# On Unilateral Choice-of-Court Agreements and Options to Arbitrate (article)

A topic we were discussing just a few days ago at the MPI, with especial attention to a Spanish decision. Now it's Italian time. The article, by S. Ferrero, is to be found here.

Abstract:

In this work it is discussed the validity and the enforceability of unilateral choice-of-court agreements and options to arbitrate. Such clauses are very frequent in international contracts, particularly in loan agreements, where the provision is in favour of the lender, the stronger party to the contract. Whilst in various jurisdictions there are significant lines of authorities enforcing such agreements as perfectly valid, unilateral choice-of-court agreements and options to arbitrate have been recently questioned and struck down by the French, the Russian and the Bulgarian Supreme Courts. Recognizing in these decisions a rising general tendency, at the international level, contrary to asymmetric arbitration and choice of court agreements is, perhaps, premature. Nevertheless, the arguments put forward by the mentioned decisions naturally trigger further analysis of the matter. The legal assessment will be carried out under a twofold perspective: on the one hand, the private international law, which entails the analysis of the relevant European legislation (Regulation 44/2001 and Regulation 1215/2012) and, on the other hand, the domestic substantive law, namely Italian law. Particularly, it will be considered whether, in the light of the reasoning of the foreign case law, Italian courts may change their attitude towards one-sided jurisdiction and arbitration agreements. It is submitted that the decisions against the validity and enforceability are open to criticism and Italian courts should remain in favour of asymmetric arbitration and choice of court agreements for, it is suggested, the European legislation and Italian domestic law do not lead, expressly or implicitly, to hold them invalid and/or unenforceable, except for certain limited cases.

# Save the Date: ILA 2016 Biennial Conference

The 77th Biennial Conference of the International Law Association will take place **from 7 to 11 August 2016** in Johannesburg, South Africa.

This year's theme will be **'International Law and State Practice: Is there a North/South Divide?'**

You are invited to register your interest at the official conference website. Further information and programme details will follow as and when they become available.

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# OGEL & TDM Call for Papers: Special Issue on Renewable Energy Disputes

Oil, Gas, and Energy Law Journal and Transnational Dispute Management invite submissions for a joint Special Issue on Renewable Energy Disputes.

Renewable energy production is nothing new: windmills have been used to produce wind-based energy and dams have been used to produce mechanical energy for centuries past. However, the scale of investment in this area and the increased subsidies, regulation of and drive towards this type of electricity generation are unprecedented. Given the surge in activity in renewable energy production, it is no surprise that disputes in this area have started to arise.

Issues that have led to disputes within the EU, the US and globally have, for

example, related to the national governments' objective of ensuring maximum national or regional benefit from governmental measures in this area (similar to what is done in oil and gas-producing countries through local content requirements), miscalculations of subsidies in the planning stages and excessive costs for the state from such subsidies, especially when economic circumstances have changed. Furthermore, the scale of activities has in itself contributed to all kinds of disputes arising at various levels and various forums. These disputes may involve issues of public international law, EU and US law (at the supranational, national and subnational levels), private law and contractual arrangements. The Special Issue examines these types of disputes and analyses their backgrounds and the reasons why they arose. Recent and ongoing renewable energy disputes under international law have concerned international investment law and WTO law. However, recent renewable energy disputes at European level have mostly related to the free movement provisions of EU Treaty law. Contractual arrangements and connection issues serve as illustrations of private and contractual disputes in these areas.

This OGEL/TDM Special Issue on Renewable Energy Disputes will examine all kinds of renewable energy disputes. The basic structure of the special issue is:

Introduction: Renewable energy disputes: an overview – Professor Kim Talus (UEF Law School)

**I) Public International Law Disputes**

WTO cases: an overview (already in preparation)
WTO case against Canada (Ontario local content requirement) (already in preparation)
Investment Disputes in Renewable Energy (already in preparation)
*Further proposals welcome!*

**II) EU Law Disputes**

Judgment Ålands Vindkraft (already in preparation)
Judgment Essent (already in preparation)
*Further proposals welcome!*

**III) National and Subnational Law and Commercial or Contractual Law Disputes**

Spain: Spanish Supreme Court and ICSID cases against Spain (already in preparation)
UK Renewable Disputes (already in preparation)
*Further proposals welcome!*

OGEL and TDM encourage submission of relevant papers, studies, and comments on various aspects of this subject, including International, regional and national disputes on various aspects of renewable energy disputes. Contributions discussing a particular topic within this area, such as need to reform the ISDS with regards renewable energy and climate change, are also welcome.

