Parallel Proceedings and Contradictory Decisions in International Arbitration

Bruylant, in its Arbitration collection, has just published the speakers' contributions to the conference on *Parallel Proceedings and Contradictory Decisions in International Arbitration* hosted by ICC on this sensitive topic. The conference was organized by the students and alumni of International Law programs of the University Panthéon-Assas, Paris II. A detailed report was published by the ICC at the time. The book dedicated its first section to Investment Arbitration and a second section to Commercial Arbitration. The book, in French, can be ordered on Bruylant's website.

Summary:

Première partie – Les procédures parallèles et la contrariété de décisions dans l'arbitrage d'investissement

- Développement des procédures parallèles et facteurs de désordres procéduraux dans l'arbitrage d'investissement, par *Walid Ben Hamida*
- La contrariété de décisions dans l'arbitrage d'investissement : risques et conséquences, par *Fernando Mantilla-Serrano*
- Procédures parallèles : aspects procéduraux et solutions institutionnelles, par *Éloïse Obadia*

Seconde partie – Les procédures parallèles et la contrariété de décisions dans l'arbitrage commercial international

- Propos introductifs relatifs aux Problématiques spécifiques à l'arbitrage commercial international, par *Philippe Leboulanger*
- La prévention des contrariétés de décisions arbitrales et étatiques, par *Claire Debourg*
- L'exclusion de l'arbitrage dans la refonte du règlement Bruxelles I, par *Laurence Usunier*
- Les contrariétés de décisions dans le contrôle des sentences arbitrales, par *Sylvain Bollée*

- Une illustration récente : l'affaire Planor Afrique, par *Alexandre Reynaud et Héloïse Meur*
- La jonction de procédures arbitrales dans le règlement de la Chambre de commerce internationale, par *Thomas Granier*
- Un remède : la concentration du contentieux devant l'arbitre, par *Jean-Pierre Ancel*

Conclusion

Procédures parallèles et contrariété de décisions dans l'arbitrage international : essai de synthèse, par *Daniel Cohen*

International Maritime Labour Law by Laura Carballo

A readworthy and laboursome book on **International Maritime Labour Law**, authored by Laura Carballo Piñeiro (Santiago de Compostela), has just been published within the Hamburg Studies on Maritime Affairs (Springer, 2015).

The blurb reads:

> *This book focuses on maritime employment from a private international law perspective. The first chapter analyzes the background against which international jurisdiction and conflict of laws rules are drawn up and examines uniform law in this context, in particular the 2006 Maritime Labour Convention and the 2007 ILO Convention No. 188 on Work in Fishing. The second chapter addresses international jurisdiction issues as regards individual employment contracts, while also exploring other issues (e.g. insolvency-related and social security matters) that are subsequently revisited in the third chapter while discussing conflict of laws issues related to said contracts. In turn, chapter four focuses on collective labour relations and private international law, i.e. collective agreements, strikes and other forms of collective action and information, and on the participation rights of employees in business matters.*

More information is available here.

On PIL, International Labour law and Corporate Social Responsibility

On the blog section of the Dutch journal Nederlands Juristenblad, a blog of Veerle Van Den Eeckhout on the importance of Private International Law has been published, see here.
The blog is entitled “The impact and potential of a curious and unique discipline. About PIL, Shell Nigeria, European and global competition and social justice.” It is written in Dutch; here is the English version.

The blog refers, inter alia, to the Shell-Nigeria case and to some PIL-aspects of international labour law. It was foreseen that on 14 July 2015 the Hague Court of Appeal would pass judgement in the Shell-Nigeria case, but in the meantime the judgement has been postponed until a later date.

On SSRN, an English verson of Van Den Eeckhout’s paper “The Right Way to Go in International Lbour law – and Beyond” has been made available meanwhile. This paper discusses some PIL-aspects of international labour law.

The procedural impact of the Greek debt crisis: The CJEU rules

on the applicability of the Service Regulation

by Anastasia Gialeli

Anastasia Gialeli, LL.M. (Freiburg), is a doctoral candidate at the Albert-Ludwigs-University Freiburg (Germany) and a research assistant at the University's Institute for Comparative and Private International Law (Dept. III). She has kindly provided us with her thoughts on a seemingly technical, but actually very sensitive legal and political issue raised by the Greek debt crisis.

The Court of Justice of the European Union (CJEU) on 11 June 2015 delivered its judgment in the joined cases C-226/13, C-245/13, C-247/13 and C-578/13 regarding the concept of "civil and commercial matters", now for the first time within the meaning of the Service Regulation (No 1393/2007).

1. Background

In the main four proceedings before German courts (i.e. Landgericht Wiesbaden and Kiel), the claimants, all holders of Greek State bonds, had initiated legal actions against the Hellenic Republic based on German civil law. They were claiming compensation for disturbance of ownership and property rights, contractual performance of the bonds which have reached maturity or damages caused by the retroactive and unilateral change of the bonds by the Greek State in the framework of the Private Sector Involvement (PSI). The judgment is particularly important because it concerns numerous civil legal actions of German bondholders against Greece brought before German courts (cf. the identical request for a preliminary ruling made by Landgericht Aachen in case C-196/14 and the cited case law as follows).

In the decision made by the European Council regarding financial assistance for Greece at the summit of 21 July 2011 a "voluntary" PSI was included. It was regarded as an exceptional and unique solution for the sustainability of the Greek debt (Euro Summit Statement of 26 October, 2011, page 4-5, Statement by the Eurogroup of 21 February, 2012). A successful PSI operation was therefore a requirement for Greece in order to achieve a second Economic Adjustment Programme with the EU, the IMF and the ECB (Statement by the Eurogroup of 21

February, 2012). In line with this, the Greek Parliament adopted the Law No 4050/2012 entitled „Rules relating to the adjustment of securities, their issue or guarantee by the Greek State with the agreement of the bond holders“ (hereinafter: Greek Bondholder Act) on 23 February 2012.

