 8(2) of the BIT provides that disputes under the Treaty between an investor and Argentina must first be submitted to a competent court in the sovereign state where the investment was made. Subsequently, the dispute can go to international arbitration at one party's request only if (1) a period of eighteen months has elapsed since the dispute was presented to the court and no decision has been made; or (2) a final decision was made by the court, but the parties still disagree. Argentina opposed jurisdiction of the arbitral tribunal

because the dispute had not been submitted to Argentine courts at all. BG Group argued that waiting to meet the requirements of Article 8(2) of the BIT would have been futile. The arbitral tribunal determined that they had jurisdiction because Argentina had enacted laws hindering judicial recourse for foreign investors, and ultimately issued an award on the merits in favor of BG Group.

Both parties filed petitions for review in the United States District Court for the District of Columbia, which deferred to the arbitrators and upheld the arbitration award. The United States Court of Appeals for the District of Columbia Circuit, however, overturned that decision. It found that the arbitral tribunal did not have jurisdiction because BG Group had not complied with the local litigation requirements of Article 8(2) of the BIT. As a result, it set aside the award. The Supreme Court was asked to decide the question that had split the inferior U.S. Courts, namely: "whether a court of the United States, in reviewing an arbitration award made under the Treaty, should interpret and apply the local litigation requirement de novo, or with the deference that courts ordinarily owe arbitration decisions."

Now here comes the "intellectual whiplash." A majority of the Supreme Court "treat[ed] the [treaty] before us as if it were an ordinary contract between private parties." In doing so, Justice Breyer—citing the Court's domestic, commercial arbitration jurisprudence—found that the local litigation requirement was a procedural condition precedent to arbitration, which determined "when the contractual duty to arbitrate arises, not whether there is a contractual duty to arbitration at all." Thus, as a procedural precondition rather than a substantive bar to arbitrability, Breyer found that, "courts presume that the parties intend arbitrators, not courts, to decide disputes about [the local litigation requirement's] meaning and application." The Court found nothing in Article 8 of the BIT to overcome this presumption, and thus saw "no reason to abandon or increase the complexity of [its] ordinary intent-determining framework" for contractual arbitration clauses. (Of course, it remains an open question of what the Court would do if the Treaty were more express on the obligatory nature of the local litigation provision). Under a deferential review of the arbitrators' decision, the award was allowed to stand.

The dissent, authored by Chief Justice Roberts and joined by Justice Kennedy, harkened back to *Lozano* and took issue with the majority's decision to consider the BIT as an ordinary contract between private parties. In their view, when

looking at the BIT as an act of state between co-equal sovereigns, with all deference that comes with that conclusion, the local litigation requirement can only be viewed as a textual precondition to the formation of an agreement to arbitrate against the state. “By focusing first on private contracts, the majority “start[s] down the wrong road” and “ends up at the wrong place,” the dissent noted. “It is no trifling matter for a sovereign nation to subject itself to suit by private parties,” the Chief Justice said; “we do not presume that any country-including our own-takes that step lightly.” Thus, without having submitted to the local courts before it initiated arbitration, the dissent would have held that BG Group had no agreement to arbitrate against Argentina.

In some contexts, sovereign consent to convene an arbitration deserves a special place in the law. At least one federal judge has said that the federal policy in favor of arbitration carries special force when the agreement to arbitrate is contained in a treaty as opposed to a private contract. And take, for example, the recurring situation where parties use the U.S. courts to seek evidence by way of 28 U.S.C. § 1782 for use in international arbitration proceedings. Where that arbitration is convened by treaty and not by contract, U.S. courts will more readily lend their assistance. On its face, the *BG Group* decision runs counter to the idea that U.S. courts will treat investment treaty arbitration with greater deference than commercial arbitration. On the other hand, however, upholding the award furthers the above jurisprudence, the Supreme Court’s recent string of pro-arbitration rulings, as well as the “basic objective of . . . investment treat[ies].” But “intellectual whiplash” still occurs when we consider that, in *Lonzano*, the Court was unwilling to “rewrite the treaty” in order to “advance its objectives.”

Brazilian Seminar on National Codification and Regional

Unification of PIL

The Federal University of Minas Gerais – UFMG- of Belo Horizonte (Brazil) will host on 13 March 2014 a seminar on *National Codification and Regional Unification of Private International Law – Complementary or Conflicting Trends?*

The event, the first in a series on private international law topics jointly organised by UFMG and the University of Ferrara, will compare European and Latin American experiences.

Participants include Roberto Luiz Silva (UFMG), Eduardo Grebler (PUC-MG, ILA), Fabricio Bertini Pasquot Polido (UFMG) and Pietro Franzina (University of Ferrara).

See here for more information.

New Greek Blog on International Civil Litigation

Apostolos Anthimos has founded a new blog on International Civil Litigation in Greece, which will survey Greek case law in the field.

The latest post discusses a recent case where two Greek lawyers had sued Facebook on the ground of breach of privacy.

Welcome to the Blogosphere!