Papers should be submitted by the 15 January 2015 deadline to Professor Kim Talus – contact details on the OGEL and TDM website – as well as a copy to info@ogel.org

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# Foreign Judgments and Arbitral Awards – A Practical Guide

This new book by Apostolos Anthimos is a further step to record systematically the existing Greek case law in the field of International Civil Litigation. Following last year's publication on the Service of Process Abroad the author engages in an exhaustive presentation of reported and unreported material in the field of recognition and enforcement of foreign judgments and arbitral awards published within the last 40 years in Greece. The methodology selected resembles to the one chosen in the author's previous publication: Its central purpose is the direct access to key information on a state by state basis, i.e. the presentation of applicable laws and case law for each country separately. The analysis is based on the 4-level model, well known for EU Member States: Domestic provisions (Articles 323, 780, 903, 905, 906 Greek Code of Civil Procedure), (seventeen) bilateral & (nearly ten) multilateral agreements, and seven EC-Regulations are considered, and their repercussion in Greek court practice is thoroughly scrutinized.

After introducing the reader to the existing landscape of recognition and enforcement in Greece (pp. 1-20), the main part of the book (pp. 21-274) elaborates each country of origin separately. The material varies, depending on social and commercial ties and factors. For instance, German, UK, US, Italian, and French judgments emanate both from commercial and family matters, whereas Albanian, Russian, Georgian, Armenian, and Australian judgments are almost exclusively dealing with personal status matters. By way of comparison, no judgments are reported by many African, Asian and Latin American legal orders, where no conventional link or case law could be traced.

The annexes of the book (pp. 285-418) host all bilateral & multilateral conventions signed / ratified by Greece on the matter, and the respective chapters of EC-Regulations. The case law coverage is fully updated, and includes all decisionsreported until August 2014.

(ISBN/ISSN: 978-960-568-179-1; available at Sakkoulas Publications)

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# Daimler AG v. Bauman et al. (a comment)

Prof. Zamora Cabot (University Jaume I, Castellón, Spain), has just published a new comment on the US Supreme Court decision *Daimler* in English. He has kindly provided me the link: just click here.

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# Reminder: Conference on

# Minimum Standards in European Civil Procedure Law

As mentioned earlier on this blog, Matthias Weller from EBS Law School and Christoph Althammer (now) from the University of Regensburg will host a conference on minimum standards in European Civil Procedure in Wiesbaden on 14 and 15 November 2014. Further information is available on the conference website. Registration is still open.

**The conference language will be German.**

The programme reads as follows:

Friday, 14 November, 2 – 4 p.m.:

**Welcome remarks**
*Prof. Dr. Matthias Weller, EBS Law School*

**Minimum standards und core procedural principles from a German law perspective: European Convention on Human Rights/German constitutional law/German national law**
*Prof. Dr. Christoph Althammer, University of Regensburg*

**Minimum standards und core procedural principles from a French law perspective: European Convention on Human Rights/French constitutional law/French national law**
*Prof. Dr. Frédérique Ferrand, Université Jean Moulin, Lyon*

Friday, 14 November, 5 – 7 p.m.:

**Minimum standards und core procedural principles from a UK law perspective: European Convention on Human Rights/UK constitutional law/UK national law**
*Prof. Dr. Matthias Weller, EBS Law School*

**Transnational synthesis: ALI/UNIDROIT Principles of Civil Procedure**
*Prof. Dr. Thomas Pfeiffer, Ruprecht-Karls-University Heidelberg*