In accordance with the Greek Bondholder Act, the Greek State in February 2012 submitted an exchange offer to the applicants which provided for the original bonds to be exchanged for new bonds with a considerably reduced nominal value (53,5%) and a longer period of validity, which the applicants, however, rejected. Nevertheless, the Greek State carried out the proposed exchange in March 2012, by means of the restructuring clause contained in the Greek Bondholder Act, also known in financial terms as a so-called “CAC“ (Collective Action Clause) (see the detailed presentation by *Sandrock* RIW 2012, 429). Pursuant to this clause, the unilaterally proposed change of the initial conditions of the bonds could be accepted (or refused, but not renegotiated or modified) by a quorum representing 50% of the total outstanding bondholders concerned and with a decision by the qualified majority corresponding to two thirds of the participating capital. This decision then had to be approved by a resolution of the Greek Council of Ministers and executed by the Greek Central Bank. Article 1(9) of the Greek Law furthermore provides for an *erga omnes* effect of the decision adopted by the majority, which is also binding on the minority of the concerned bondholders and overrides any general or specific law and any contracts conflicting with it. Finally, it stipulates that these provisions protect the public interest and, thus, they constitute overriding mandatory rules, excluding any liability of the Greek State.

The exchange of the bonds was disadvantageous for the applicants, who obviously belong to the disagreeing minority (hold-out creditors, 5% pursuant to the Second Economic Adjustment Programme for Greece of March 2012, page 48). In order to serve the documents initiating the proceedings against the Greek State, the transmitting body (Bundesamt für Justiz, i.e. the German Federal Office for Judicial Administration and Cooperation) raised the question as to whether, for the purpose of Article 1 (1) of Regulation No 1393/2007, those actions concerned “civil or commercial matters” or acts or omissions in the exercise of State authority, which are, pursuant to Article 1 (1, 2nd sentence), explicitly excluded from the scope of the Regulation (*acta iure imperii*). The crucial question is whether the interpretation of the concept of civil or commercial matters should be made by focusing on the civil law basis of the legal actions or on the subject

matter of the dispute.

The Landgericht Wiesbaden (one of the referring courts) tended towards characterizing the claims based on the subject matter of the dispute, namely the intervention by law in a case originally of a civil nature – i.e. the purchase of the bonds – and its effects on the property or contract rights of the applicants. Thus, according to this court, the case at issue should be classified as falling under the explicit exclusion in Article 1 (1, 2nd sentence) concerning the liability of a State acting in the exercise of public authority (LG Wiesbaden, 18.4.2013 para. 14-15). This is in line with the case law of other German civil courts, which in similar cases involving German bondholders' actions have argued that the subject matter concerns the Greek State's public authority and that, accordingly, the Hellenic Republic should enjoy immunity in this regard (cf. LG Konstanz 19.11.2013, para. 27; OLG Schleswig-Holstein 04.12.2014, para. 48-72, pending before the BGH ref. number XI ZR 7/15). This line of reasoning also corresponds with the leading judgment of the plenum of the Greek Council of State No 1116/2014 of 21 March, 2014.

2. Judgment

The CJEU, however, holds that article 1 (1) of the Service Regulation "*must be interpreted as meaning that legal actions for compensation for disturbance of ownership and property rights, contractual performance and damages, such as those at issue in the main proceedings, brought by private persons who are holders of government bonds against the issuing State, fall within the scope of that regulation in so far as it does not appear that they are manifestly outside the concept of civil or commercial matters.*"

Standard of evidence

First, the CJEU points out that it "*suffices that the court hearing the case concludes that it is* ***not manifest*** *that the action brought before it falls outside the scope definition of civil and commercial matters*" (para. 49). The Court adopts the Commission's opinion and argues that, because of the complexity of the distinction between civil or commercial matters and *acta iure imperii*, the court usually has to decide on this question only after having heard all the parties and thus having all the necessary information. In the case of the Service Regulation however, this question arose in a very early phase, i.e. even before the defendant

had been served with the initiating document. Moreover, the answer to this question determines the methods of service of that document. Thus, *"the court must limit itself to a preliminary review of the available evidence, which is inevitably incomplete, in order to decide"* about the application of the Service Regulation.

As far as the question of distinguishing between civil or commercial matters, on the one hand, and *acta iure imperii*, on the other, arises within the framework of the Service Regulation, the answer is restricted to the method of the service without prejudice to the international jurisdiction and the substance of the case at issue (para. 46). Thus, the Court reasonably takes into account that the court seised may not have the jurisdiction that is required to deliver its judgment in substance. As a consequence, the Court facilitates the initiation of the proceedings, one of the key aims of the Regulation.

However, the Court argues that its interpretation is also confirmed by the general scheme of the Service Regulation, as this results from recital 10, which states that *"the possibility of refusing service of documents should be confined to exceptional situations"*, in conjunction with Article 6 (3), which enables the receiving agency to return the documents to the transmitting agency if the concerned request for service is *"manifestly outside the scope of that regulation"*. This argument is not fully convincing as it should be noted that the cited provision is a special rule and is addressed to the receiving agency because of the non-judicial nature of those bodies in contrast to the seised court. The seised court, however, is the competent body to decide on the applicability of the Service Regulation. Thus, the systematic argument of the Court is rather doubtful (see also Advocate General *Bot* 9.12.2014, para 72 and footnote 73).

The CJEU further stipulates that, in conformity with its case law on the Brussels Convention and Brussels I, the concept of civil or commercial matters must be regarded as an independent concept within the framework of the Service Regulation as well, interpreted by referring to the objectives and the scheme of that Regulation. With regard to the main objectives of the Service Regulation, the Court points out that recitals 2, 6 and 7 provide for the improvement and the expediency of the transmission of judicial and extrajudicial documents, in order to ensure the proper functioning of the internal market. In this context, it should be noted that – in contrast to the opinion of AG *Bot* (AG *Bot* 9.12.2014, para. 49) – the Court seems not willing to take into proper consideration the general

objectives of legal certainty and coherence of law, but overestimates the objective of the effectivity of the Service Regulation. The service of a document should certainly be improved and facilitated, but only under the condition that the case at issue falls into the scope of the Regulation at all.

