TDM Call for Papers on Dispute Resolution from a Corporate Perspective

While corporations are one of the key stakeholders in international dispute resolution, they do not often participate in the debate, and if they do, they often speak a language completely different from that of the other stakeholders. There are numerous topics that play a key role in the daily life of corporate dispute resolution lawyers but are rarely discussed outside the corporate world or from a corporate perspective irrespective of having a significant impact on how disputes are managed and resolved, or how corporations expect this to be done.

A TDM special on dispute resolution from a corporate perspective will be edited by Kai-Uwe Karl (General Electric), Abhijit Mukhopadhyay (Hinduja Group), Michael Wheeler (Harvard Business School) and Heba Hazzaa (Cairo University), seeking to widen and deepen the debate on issues that are central to the efficient management of disputes from a corporate perspective. There is still time to submit proposals and papers for the TDM as deadline has been extended to December 15th.

Contributions should be related to any of the areas set out; however, other relevant contributions are welcome as well.

Dispute Management. While companies do not enter into contracts with the expectation of becoming embroiled in litigation, disputes do occur and are part of doing business. The assumption is that disputes should be managed systemically rather than as *ad-hoc* events.

Commercial Dispute Resolution – The field of negotiation. In order to successfully resolve commercial disputes, lawyers must possess, in addition to their legal, technical, and industry expertise, the skills to understand, predict and manage conflict through negotiation. While discussion of legal concepts and theory among the community of international dispute resolution lawyers is highly sophisticated, there is less of a debate on *negotiation* and limited exchange with other disciplines researching the field of negotiation

Managing the cost of dispute resolution. Managing the cost of dispute resolution is key, and discussions between law firms and corporations often center on the subject of how much and how to bill, including for dispute related work. While there is an ongoing debate about whether traditional hourly rate billing creates the wrong incentives, alternative fee arrangements for dispute resolution still appear to be exceptional.

The future of commercial dispute resolution – breaking new ground. The arrival of "big data", *i.e.,* the increasing volume, velocity, and variety of data, is likely to catapult us into a world where analytics of very large data sets may allow predictions of outcomes and behavior that currently does not exist.

For more information see here.

Investor-to State Dispute Settlement Mechanism (EU Regulation)

On 28 August, the European Union took an important step towards creating a comprehensive EU investment policy, with the publication of a Regulation setting out a new set of rules to manage disputes under the EU's investment agreements with its trading partners. The rules – set out in the Regulation on financial responsibility under future investor-to-state disputes – are a necessary component of a common EU investment policy.

'This Regulation,' said EU Trade Commissioner Karel De Gucht 'represents another building block in our efforts to develop a transparent, accountable and balanced investor-to state dispute settlement mechanism as part of EU trade and investment policy. '

The rules set up the EU's internal framework for managing future investor-state disputes. They define who is best placed to defend the EU's and Member States' interests in the event of any challenge under investor-to-state dispute (ISDS) in EU trade agreements and the Energy Charter Treaty. The rules also establish the principles for allocating any eventual costs or compensation. Member States will defend any challenges to their own measures and the EU will defend measures taken at EU level. In all cases, there will be close cooperation and transparency within the EU and the EU institutions.

EU investment policy

Under the Treaty of Lisbon, investment became part of the EU Common Commercial Policy – an exclusive competence of the EU. As a consequence, the European Commission now also negotiates the investment component of trade agreements on behalf of the European Union.

The possibility of dispute settlement between an investor and a state is the enforcement mechanism typically used in agreements containing investment protection. There are currently 3000 bilateral investment treaties in force globally, more than 1400 of which are concluded by EU Member States. The vast majority of them include ISDS, as a necessary enforcement mechanism for those investing in third countries. EU investors are the most frequent users of ISDS worldwide.

The EU is negotiating investment protection and ISDS in a number of agreements, and is already party to the Energy Charter Treaty which provides for investment protection and ISDS. As part of its investment policy, the EU aims to implement extensive improvements to the already existing investor-to-state dispute settlement mechanisms by requiring increased transparency, accountability and predictability. In its agreements, the EU is including firm transparency obligations, so that all documents and hearings are public, provisions against the abuse of the system and provisions ensuring the independence and impartiality of arbitrators. The Regulation published today will help to ensure transparency in investor-to-state disputes that arise under future EU agreements, by foreseeing close consultations and information-sharing between the Commission, Member States and the European Parliament.

Where EU-level agreements including investment protection are concluded, they

will replace the Member States' Bilateral Investment Treaties with the same non-EU countries.

When will the new rules be used?

Although the Regulation will enter into force on 17th September, the rules will only be applied once actual investor-state disputes under EU agreements with an ISDS mechanism arise.

