ISDS in the TTIP?

The question whether the Transatlantic Trade and Investment Partnership (TTIP) should include an Investor-State Dispute Settlement (ISDS) provision clause has triggered a lively debate where opinions are clearly opposed. As I am not an expert in the field I can only report on the fact and refer to what has been already said elsewhere. In this regard I would recommend to have a look at J. Garcia Olmedo's post of last Friday. It contains info and interesting links to further contributions, in particular to the responses to the EC public consultation on the matter in March 2014 (ended on 13 July 2014). The author comments focus especially in the response submitted by professors from several universities such as Sciences Po Paris, the University of Kent, the School of Oriental and African Studies, and Osgoode Hall Law School. Some other contributions can be found online: click here, or here). The Preliminary Report of the Commission, which provides a statistical overview, was published in July 2014; the EC does not expect to have its final analysis ready before November this year. Considering the success of the public consultation, with almost 150.000 answers, stakeholders will be certainly waiting for it.

Roundup of Recent Alien Tort Statute Cases Post-Kiobel

For those interested in the impact that *Kiobel* is having on Alien Tort Statute litigation, John Bellinger of Arnold & Porter (who was the Legal Advisor at the US State Department) has an interesting post here. After reviewing the cases, John concludes

> *It is clear from these decisions that the courts remain uncertain about what domestic conduct is necessary to "touch and concern" the territory of the United States and whether the conduct of corporate defendants inside the United States must itself violate the law of nations. In particular, there already*

> *appears to be a circuit split between the 9^{th} and 11^{th} circuits regarding whether the Supreme Court intended lower courts to apply to ATS cases the "focus" test in Morrison v. Australian National Bank, where the Supreme Court concluded that, in considering whether conduct that occurs both inside and outside the United States violates a statute without extraterritorial application, the courts should determine whether the conduct that is the "focus of congressional concern" occurred inside or outside the United States. I discuss the decisions in more detail below.*

The whole piece is definitely worth a read.

EP Paper on future of European Private International Law

In a workshop of the European Parliament's JURI Committee on *Upcoming issues of EU Law,* that took place on 24th September, papers were presented on five selected topics: the application of EU Law (Wolfgang Heusel), the implementation of EU law (Marta Ballesteros), European private international law (Xandra Kramer), intellectual property law (Lionel Bently and Alfred Radauer) and regulating robotics (Andrea Bertolini and Erica Palmerini).The workshop focused on work that has been accomplished in the past and challenges for the current legislature (2014-2019). The compilation of papers is available here.

For those readers only interested in private international law, the paper entitled *European private international law: the way forward*, is also available here.

Second Issue of 2014's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The second issue of 2014 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features one article and three comments.

Angela Del Vecchio, Professor at LUISS – Guido Carli University, addresses recent cases of conflict of criminal jurisdiction and piracy in **"Il ricorso all'arbitrato obbligatorio UNCLOS nella vicenda dell'*Enrica Lexie*"** (Recourse to UNCLOS Compulsory Arbitration in the *Enrica Lexie* Case)

> *The* Enrica Lexie *incident has given rise to two disputes between Italy and India, one concerning the violation of the United Nations Convention on the Law of the Sea ("UNCLOS") rules on piracy and criminal jurisdiction in the case of an incident of navigation on the high seas, and the other concerning the violation of the international rules on the sovereign functional immunity of military personnel abroad. Regarding the first dispute, there is a difference of opinion between Italy and India as to the interpretation of the UNCLOS provisions that govern the jurisdiction of domestic courts to adjudicate on the merits of the case. This has led to a conflict of jurisdiction between the two States that, as examined in this article, could be resolved by recourse to the compulsory arbitration provided for in Annex VII to UNCLOS. Such arbitration may be commenced even by just one of the parties. By contrast, as concerns the second dispute recourse to compulsory dispute resolution mechanisms would appear quite problematic as a result of the gradual erosion of the principle of sovereign functional immunity of State organs.*

Georgia Koutsoukou, Research Fellow at the Max Planck Institute Luxembourg,

and *Nikolaos Askotiris*, Ph.D. Candidate at the International Investment Law Centre Cologne, examine waivers of sovereign immunity in light of the most recent jurisprudence in **"Tightening the Scope of General Waivers of Sovereign Immunity from Execution"** (in English)