Decisive criterion for the distinction

The wording of the Court's ruling that *"legal actions (…) fall within the scope of that regulation* ***in so far as it does not appear*** *that they are manifestly outside the concept of civil or commercial matters"* is rather unfortunate and unusual – compared to, e.g., C-302/13 flyLAL, C-292/05 Lechouritou, C-645/11 Sapir, C-14/08 Roda Golf – and ends in a vicious circle, which does not provide a safe harbour for national courts having to determine whether the case at issue falls in or outside the scope of the Regulation.

In the reasoning of its judgment, the Court tries to define the crucial criterion for determining whether the case at issue falls in or outside the scope of the Service Regulation. In general terms, the disputed act of the state authority should lead directly and immediately to a change in the legal relationship involved and therefore should cause the alleged damage. The Court holds that *"it is not obvious that the adoption of the Law No 4050/2012 led* ***directly and immediately*** *to changes to the financial conditions of the securities in question and therefore* ***caused*** *the damage (…)"* (para. 57). Instead of the Greek Bondholder Act itself, the Court considers the decision of the majority of the bondholders accepting the exchange offer as the event giving rise to the damage. This is hard to square with the fact that it was exactly the Greek Bondholder Act which imposed the retroactive *erga omnes* effect of a majority decision upon the hold-out bondholders' contracts in order to safeguard public interests. The direct binding effect of the majority's decision on the contracts of the hold-out applicants does not, however, fall under the scope of ordinary legal rules applicable to relationships between private individuals. Further, it should be pointed out that, first, the bond exchange was executed by the Central Bank of Greece after a resolution of the Council of Ministers had approved the majority's decision, also by an administrative process, and secondly, that the content of the decision itself was not negotiable by the majority but in fact unilaterally designated by the Greek Bondholders Act. Finally, this Act was adopted in order to deal with a severe financial crisis and especially to restructure the public debt and secure the stability in the Eurozone, objectives closely linked to state sovereignty. Those

objectives are also noticed by the Court, but the judges do not consider them as decisive. Thus, the Court, similar to its earlier *Sapir* judgment (C-645/11 para. 35-37) concerning Brussels I, interprets the concept of civil or commercial matters widely in the framework of the Service Regulation as well.

In contrast, AG *Bot* had pleaded persuasively that the case at issue should be excluded from the scope of the Service Regulation because the present dispute was rooted in the adoption and the implementation of the Greek Bondholders Act, which constitutes an act in the exercise of public power (AG *Bot* para. 63-70). This opinion is in accordance with my reading of the earlier case law of the CJEU with regard to the unilateral and binding manner of acting by a public authority, which appears as inextricably linked to a State's public interest, in the case at issue to financial policy (cf. especially CJEU Lechouritou C-292/05 para. 37; Baten C-271/00, para. 36; Tiard C-266/01, para. 33; Sapir C-645/11, para. 33; flyLAL C-302/13, para. 31; cf. *Kropholler/von Hein* EuZPR, 9th ed., Art. 1 EuGVO para. 6; Stein/Jonas/*Wagner* ZPO, 22nd ed., Art. 1 EuGVO para. 11).

The initial purchase of the bonds is, in line with the Court's judgment, governed by the ordinary financial market and legal rules applying to individuals. However, the decision of the majority of the bondholders, which pursuant to the Court should be regarded as the decisive act, does constitute the implementation of the Greek Bondholders Act itself. It seems that the Court adopts an inconsistently technical view of the subject matter when it refuses to consider the form of the crucial act of the Greek State, i.e. the adoption of the Law in itself, as decisive, but at the same time characterizes the majority bondholders' acceptance as the decisive criterion, although that acceptance was in fact only motivated by a desire to avoid an absolute loss (cf. *Sandrock* RIW 2013, 12, 15: Bondholders had the choice between Scylla and Charybdis). Furthermore, the argument that the *intention* of the Greek State (para. 57) was to keep the handling of the bonds within a regulatory framework of a civil nature should be irrelevant to an autonomous definition in European civil procedure law.

3. Outlook

After the Court has paved the way for applying the Service Regulation in the cases of German bondholders, it must be awaited how the German courts will evaluate the parallel issue at the level of jurisdiction. As far as the courts accept the civil nature of the case, they must then determine which head of jurisdiction

under Brussels Ia could apply. After the *Kolassa* judgment (C-375/13), the only available basis is found in Article 7 No 2, which in turn may be overruled by a choice of court agreement (Article 25). On a conflict of laws level, it is assumed that in the general terms of the exchange of the bonds at issue a choice of law clause in favour of Greek, English or Swiss law has been made (*Sandrock*, RIW 2012, 429 434). In case that the *lex causae* is not Greek law, the question arises as to whether the Greek Bondholder Act must be characterized as an overriding mandatory rule (cf. the request for a preliminary ruling of the BAG, 25.2.2015 in case C-135/15 Nikiforidis, concerning labour contracts with the Greek State, and the previous post by *Dr. Lisa Günther* on this issue).