Friday, 14 November, 7 p.m.:

**Panel Discussion**

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Saturday, 15 November, 9 – 11 a.m.:

**Minimum standards and procedural principles in criminal law proceedings under European influence**
*Prof. Dr. Michael Kubiciel, University of Cologne*

**Minimum standards and procedural principles in administrative law proceedings under European influence**
*Prof. Dr. Andreas Glaser, University of Zurich*

Saturday, 15 November, 11.30 a.m. – 1.30 p.m.:

**Minimum standards and procedural principles in public and private antitrust law proceedings under European influence**
*Prof. Dr. Friedemann Kainer, University of Mannheim*

**Minimum standards and procedural principles in intellectual property law under European influence**
*Prof. Dr. Mary-Rose McGuire, University of Mannheim*

Saturday, 15 November, 2.30 – 3.30 p.m.:

**European law synthesis: Minimum standards and procedural principles in the aquis communautaire/ conclusions for European Principles of Civil Procedure**
*Prof. Dr. Burkhard Hess, Director of the Max Planck Institute Luxemburg for International, European and Regulatory Procedural Law*

Saturday, 15 November, 3.30 p.m.:

**Panel Discussion**

# Opinion 1/13 of the ECJ (Grand Chamber)

As you might remember, the following request was submitted to the ECJ on June 2013:

'Does the exclusive competence of the [European] Union encompass the acceptance of the accession of a non-Union country to the Convention on the civil aspects of international child abduction [concluded in the Hague on] 25 October 1980 [("the 1980 Hague Convention" or "the Convention")]?'

The answer was given yesterday: "**The exclusive competence of the European Union encompasses the acceptance of the accession of a third State to the Convention on the civil aspects of international child abduction concluded in The Hague on 25 October 1980″.**

For the whole document click here.

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# Dutch Private International Law journal, 2014 second and third issue published

The second issue of 2014 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* (published in June) includes scholarly articles on the Unamar ruling of the European Court of Justice and the reform of the European Insolvency Regulation.

**Jan-Jaap Kuipers & Jochem Vlek, 'Het Hof van Justitie en de bescherming**

**van de handelsagent: over voorrangsregels, dwingende bepalingen en openbare orde'**, p. 198-206. The English abstract reads:

> *In Unamar, the Court of Justice of the European Union decided that national rules providing protection to commercial agents going beyond the mandatory floor laid down by the Agency Directive can be qualified as overriding mandatory provisions. This article discusses the decision of the CJEU and its articulation with another case involving the Agency Directive: Ingmar. Subsequently, the article addresses two wider issues relating to overriding mandatory provisions and the Agency Directive that, even after Unamar, remain to be resolved. The first is whether rules primarily protecting the weaker party, such as the agent, can at all be qualified as overriding mandatory provisions. The second is whether a choice of court or arbitration clause should be set aside or invalidated because of the applicability of an overriding mandatory provision.*

**Laura Carballo Piñeiro, 'Towards the reform of theEuropean InsolvencyRegulation: codification rather than modification'**, p. 207-215. The abstract reads:

> *The European Insolvency Regulation has largely succeeded in providing a framework for cross-border insolvency. But after serving for more than a decade, the time is ripe to give it 'a new facelift', as suggested by Mrs. Viviane Reding. This paper provides a critical overview of the Proposal amending the Regulation issued by the European Commission on 12 December 2012. While its inputs are backed up by a broad consensus as it mostly reflects developments in national insolvency laws and codifies the Court of Justice of the European Union's case law, the Proposal is a missed opportunity to modify some rules which do not properly contribute in their current wording to achieving the insolvency proceedings' goals. This is particularly remarkable in view of the extension of the Regulation's scope of application to include proceedings with reorganization, adjustment of debt or rescue purposes and hence, aiming to enhance their cross-border effects and ultimate goals.*

The recently published third issue of 2014 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* contains the following three articles on: the (English) court language in international litigation, the

recognition and enforcement of provisional and protective measures and international matrimonial property law in Turkey.