> *The establishment, under international law, of the proper interpretive approach to broadly phrased waivers of sovereign immunity from execution is an unsettled issue, which was not addressed in legal theory or practice until recently. However, this issue became practically relevant in the wake of certain hedge funds' strategy to seek the collection of defaulted sovereign debt in any available jurisdiction. Most important in this respect are the recent judgments of the French Court of Cassation in* NML v. Argentine Republic*, where the Court held, in fact, that, under customary international law, waivers of execution immunity may not extend to a particular category of state assets, unless expressly referred to. The present article examines the accuracy of the Court's proposition in light of the major parameters for the determination of the relevant standards of interpretation: the 2004 UN Convention on Jurisdictional Immunities of States and Their Property as well as the pre-existing state practice,* i.e. *the settled case law regarding the interpretation of general immunity waivers in light of the diplomatic and consular law principle* ne impediatur legatio*, and the submission of execution immunity waivers to certain restrictions under domestic statutes. The Authors take the view that the interpretive criteria of the Vienna Convention on the Law of Treaties are applicable by analogy to immunity waivers inserted in government bonds, leading to the adoption of a rather narrow approach. It is further suggested that, under the well-established principle that the plaintiff bears the burden of proof with respect to any exception to execution immunity, the "asset specificity" requirement may reasonably be seen as the allocation of the risk of ambiguity of immunity waivers to the judgment creditor. Finally, the Authors argue that the restrictive interpretation of general immunity waivers may serve as a functional substitute for lacking clear-cut international law rules on state insolvency, insofar as no international law rule protecting good faith restructuring procedures from the speculative tactics of vulture funds is yet in force.*

Antonio Leandro, Researcher at the University of Bari, addresses the impending reform of EC Regulation No 1346/2000 in **"Amending the European**

Insolvency Regulation to Strengthen Main Proceedings" (in English)

> *EC Regulation No 1346/2000 on insolvency proceedings allows for the coexistence of different proceedings with respect to the same debtor. This engenders certain problems in terms of efficiency of the insolvency administration within the European Judicial Space, thus menacing the "effet utile" of the Regulation. This article focuses on such problems, explaining the shortcomings which affect the Regulation and wondering whether ECJ managed a solution for them. As a matter of principle, preventing the opening of secondary proceedings seems in several cases to be a suitable means for protecting the main proceedings' purposes. However, at the same time, not opening secondary proceedings could hamper the interests of local creditors, which rely on them to safeguard rights and priorities on the grounds of the local* lex concursus*. The Author addresses the main aspects of this tension. The Regulation is under revision as result of the 2012 Proposal of the European Commission, which,* inter alia*, aims to strike a balance between the aforesaid interests at odds. In this paper, the Author carries out a critical appraisal of the envisaged amendments, taking also into account the recent reactions of the other European Institutions, so as to ascertain whether they could really achieve such a balance.*

Arianna Vettorel, Fellow at the University of Padua, discusses the protection of the unity of one's personal name in **"La continuità transnazionale dell'identità personale: riflessioni a margine della sentenza *Henry Kismoun*"** (Pesonal Identity's Continuity across Borders: Remarks on the *Henry Kismoun* Judgment")

> *This paper focuses on the novelties introduced by the European Court of Human Rights' judgment in* Henry Kismoun v. France*, which concerns the issue of transnational continuity of names: in* Henry Kismoun v. France *the Court recognized the need of protecting the unity of a personal name on the basis of Article 8 ECHR, also with regard to the secondary name conferred on a person, in the State of the person's second citizenship. The novelties introduced by this judgment could influence the future jurisprudence of the European Court of Justice which has granted protection to the unity of the name firstly attributed on the basis of the EC Treaty (now TFEU) without referring to fundamental human rights. At the domestic level, fundamental human rights have been used to grant protection to transnational continuity of*

names of non EU citizens by the Italian courts, first, and by the Minister for Internal Affairs, then. Moreover, Article 8 ECHR constituted the legal basis to grant new Italian citizens the right to maintain the name they were assigned abroad. In addition to introducing new interpretational perspectives about the issue of continuity of name across borders, the above mentioned judgment and the new Italian practice seem to constitute an additional step in the direction of the establishment of the "method of recognition" based on the vested rights theory, and bear a great impact on the issue of continuity of personal status across borders.

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale. This issue is available for download on the publisher's website.

Volume on German Case Law on Private International Law

The Max Planck Institute for Comparative and Private International Law has released the latest volume of its annual series on German case law in matters of private International law ("Die deutsche Rechtsprechung auf dem Gebiet des Internationalen Privatrechts"). Published by Mohr Siebeck it contains all private international law cases decided by German courts in 2012.