Latest Issue of RabelsZ: Vol. 79 No 3 (2015)

The latest issue of "Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabel Journal of Comparative and International Private Law" (RabelsZ) has recently been released. It contains the following articles:

Dagmar Coester-Waltjen, *Himmel und Hölle: Einige Überlegungen zur internationalen Zuständigkeit (*Heaven and Hell: Some Reflections on International Jurisdiction)

> *Jurisdictional rules differ all over the world. Plaintiffs might consider jurisdictional practices in one legal system as "heaven", whereas defendants will fear exactly these rules like "hell". Due to increasing global interconnectedness that results from increasing cross-border trade, from the mobility of people, and the global reach of the internet, there is a need for international consensus on matters of jurisdiction on several levels. The first level concerns the question whether a complete set of acceptable grounds of jurisdiction (direct grounds of jurisdictions) can be developed for a binding instrument. On the second level the question arises as to tolerable heads of jurisdiction (only) for the purpose of recognition and enforcement of foreign*

judgments (indirect grounds of jurisdiction). And finally the jurisdiction of the courts that recognize and enforce the foreign judgment is at issue. The Hague Conference on Private International Law has resumed its work on the so-called judgment project and it is working on all three levels although direct grounds of jurisdiction will be tackled only after a certain agreement will have been reached on jurisdictional issues concerning recognition and enforcement of judgments. However, on all three levels the inclusion and the role of the doctrine of forum non conveniens will be an important and most decisive issue.

The doctrine of forum non conveniens has its origin in the common law world, but has spread around the globe in recent decades. Today it can be found also in jurisdictions which traditionally apply strict jurisdictional rules. The very essence of the doctrine is a margin of discretion the competent court may apply in staying or rejecting litigation. This applies if in the given situation the court addressed seems to be a "not convenient" forum and there is another more appropriate forum. The particulars of the doctrine as well as the standards of the test (inconvenient, clearly inconvenient, more appropriate) and the determinative considerations vary.

By contrast, it has been said that the European rules on jurisdiction are and have to be strict rules in order to guarantee certainty and predictability. However, a close look at these jurisdictional systems in European regulations reveal some weakness of the strict rules on the one hand and also the fact that even in these systems a non-convenience substitute has been developed. There are rules which allow courts to deny jurisdiction by way of interpreting a jurisdictional rule restrictively in the light of specific circumstances of the case at hand. There are other rules which give judges a limited power to decline (or in case of a forum necessitatis even to attract) jurisdiction outside the normal rules. In this situation forum non conveniens-type considerations are at issue. In so far the acceptability of the doctrine of forum non conveniens in a global instrument concerning jurisdiction even for continental-European legal systems and the EU as such does not seem unthinkable any more.

This applies especially as far as direct jurisdiction is concerned. Globalization of the markets and of societies as well as the delocalisation of the connecting factors ask for wide jurisdictional rules which may have to be restricted with regard to the specific and limited circumstances of the precise facts of a case.

Concerns about "access to justice", "the right to a lawful judge", non-discriminatory decisions, predictability and certainty of the jurisdictional system can be rebutted if the terms and conditions of a rule on forum non conveniens are framed accordingly: A presumption that honours the plaintiff's choice of court may only be rebutted, if the defendant proves that the interests of both parties and the end of justice justify a stay or denial of the proceedings. He will have to prove in addition that there is an alternative appropriate forum which guarantees a lawful procedure and a possibility for the plaintiff to enforce his right when granted by this alternative court. Much will depend on the phrasing of the rule, but there are models for orientation.

When it comes to indirect jurisdiction the doctrine of forum non conveniens for constitutional reasons plays an important role in the United States. It seems unlikely that an agreement on the international level will be reached without coping with this issue. However, forum non conveniens may have a very limited role on this level only. Due to the fact that in so far practical difficulties for the original forum in adjudicating the case are not at issue any more, the essential issue will be whether the interests of the defendant have been treated in accordance with the rule of law. This could be argued under the head of "ordre public", but it seems preferable to define the limits of such exception expressly.

Finally, the jurisdictional rules of the courts recognizing and enforcing foreign judgments are of pivotal importance. Without the possibility of enforcement a right may be theoretical and illusionary only. Therefore, in order to guarantee practical and effective rights, a legal system must not refrain from enforcing a judgment according to the doctrine of forum non conveniens if and so far as this judgment has to be recognized in this system. Thus, on the third stage of jurisdictional issue the doctrine of forum non conveniens should not play any role at all.

Rolf Wagner, *EU-Kompetenz in der justiziellen Zusammenarbeit in Zivilsachen – Resumée und Ausblick nach mehr als fünfzehn Jahren* (EU Legislative Powers Regarding Judicial Cooperation in Civil Matters)

Since the entry into force of the Amsterdam Treaty in 1999, the European Union has been empowered to cooperate in the area of civil matters. As this power has now existed for more than fifteen years, it seems appropriate to take

stock of developments. In addition to asking whether initial legal uncertainties regarding the interpretation of the power of judicial cooperation in civil matters have been resolved over the course of time, the present article also considers what new problems may have emerged.

Chloé Lignier and **Anton Geier,** *Die Verstärkte Zusammenarbeit in der Europäischen Union – Politischer Hintergrund, Bestandsaufnahme und Zukunftsperspektiven* (Enhanced Cooperation in the European Union – Political Background, Current Status and Future Perspectives)

The legislative instrument of enhanced cooperation allows member states to create a common legal regime in a given field, which applies only to those member states that voluntarily subject themselves to it. While the concept of having different levels of integration ("differentiated integration") as such is not new to EU law, the instrument of enhanced cooperation stands out through its broad scope of application and its elaborate institutional entrenchment.

The history of differentiated integration in the EU illustrates the basic conflict between effective integration on the one hand and preserving the sovereignty of the member states on the other hand. In this context, the two principal competing political ideals aspiring to resolve this conflict are often labelled as "Europe à la carte" on the one hand and "multi-speed Europe" on the other hand. Both ideals – to a varying degree – manifest themselves in the rules on enhanced cooperation introduced with the treaties of Amsterdam and Nice.

After having been neglected by the European legislator for a long time, we can now witness the first practical implementations of enhanced cooperation in the fields of divorce law, patents and the financial transaction tax. The ideas of differentiated integration and the instrument of enhanced cooperation remain highly controversial. Some see it as the only means for overcoming the integrational standstill in an ever more complex and heterogenic Union. Others fear that enhanced cooperation will sow division among the member states and foster political and legal alienation between them.