Source: European Commission Press release.

Note: for a further reading on the topic, based on the draft of the Regulation, Jan Kleinheisterkamp, 'Financial Responsibility in the European International Investment Policy', (2014) 63-2 International and Comparative Law Quarterly 449-476 (summary here).

New Book Published: Recognition in International Civil Litigation – European Enforcement Law

The lectures delivered at the 2013 Conference of the International Association of Procedural Law on recognition of foreign judgments and cross-border enforcement have been collected in a book, recently published by Gieseking Verlag and edited by Prof. Burkhard Hess, under the title *Die Anerkennung im Internationalen Zivilprozessrecht – Europäisches Vollstreckungsrecht.*

The volume addresses the following topics:

- Perspectives on recognition within the European Union
- Recognition under national law in Europe
- Recognition of foreign judgments in the U.S. and in Asia

- International enforcement between territoriality, the creditor's interests and debtor protection
- The European Account Preservation Order
- Transparency of assets between the creditor's interests and debtor protection
- Liability, Security and Undertakings in cross-border enforcement law.

See here the table of contents. For further information please click here.

Another Opinion Limiting the Alien Tort Statute

Today, Judge Scheindlin of the United States District Court for the Southern District of New York dismissed a case filed by a class of South Africans against Ford Motor Company and IBM (see here SDNY SAAL. Those companies had been sued under the Alien Tort Statute for allegedly aiding and abetting human rights violations during the Apartheid regime. Put simply, the plaintiffs alleged that Ford and IBM oversaw operations of a subsidiary in South Africa that led to human rights violations in South Africa. Given that the plaintiffs were unable to plead relevant conduct in the United States that would give rise to a violation of customary international law, the case was dismissed. According to Judge Scheindlin, "That these plaintiffs are left without relief in an American court is regrettable. But I am bound to follow *Kiobel II* and *Balintulo*, no matter what my personal view of the law may be."

In addition to this case, the Eleventh Circuit recently dismissed a case against Chiquita for similar reasons.

Besides these two cases, the Fourth Circuit permitted a case to go forward against CACI Premier Technology for alleged abuse and torture occurring at Abu Gharib. See here for a roundup on the Chiquita and CACI cases.

Invitation to Tender: Study on the Law Applicable to Companies

The European Commission has published an invitation to tender relating to a study on the law applicable to companies with the aim of a possible harmonization of conflict of laws rules on the matter. Deadline for submissions is 30 September 2014. More information is available here and here.

Presentation on the Boundaries of European Private International Law on SSRN

The text of the presentation of Veerle Van Den Eeckhout on the international conference "Boundaries of European Private International Law" at Louvain La Neuve, 5/6 June 2014, entitled "The (Boundaries of) the Instrumentalisation of Private International Law by the European Institutions".is now available on ssrn.

The abstract reads as follows:

"Where European institutions (the European legislator or the Court of Justice) get involved in PIL, PIL might (also) be assessed in the light of European objectives. Is PIL, thus, evolving into a policy instrument? Two case-studies could be analysed from this perspective: international labour law (with focus on intra-community cross-border situations) and corporate social responsibility (with focus on environmental pollution outside Europe). What interests can or may PIL serve in these areas at the end of the day, and what should be the limits?"

14th Ernst Rabel Lecture at the Max Planck Institute in Hamburg

On 20 October 2014, Dagmar Coester-Waltjen from the University of Göttingen (Germany) will deliver the 14th Ernst Rabel Lecture at the Max-Planck-Institute for Comparative and International Private Law in Hamburg. She will discuss "Heaven and Hell – Some Refelctions on International Jurisdiction". More information is available here.

ERA: Annual Conference on European Family Law 2014

On 25 and 26 September 2014 the Academy of European Law (ERA) will host its Annual Conference on European Family. The conference will be dedicated to recent case law and recent developments in cross-border family matters. Particular attention will be placed on the review of the Brussels IIa Regulation as well as cross-border maintenance after the entry info force of the Hague Maintenance Convention.

Further information is available here.

Conference on “Artificial Reproduction and European Family Law”

From October 2 to 4, 2014 the 12th biannual Symposium on European Family Law will take place at the University of Regensburg (Germany). Hosted by Anatol Dutta, Dieter Schwab, Peter Gottwald, Dieter Henrich and Martin Löhnig the symposium will be dedicated to artificial reproduction. The topic shall be discussed from a comparative and private international law perspective.

The conference language will be German. The conference programme and registration information is available here.

Recent PIL Scholarship

See here for a list of abstracts on SSRN of recent PIL scholarship. Please consider subscribing to and posting PIL scholarship with this eJournal, as it will help create a central location for PIL scholarship.