More information is available here.

Symeonides' Codifying Choice of Law Around the World

For those readers that did not know yet, early this summer 'Codifying Choice of Law Around the World' (OUP, 2014) authored by Symeon Symeonides, was published. One can only agree with Lawrence Collins in the foreword to this book that it is 'a truly monumental contribution to the study of codification in the conflict of laws'.

The blurb reads:

> ***Codifying Choice of Law Around the World*** *chronicles, documents, and celebrates the extraordinary, massive country-by-country codification of Private International Law (PrIL) or Conflict of Laws that has taken place in the last 50 years from 1962-2012. During this period, the world has witnessed the adoption of nearly 200 PrIL codifications, EU Regulations, and international conventions—-more than in all preceding years since the inception of PrIL. This book provides a horizontal comparison and discussion of these codifications and conventions, firstly by comparing the way they resolve tort and contract conflicts, and then by comparing the answers of these codifications to the fundamental philosophical and methodological dilemmas of PrIL. In the process, this book re-examines and dispels certain widely held assumptions about choice of law, and the art and science of codification in general.*

More information is available here.

Volume on Private International Law in Mainland China, Taiwan

and Europe

Jürgen Basedow and Knut B. Pißler, both from the Max Planck Institute for Comparative and International Private Law in Hamburg, have edited a book on "Private International Law in Mainland China, Taiwan and Europe". The book has been published by Mohr Siebeck.

The official abstract reads as follows:

> *Over the last decades, private international law has become the target of intense codification efforts. Inspired by the stimulating initiatives taken by some European countries, by the Brussels Convention and the Rome Convention, numerous countries in other regions of the world started to enact comprehensive legislation in the field. Among them are Taiwan and mainland China. Both adopted statutes on private international law in 2010. In light of the rising significance of the mutual economic and societal relations between the jurisdictions involved and of the legal innovations laid down in the new instruments, the Max Planck Institute for Comparative and International Private Law convened scholars to present the conflict rules adopted in Europe, in mainland China and in Taiwan across a whole range of private law subjects. This book collects the papers of the conference and presents them to the public, together with English translations of the acts of Taiwan and mainland China.*
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> *Survey of contents:*
> ***Part 1: Jurisdiction, Choice of Law, and the Recognition of Foreign Judgments in Recent*** *Legislation Jin Huang: New Perspectives on Private International Law in the People's Republic of China – Rong-Chwan Chen: Jurisdiction, Choice of Law and the Recognition of Foreign Judgments in Taiwan – Stefania Bariatti: Jurisdiction, Choice of Law and the Recognition of Foreign Judgments in Recent EU Legislation*
>
> ***Part 2: Selected Problems of General Provisions***
> *Weizuo Chen: Selected Problems of General Provisions in Private International Law: The PRC Perspective – Rong-Chwan Chen: General Provisions in the Taiwanese Private International Law Enactment 2010 – Jürgen Basedow: The Application of Foreign Law – Comparative Remarks on the Practical Side of Private International Law*

Part 3: Property Law
Huanfang Du : The Choice of Law for Property Rights in Mainland China: Progress and Imperfection – Yao-Ming Hsu: Property Law in Taiwan- Louis d'Avout: Property Law in Europe

Part 4: Contractual Obligations
Qisheng He: Recent Developments of New Chinese Private International Law With Regard to Contracts – David J.?W. Wang: The Revision of Taiwan's Choice-of-law Rules in Contracts – Pedro A. De Miguel Asensio: The Law Applicable to Contractual Obligations. The Rome I Regulation in Comparative Perspective

Part 5: Non-Contractual Obligations Guoyong Zou: The Latest Developments in China's *Conflicts Law for Non-contractual Obligations – En-Wei Lin: New Private International Law Legislation in Taiwan: Negotiorum Gestio, Unjust Enrichment and Tort – Peter Arnt Nielsen: Non-Contractual Obligations in the European Union: The Rome II Regulation*

Part 6: Personal Status (Family Law/Succession Law)
Yujun Guo: Personal Status in Chinese Private International Law Reform – Hua-Kai Tsai: Recent Developments in Taiwan's Private International Law on Family Matters – Katharina Boele-Woelki: International Private Law in China and Europe:A Comparison of Conflict-of-law Rules Regarding Family and Succession Law

Part 7: Company Law
Tao Du: The New Chinese Conflict-of-law Rules for Legal Persons: Is the Middle Way Feasible? – Wang-Ruu Tseng: Private International Law in Taiwan – Company Law – Marc-Philippe Weller: Companies in Private International Law – A European and German Perspective

Part 8: International Arbitration
Song Lu: China – A Developing Country in the Field of International Arbitration – Carlos Esplugues Mota: International Commercial Arbitration in the EU and the PRC: A Tale of Two Continents or 28+3 Legal Systems

Further information ist available here.