Ultimately, an analysis of the rules on enhanced cooperation in the treaties and the latest examples of its implementation gives rise to optimism. It reveals a promising potential of the instrument of enhanced cooperation for achieving effective integration in the EU, while duly observing the legitimate interests of

all member states, be they participating or not. At the same time, the European legislator should wield its new sword with caution if it wishes to preserve the solidarity among the member states and the coherence of EU law. It cannot be denied that specific projects of enhanced cooperation can come into conflict with other EU interests such as the coherence and effectiveness of the internal market. As regards the political coherence of the EU, the provisions on sincere cooperation do allow for political inclusion and wisely oblige the participating member states to confer with the non-participants at every stage. The extent to which the member states act in this spirit of constructiveness and cooperation will decide over the fate of enhanced cooperation as either a king's road or a dead end of European legal integration.

Marieke Oderkerk, *The Need for a Methodological Framework for Comparative Legal Research – Sense and Nonsense of "Methodological Pluralism" in Comparative Law*

The paper has presented a framework for comparative legal research indicating the various methodological issues that have to be considered in the various stages of a research project. Its significance is twofold. In the first place it brings order into the existing methodological knowledge in the field such that the various methods and techniques can be understood and assessed within the correct context, automatically unveiling existing lacunae. Secondly, and probably most importantly, the framework shows that there is indeed one framework which contains – at the moment at least, for certain parts of it – clear guidelines and principles that can guide comparatists conducting any type of comparative legal research in any field of the law.

Dieter Martiny, *Die Haager Principles on Choice of Law in International Commercial Contracts – Eine weitere Verankerung der Parteiautonomie (*The Hague Principles on Choice of Law in International Commercial Contracts: Buttressing Party Autonomy)

The Hague Conference on Private International Law has recently drawn up "Principles on Choice of Law in International Commercial Contracts". An innovative feature of these Principles, which are accompanied by an explanatory Commentary, is that unlike an international convention they are non-binding. The Principles were drafted by a Working Group, which

commenced in 2010, and by a Special Commission of November 2012. The instrument was approved by the Council on General Affairs and Policy in March 2015.

The Principles' relatively few black-letter rules (12 articles and a preamble) seek to encourage choice of law in international commercial transactions. They contain clarifications and innovations on choice of law, particularly for jurisdictions where party autonomy is not accepted or is accepted only in a restrictive manner. The Principles try to achieve universal application and also to influence existing regional instruments such as the Rome I Regulation of the European Union and the OAS Mexico Convention.

Developing the Principles was a demanding task since they apply not only to courts but also to arbitral tribunals. Since party autonomy is the centrepiece of the Hague Principles, freedom of choice is granted basically without restriction. The Principles clarify important issues for agreements on choice of law. A reference to "law" also includes generally accepted "rules of law". The latter refers to principles developed by international organisations or international conventions. This approach is also applicable to courts. Under he Hague Principles the parties' choice of law is severable from the main contract. Express and tacit choices are accepted. There is no requirement as to the formal validity of a choice of law. An innovative solution also tries to find an agreement on choice of law in the case of a battle of the forms. Not only are international mandatory rules of the forum respected but under certain circumstances mandatory provisions from other sources are also taken into account. The extent to which overriding mandatory rules and public policy are applied or taken into account, however, is ultimately a matter not for the non-binding Principles themselves but for other rules.

The Hague Principles declare themselves to be an international code of current best practice with respect to the recognition of party autonomy in choice of law in international commercial contracts. Their acceptance in international practice will show how far the expectations of The Hague will be met.

Call for Papers

Call for Papers on Private International Law, Economics, and Development

The Federalist Society's Faculty Division is pleased to announce a **Call for Papers** on **Private International Law, Economics, and Development**. Up to four submissions will be selected for inclusion in an upcoming Faculty Division colloquium on this topic. Authors of the selected pieces will each receive a prize of approximately $2,500 (any co-authors must share a single prize). The topic is intentionally broad in scope, though we have a particular interest in papers that offer fresh perspectives or insights on the relationship between private international law, economics, and development.

The **Private International Law, Economics, and Development** colloquium is intended to engage private international law from a legal, economics, and public policy perspective—particularly the seeming lack of international agreement on how trade should be encouraged and regulated. Some contend legal regimes that promote free trade will benefit all of society, while others argue that such an approach benefits the relatively wealthy at the expense of the relatively poor. Fitted within this larger debate of politics and economics is the important question of what role, if any, private international law should play in promoting and regulating transnational activity. Winning submissions will be incorporated into a special colloquium session, during which we hope to engage some of the latest thinking on these issues.

The winning authors will be expected to attend the colloquium (Oct. 9-10, 2015), which we plan to hold in the Los Angeles area, but not to present their papers in the formal sense; rather, all participants will have read the papers beforehand and will come prepared to engage in a freewheeling discussion on the issues the papers raise. Submissions will be accepted from current law faculty or those pursuing full-time employment in the legal academy.

There is a limit of one submission per person.

Submissions must be substantially complete and formatted in accord with the Bluebook. Submissions should be of a quality publishable in a mainstream law journal, but must **not** have been published as of the date of the submission deadline below. This must be the case even if the paper has been accepted for

publication in a journal or law review.

Submissions must be sent via Microsoft Word or pdf attachment to anthony.deardurff@fed-soc.org **no later than 5:00pm Eastern Time on Friday July 31, 2015.**

Patents and the Internet

Guest Post by Professor Marketa Trimble (UNLV) (also posted at this blog).

Imagine that someone had a patent on the internet and only those who had a license from the patent holder could, for example, do business on the internet. This internet patent would not need to concern the internet protocol, the domain name system, or any other technical features of the network; the patent could, in fact, cover something else – a technology that everyone, or almost everyone, who wants to do business on the internet needs, a technology that is not, however, a technical standard. There might be one such patent application – the patent application discussed below – that could be approaching this scenario.