**Johanna L. Wauschkuhn, 'Babel of international litigation: Court language as leverage to attract international commercial disputes',** p. 343-350. The abstract reads:

*Ever since the disappearance of Latin from European courtrooms, it has been commonly understood that each nation would use its own language(s) in its own courts of law. However, in the last few years, discussions have arisen among politicians and legal scholars as to the possibility of introducing foreign languages as court languages. Whereas politicians are mostly driven by economic considerations, many academics are more reluctant as they fear an infringement of the principle of the publicity of proceedings and a contamination of the native legal system. The present article analyses whether offering the option of using a non-national language as court language in civil and commercial litigation is an effective, feasible and efficient leverage to make a jurisdiction (or court) more attractive for international commercial dispute resolution. The article therefore addresses, firstly, why and how lawmakers would try to attract legal disputes and, secondly, why and how parties to a dispute choose a particular jurisdiction. Here, special attention is paid to the role of language in the choice of court. Following this, the most prominent and most frequently expressed practical and constitutional objections regarding competition by means of court language are summarised. After this theoretical presentation, the jurisdictions of Germany and Switzerland are analysed, as examples, as to their standing in the present discussion and their role on the market for international dispute resolution. It is concluded that the objections against introducing a non-national court language outweigh the mostly economic arguments in favour, especially considering the only minimal positive effects.*

**Carlijn van Rest, 'Erkenning en tenuitvoerlegging van (ex parte) voorlopige en bewarende maatregelen op grond van de EEX-Verordening en de Herschikking van de EEX-Verordening. Een analyse aan de hand van de Engelse Freezing Order'**, p. 351-356. The English abstract reads:

*An English Freezing Order is an interim prohibitory injunction, which is almost*

*invariably granted ex parte and which restrains a party from disposing or dealing with its assets. On the basis of the Brussels I Regulation it is possible to recognize and enforce an English Freezing Order in the Netherlands. This is only possible if the Freezing Order has been granted on an inter partes basis, because ex parte decisions cannot generally be enforced. This article discusses what a (worldwide) Freezing Order exactly is and under what conditions it can be ordered by the English courts. A comparison will be made with the Dutch garnishee order (conservatoir derdenbeslag). Furthermore, this article discusses the problems with the recognition and enforcement of provisional and protective measures which have been granted ex parte under the Brussels I Regulation (Regulation No. 44/2001) and the consequences for the recognition and enforcement of ex parte decisions under the Recast of the Brussels I Regulation (Regulation No. 1215/2012).*

**Zeynep Derya Tarman & Ba?ak Ba?o?lu, 'Matrimonial property regime in Turkey',** p. 357-363. The abstract reads:

*As the number of marriages between spouses from different nations is increasing the issue of the matrimonial property regime has become significant. The aim of this article is to examine the possible problems when claims regarding the matrimonial property regime with a foreign element are brought before a Turkish court. In this regard, both the private international law and the substantive law aspects of the matrimonial property regime in Turkey will be explained: namely the jurisdiction issue in matrimonial property cases, the conflict of law rules regarding the applicable law in the matrimonial property regime before the competent Turkish courts and, finally, the matrimonial property regime under the Turkish Civil Code. Accordingly, both the legal matrimonial property regime and three contractual matrimonial property regimes that the spouses may choose under Turkish law will be described.*

# Ratification of The Choice of Court Agreements Convention

*(Many thanks to François Mailhé, Associate Professor Paris 2, Panthéon-Assas, for the tip)*

Last Friday (10.10.2014) the EU Justice Ministers approved a decision ratifying the Choice of Court Agreements Convention, 2005 (the Convention has been signed by the US, 19.1.2009, and by the EU, 1.4.2009; and ratified by Mexico, 26.9.2007). For those who are not familiar with it: The Convention is aimed at ensuring the effectiveness of choice of court agreements ("forum selection clauses") between parties to international commercial transactions. By doing so, the Convention provides greater certainty to businesses engaging in cross-border activities and therefore creates a legal environment more amenable to international trade and investment. In practice, ratifying the Convention will ensure that EU companies have more legal certainty when doing business with firms outside the EU: they will be able to trust that their choice of court to deal with a dispute will be respected by the courts of the countries that have ratified the Convention, and that the judgment given by the chosen court will be recognised and enforced in the countries which apply it.