Is an International Arbitral Tribunal the Answer to International Human Rights Litigation?

I just was alerted to a proposal that was put forward to create an International Arbitral Tribunal on business and human rights. The authors of the proposal are Claes Cronstedt, Robert C Thompson, Rachel Chambers, Adrienne Margolis, David Rönnegard and Katherine Tyler, all (save for Ms Margolis, a journalist, and Dr Rönnegard, a philosopher and economist) one-time or current private practice lawyers with a background and/or practice in human rights and CSR.

The initiative seeks to respond, in part, to the US Supreme Court's decisions in *Kiobel v Royal Dutch Petroleum* and *Daimler AG v Bauman.* In short, it is now difficult to plead international human rights violations against corporations in U.S. courts. As I discuss in a forthcoming article, foreign courts may move in to fill the gap. This proposal raises another question: Are international tribunals the right forum for such cases?

Kühn on Imbalance in Joint and

Several Debt in Private International Law

Anna-Lisa Kühn has authored a book on the imbalance in joint and several debt in private international law ("Die gestörte Gesamtschuld im Internationalen Privatrecht. Am Beispiel einer Spaltung des Mehrpersonenverhältnisses zwischen deutschem und englischem Recht"). The book is written in German and has been published by Mohr Siebeck.

The abstract reads as follows:

> *Anna-Lisa Kühn analyzes a situation in which a creditor has a claim against several debtors whose obligations are governed by different legal systems and who would be liable for the same claim could one of them not rely on an exemption from liability, the impact of which is assessed differently by the legal systems involved. She shows how this should be treated under the Rome I and Rome II Regulations.*

More information is available here.

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23 and 24 October: Conference on the recast Brussels I Regulation in Graz

On 23 and 24 October 2014 Bettina Nunner-Krautgasser and Thomas Garber, both from the University of Graz, will host a conference on the recast Brussels I Regulation ("Die neue EuGVVO – Verbesserung des Rechtsschutzes im Europäischen Binnenmarkt?"). The conference will take place in Graz (Austria). The conference language will be German. More information is available on the conference website.

The programme reads as follows:

Thursday, 23 Oktober 2014

- 14:00 Welcome notice
- 14:30 Vom Heidelberger-Report zum Kommissionsvorschlag, *Robert Fucik* (Vienna)
- 15:00 Der Anwendungsbereich der neuen EuGVVO, *Bartosz Sujecki (*Utrecht)
- 15:30 Die neue EuGVVO und die Schiedsgerichtsbarkeit, *Petra Hietanen-Kunwald, Riikka Koulu & Santtu Turunen* (Helsinki)
- 16:00 Discussion
- 16:30 Break
- 17:00 Änderungen im Bereich der internationalen Zuständigkeit, *Jan von Hein* (Freiburg im Breisgau)
- 17:20 Änderungen in Versicherungs-, Verbraucher- und Arbeitssachen, *Ale Gali* (Ljubljana)
- 17:40 Gerichtsstandsvereinbarungen, *Bettina Nunner-Krautgasser* (Graz)
- 18:00 Discussion

Friday, 24 Oktober 2014

- 10:00 Rechtshängigkeit, *Alan Uzelac* (Zagreb)
- 10:30 Einstweiliger Rechtsschutz, *Vesna Rijavec & Sascha Verovnik* (Marburg/Graz)
- 11:00 Discussion
- 11:30 Anerkennung und Vollstreckung, *Matthias Neumayr* (Salzburg/Wien)
- 12:15 Discussion
- 12:45 Break
- 13:45 Änderungen durch die Schaffung eines Einheitlichen Patentgerichts und des Benelux-Gerichtshofs, *Bartosz Sujecki* (Utrecht)
- 14:15 Die neue EuGVVO und der Rest der Welt, *Gottfried Musger* (Wien)
- 14:45 Discussion