We must accept, however reluctantly, that activities on the internet will not be governed by a single internet-specific legal regime or by the legal regime of a single country. Although countries might agree on an internet-specific regime for the technical features of the internet, and might even adopt some uniform laws, countries want to maintain some of their country-specific national laws. People and nations around the world are different, and they will always have diverse views on a variety of matters – for example, online gambling. Online gambling might be completely acceptable in some countries, completely unacceptable in others, or somewhere in between; likewise, countries have different understandings of privacy and requirements for the protection of personal data. Therefore, countries now have and likely always will have different national laws on online gambling and different national laws on privacy and personal data protection. Compliance with multiple countries' laws regarding the internet is

nonnegotiable, certainly for those private parties who wish to conduct their activities on the internet transnationally and legally. Nevertheless, in practice and for some matters, the number of countries whose laws are likely to be raised against an actor on the internet may be limited, as I discussed recently.

For some time the major excuse for noncompliance with the laws of multiple countries on the internet was the ubiquitousness of the network. The network's technical characteristics seemed to make it impossible for actors to both limit their activity on the internet territorially, and also to identify with a sufficient degree of reliability the location of parties and events on the internet, such as customers and their place of consumption. However, as geolocation and geoblocking tools developed, location identification and territorial limitation of access became feasible. Of course the increase in the use of geolocation tools generated more interest in the evasion of geolocation, and increased evasion has prompted even further improvements of the tools. The argument that we cannot limit or target our activity territorially because we don't know where our content is accessed or consumed no longer seems valid. (Also – at least in some countries – courts and agencies have permitted internet actors to employ low-tech solutions as sufficient territorial barriers, for example, disclaimers and specific language versions.)

The multiplicity of applicable laws that originate in different countries and apply to activities on the internet is more troubling in some areas of law than in others. One area of law that permeates most internet activity is data privacy and personal data protection. Any internet actor who has customers and users (and therefore probably has user and traffic analytics) will likely encounter national data protection laws, which vary country-by-country (even in the EU countries, which have harmonized their personal data protection laws, national implementing regulations may impose country-specific obligations). Therefore, compliance with the varying national data protection laws will become one of the essential components of conducting business and other activities transnationally. If someone could patent a method for complying simultaneously with multiple countries' data privacy laws on the internet and claim the method broadly enough to cover all possible methods of achieving compliance with the national privacy laws, that patent owner might just as well own a patent on the internet, or at least on a very large percentage of internet activity.

A U.S. patent application that seeks a patent on simultaneous compliance with

multiple countries' data privacy laws on the internet through broad method claims is application No. 14/266,525, which concerns "Systems and Methods of Automated Compliance with Data Privacy Laws," meaning "laws of varying jurisdictions" (the title and the "Abstract"). The invention is designed to facilitate an automatic method of complying with the data privacy laws of various jurisdictions, which are, as the "Introduction" notes, "complicated, diverse, and jurisdiction specific." The method envisions that once "person-related data" are requested from a data provider, a "filter is the [*sic*] automatically applied to the person-related data to restrict transfer of person-related data [that] does [*sic*] not meet the data privacy regulations applicable to the jurisdiction" (the "Introduction"); the filter also checks for any consents by the data subject if the particular regulations require them. The method also foresees, for example, the possibility of "identif[ying] different origins of the person-related data sources" in terms of their geographical location ("Trust Object and Trust Data").

The patent application still must be prosecuted, and the – undeniably useful – invention will be subject to scrutiny as to its compliance with the requirements of statutory subject matter, novelty, and non-obviousness. A patent on the application may not issue at all, or the language of the application may be amended and the claims narrowed. Whatever the future might bring for the claimed invention, this patent application serves as a useful prompt for thinking about the components that have been or are becoming essential to conducting business and other activities on the internet.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2015: Abstracts

The latest issue of the *"Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)"* features the following articles:

Holger Jacobs, **The necessity of choosing the law applicable to non-contractual claims in international commercial contracts**
International commercial contracts usually include choice-of-law clauses. These clauses are often drafted narrowly, such that they do not cover non-contractual obligations. This article illustrates that, as a result, contractual and non-contractual claims closely linked to the contract risk being governed by different laws. This fragmentation might lead to lengthy and expensive disputes and considerable legal uncertainty. It is therefore advisable to expressly include non-contractual claims within the scope of choice-of-law clauses in international commercial contracts.

Leonard Hübner, **Section 64 sentence 1 German Law on Limited Liability Companies in Conflict of Laws and European Union Law**
The article treats the application of the liability pursuant to § 64 sentence 1 GmbHG to European foreign companies having its centre of main interest in Germany. At the outset, it demonstrates that the rule belongs to the lex concursus in terms of Art. 4 EuInsVO. For the purposes of this examination, the article considers the case law of the ECJ as well as the legal consequences of the qualification. At the second stage, it illustrates that the application of the rule to foreign companies does not infringe the freedom of establishment according to Art. 49, 54 TFEU.

Felix Koechel, **Submission by appearance under the Brussels I Regulation and representation in absentia**
In response to two questions referred by the Austrian Supreme Court, the ECJ ruled that a court-appointed representative for the absent defendant (Abwesenheitskurator) cannot enter an appearance on behalf of the defendant for the purposes of Article 24 of the Brussels I Regulation. This solution seems convincing because the entering of an appearance by the representative would circumvent the court's obligation to examine its jurisdiction on its own motion under Article 26 para 1 of the Brussels I Regulation. Considering also the ECJ's decisions in cases C-78/95 (Hendrikman) and C-327/10 (Hypote?ní banka) it seems that the entering of an appearance within the meaning of the Brussels I Regulation is generally excluded in case of a representation in absentia. It is, however, doubtful whether the very specific solution adopted by the ECJ in the present case should be applied in other cases of representation in proceedings.