Next steps: Following approval by Member States, the consent of the European Parliament will be asked. Once it gives its accord, the decision will be finally adopted by the Council and enter into force in the European Union.

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# Anuario Español de Derecho Internacional Privado, vol. XIII

The new volume of the AEDIPr is about to be published. It contains the usual sections: Estudios, Varia -actually, shorter studies-, Foros Internacionales -informing on the latest developments at international fora such

as The Hague Conference-, Textos Legales, Jurisprudencia- ECJ and Spanish case law, sometimes annotated-, Materiales de la Práctica – reports related to PIL from several institutions like the Consejo General del Poder Judicial-, Noticias, and Bibliografía – a thorough review of Spanish books and papers on PIL published in 2013, as well as a selection of foreign literature. Exceptionally, this volume also includes a especial section focused on PIL codification in Latin America, entitled "Nuevas perspectivas de la codificación del Derecho internacional privado en América Latina".

You will find below the table of contents of the section Estudios; for the whole ToC of vol. XIII click here. All contributions are in Spanish, with an English abstract.

**Hans van Loon**, *El derecho internacional privado ante la corte internacional de justicia: mirando hacia atrás y mirando hacia adelante*; **Dário Moura Vicente**, *La culpa in contrahendo en el derecho internacional privado europeo*; **Pedro Alberto de Miguel Asensio**, *Tribunal unificado de patentes: competencia judicial y reconocimiento de resoluciones*; **Johan Erauw**, *Relación entre el acuerdo sobre el tribunal de la patente unificada europea y el nuevo reglamento de Bruselas I sobre competencia y reconocimiento*; **Matthias Lehmann**, *Los tratados sobre libre comercio e inversiones transfronterizas y el conflicto de leyes*; **Nuria Marchal Escalona**, *Sobre la sumisión tácita en el reglamento Bruselas I bis*; **Antonia Durán Ayago**, *Procesos pendientes ante órganos jurisdiccionales de terceros estados y reglamento (UE) nº 1215/2012: ¿brindis al sol?*; **Marta Requejo Isidro**, *La cooperación judicial en materia de insolvencia transfronteriza en la propuesta de reglamento del Parlamento Europeo y del Consejo por el que se modifica el reglamento (CE) nº 1346/2000 sobre procedimientos de insolvencia*; **Nicolò Nisi**, *La refundición del reglamento de insolvencia europeo y los grupos de empresas de terceros estados*; **Emmanuel Guinchard**, *¿Hacia una reforma falsamente técnica del reglamento sobre el proceso europeo de escasa cuantía y superficial del reglamento sobre el proceso monitorio europeo?*; **Eva de Götzen**, *Cobro transfronterizo de deudas en materia civil y mercantil: ¿dónde estamos y hacia dónde nos dirigimos?*; **José Ignacio Paredes Pérez**, *La responsabilidad civil del prestador y la obligación general de no discriminación del artículo 20.2º de la directiva 2006/123/ce relativa a los servicios en el mercado interior*; **Eduardo Álvarez Armas**, *La aplicabilidad espacial del derecho medioambiental europeo, su interacción con la norma de*

*conflicto europea en materia de daños al medioambiente: apuntes preliminares*; **Angel Espiniella Menéndez**, *Las operaciones de compraventa en la distribución comercial internacional*; **Ivana Kunda**, *Competencia judicial internacional sobre violaciones de derechos de autor y derechos conexos en internet*; **Thomas Thiede**, *Obituario al libel tourism*; **Pablo Quinzá Redondo y Jacqueline Gray**, *La (des) coordinación entre la propuesta de reglamento de régimen económico matrimonial y los reglamentos en materia de divorcio y sucesiones*