Peter Mankowski, **Tacit choice of law, more preferential law principle, and**

protection against unfair dismissal in the conflict of laws of employment agreements

Labour contracts with a cross border element are a particular challenge. They call for a particularly sound administration of justice. Especially, the discharge of employees gives rise to manifold questions. The final decision of the Bundesarbeitsgericht in the case Mahamdia provides a fine example. It tempts to spend further and deepening thoughts on tacit choice of law (with a special focus on jurisdiction agreements rendered invalid by virtue of Art. 23 Brussels Ibis Regulation, Art. 21 Brussels I Regulation/revised Lugano Convention), the most favourable law principle under Art. 8 (2) Rome I Regulation, and whether the general rules on discharge of employee might possibly fall under Art. 9 Rome I Regulation.

Christoph A. Kern, **Judicial protection against torpedo actions**

In the recent case Weber v. Weber, the ECJ had ruled that, contrary to the principle of priority provided for in the Brussels I Regulation, the court second seized must not stay the proceedings if it has exclusive jurisdiction. The German Federal Supreme Court (BGH) applies this ratio decidendi in a similar case. In its reasons, the BGH criticizes – and rightly so – the court of appeal which, in the face of a manifestly abusive action in Italy, had denied an identity of the claims and the parties by applying an "evaluative approach". Nevertheless, the repeated opposition of lower courts to apply the principle of priority is remarkable. The Brussels I recast, which corrects the ECJ's jurisprudence in the case Gasser v. Misat, would, however, allow for an approach based on forum selection: Whenever the parties have had no chance to protect themselves against torpedo actions by agreeing on the exclusive jurisdiction of a court or the courts of a Member State, the court second seized should be allowed to deviate from a strict application of the principle of priority.

Jörn Griebel, **The Need for Legal Relief Regarding Decisions of Jurisdiction Subject to Setting Aside Proceedings according to § 1040 of the German Code of Civil Procedure**

§ 1040 section 3 of the German Code of Civil Procedure prescribes that a so called "Zwischenentscheid", an arbitration tribunal's interim decision on its jurisdiction, can be challenged in national court proceedings. The decision of the German Federal Court of Justice (BGH) concerned the procedural question whether a need for legal relief exists in such setting aside proceedings concerning an

investment award on jurisdiction, especially in situations where an award on the merits has in the meantime been rendered by the arbitration tribunal.

Bettina Heiderhoff, **No retroactive effect of Article 16 sec. 3 Hague Convention on child protection**

Under Article 21 German EGBGB it was possible that a father who had parental responsibility for his child under the law of its former habitual residence lost this right when the child moved to Germany. This was caused by the fact that Article 21 EGBGB connected the law governing parental custody to the place of habitual residence of the child.

Article 16 sec. 1 Hague Convention on child protection (1996) also connects the parental custody to the habitual residence. However, in Article 16 sec. 3 it has a different rule for the above described cases, stating that parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.

The author is critical towards the common understanding of Article 21 EGBGB. The courts should always have interpreted this rule in the manner that is now explicitly fixed in Article 16 sec. 3 Hague Convention. As the rule has been virtually out of force for many years due to the overriding applicability of the Hague Convention, a retroactive change in its interpretation would cause great insecurity.

The essay also deals with various transitional problems. It supports the view of the OLG Karlsruhe, that the Hague Convention cannot be applied retroactively when a child moved to Germany before January 2011.

Herbert Roth, **Rechtskrafterstreckung auf Vorfragen im internationalen Zuständigkeitsrecht**

The European procedure law (Brussels I Regulation) does not make any statement concerning the scope of substantive res judicata of national judgments. However, the European Court of Justice extends the effects of res judicata to prejudicial questions of the validity of a choice-of-forum clause, in this respect it approves a European conception of substantive res judicata (ECJ, 15.11.2012 – Case C 456/11 – Gothaer Allgemeine Versicherung AG ./. Samskip GmbH, IPRax 2014, p. 163 Nr. 10, with annotation H. Roth, p. 136). The verdict of the higher regional court of Bremen as appellate court had to consider the precedent of the ECJ. It is the final decision after the case was referred back from the ECJ. The international jurisdiction of German courts was rejected in favour of the Icelandic courts, in

spite of the defendant's domicile in Bremen.

Martin Gebauer, **Partial subrogation of the insurer to the insured's rights and the incidental question of a non-contractual claim**

The decision, rendered by the local court of Cologne, illustrates some of the problems that arise when the injured party of a car accident brings an action as a creditor of a non-contractual claim against the debtor's insurer, despite the injured party having already been partially satisfied by his insurer as a consequence of a comprehensive insurance policy. The partial subrogation leads to separate claims of the injured party, on the one hand, and its insurer on the other. According to Article 19 of the Rome II Regulation, the subrogation, and its scope, is governed by the same law that governs the insurance contract between the injured party and its insurer. The non-contractual claim, however, which is the object of the subrogation, is governed by a different law and presents an incidental question within the subrogation. The injured party, as claimant, can sue the debtor's insurer in the courts of the place where the injured party is domiciled. The injured party's insurer, however, may not sue the debtor's insurer in the courts of the place where the injured party is domiciled, but is rather forced to bring the action at the defendant's domicile. This may lead to parallel proceedings in different states and runs the risk of uncoordinated decisions being made by the different courts regarding the extent of the subrogation.

Apostolos Anthimos, **On the remaining value of the 1961 German-Greek Convention on recognition and enforcement**

Since the late 1950s, Greece has established strong commercial ties with Germany. At the same time, many Greek citizens from the North of the country immigrated to Germany in pursuit of a better future. The need to regulate the recognition and enforcement of judgments led to the 1961 bilateral convention, which predominated for nearly 30 years in the field. Following the 1968 Brussels Convention, and the ensuing pertinent EC Regulations, its importance has been reduced gradually. That being the case though, the bilateral convention is still applied in regards to cases not covered by EC law and/or multilateral conventions. What is more interesting, is that the convention still applies for the majority of German judgments seeking recognition in Greece, namely cases concerning divorce decrees rendered before 2001, as well as adoption, affiliation, guardianship, and other family and personal status matters. The purpose of this paper is to highlight the significance of the bilateral convention from the Greek

point of view, and to report briefly on its field of application and its interpretation by Greek courts.

David B. Adler, **Step towards the accommodation of the German-American judicial dispute? – The planned restriction of Germany's blocking statute regarding US discovery requests.**

Until today, US and German jurisprudence argue whether US courts are allowed to base discovery orders on the Federal Rules of Civil Procedure instead of the Hague Evidence Convention, despite the fact that evidence (e.g. documents) is located outside the US but in one of the signatory states. While the one side argues that the Hague Convention trumps the Federal Rules and has to be primarily, if not exclusively, utilized in those circumstances, the other side, especially many US courts, constantly resisted interpreting the Hague Evidence Convention as providing an exclusive mechanism for obtaining evidence. Instead, they have viewed the Convention as offering discretionary procedures that a US court may disregard in favor of the information gathering mechanisms laid out in the federal discovery rules. The Hague Evidence Convention has therefore, at least for requests from US courts, become less important over time.

The German Federal Ministry of Justice and Consumer Protection intends to put this debate to an end and to reconcile the differing legal philosophies of Civil Law and Common Law with regard to the collecting of evidence. It plans to alter the wording of the German blocking statute which, up to this date, does not allow US litigants to obtain pretrial discovery in the form of documents which are located in Germany at all. Instead of the overall prohibition of such requests, the altered statute is intended to allow the gathering of information located in Germany if the strict requirements of the statute, especially the substantiation requirements towards the description of the documents, are fulfilled. By changing the statute, Germany plans to revive the mechanisms of the Hague Evidence Convention with the goal of convincing the US courts to place future exterritorial evidence requests on those mechanisms rather than on the Federal Rules.

The article critically analyses the planned statutory changes, especially with regard to the strict specification and substantiation requirements concerning the documents requested. The author finally discusses whether the planned statutory changes will in all likelihood encourage US courts to make increased usage of the information gathering mechanisms under the Hague Evidence Convention with regards to documents located in Germany, notwithstanding the effective information gathering tools under the Federal Rules of Civil Procedure.

Steffen Leithold/Stuyvesant Wainwright, **Joint Tenancy in the U.S.**

Joint tenancy is a special form of ownership with widespread usage in the USA, which involves the ownership by two or more persons of the same property. These individuals, known as joint tenants, share an equal, undivided ownership interest in the property. A chief characteristic of joint tenancy is the creation of a "Right of Survivorship". This right provides that upon the death of a joint tenant, his or her ownership interest in the property transfers automatically to the surviving joint tenant(s) by operation of law, regardless of any testamentary intent to the contrary; and joint tenants are prohibited from excluding this right by will. Joint tenancies can be created either through inter vivos transactions or testamentary bequests, and for the most part any asset can be owned in joint tenancy. A frequent reason for owning property in joint tenancy is to facilitate the transfer of a decedent's ownership interest in an asset by minimizing the expense and time-constraints involved with the administration of a probate proceeding. Additional advantages of owning property in joint tenancy include potential protections against a creditor's claims or against assertions by a spouse or minor children of homestead rights. Lastly, owning property in joint tenancy can result in inheritance, gift, property and income tax consequences.

Tobias Lutzi, **France's New Conflict-of-Laws Rule Regarding Same-Sex Marriage and the French ordre public international**

On 28 January, the French Cour de cassation confirmed a highly debated decision of the Cour d'appel de Chambéry, according to which the equal access to marriage for homosexual couples is part of France's ordre public international, allowing the court to disregard the Moroccan prohibition of same-sex marriage in spite of the Franco-Moroccan Agreement of 10 August 1981 and to apply Art. 202-1(2) of the French Code civil to the wedding of a homosexual Franco-Moroccan couple. The court expressly upheld the decision but indicated some possible limitations of its judgment in a concurrent press release.

Study on the Service of Documents

I have been asked by Giacomo Pailli, Università degli Studi, Florence, to spread the word about this study on the service of documents. Good luck with it!

The EU Commission has recently launched a European-wide study on the service of documents in EU Member States, which is being carried out by a consortium composed by the University of Florence, the University of Uppsala and DMI, a French consulting firm.

The Commission is particularly interested in understanding the existing disparities between the national regimes on service of documents that might constitute an obstacle to the proper functioning of Regulation 1393/2007 on the service of documents. The focus of the study is on domestic service of documents.

Anyone who works in the field of civil procedure, private international law and international litigation in general–either as private practitioners, in-house counsel, legal academics or neutrals– and has knowledge of how service of documents works in a EU Member State is invited to participate to the study by answering to an online questionnaire. On the website of the project you may also find the questionnaire translated in almost all languages of EU Member States.

The questionnaire is complex and articulated, but participants are free to answer only some of the sections, especially those that relate more closely to their direct experience or knowledge. The answers are all collected anonymously, unless the participant wish to be included in the public list of contributors to the study and answers question no. 1.5.

The survey will remain open until July 7th, 2015.

We warmly thank anyone who will take the time to ensure the success of this study.

Reminder: 2015 JPIL Conference at Cambridge: Booking Deadlines

The 10th Anniversary of the Journal of Private International Law Conference is being held at the Faculty of Law, Cambridge University on 3-5 September 2015. Booking for accommodation closes soon – on 15th July. Booking for the conference and dinner will close on 13th August.

The conference offers an excellent opportunity to hear and discuss many issues currently facing private international law.

More information and registration is here. A draft programme is available on the same web site.