TDM 1 (2014) – Reform of Investor-State Dispute Settlement: In Search of a Roadmap

Edited by Jean E. Kalicki and Anna Joubin-Bret, this TDM special issue has close to 70 papers making it the largest TDM Special Issue to date. The interest in this topic, and the breadth of proposals offered by our contributors, demonstrates both the importance of holding this dialogue and the creativity of astute users and observers of the present system. It should be of interest to all international disputes lawyers. This Special Issue is particularly timely in light of the European Union public consultation on investor-state dispute settlement and the Transatlantic Trade and Investment Partnership just begun by EU Trade Commissioner Karel De Gucht.

The Table of Contents is available here.

New Book on European Insolvency Law

The evaluation on the application of the European Insolvency Regulation in the 27 Member States conducted by the Universities of Heidleberg and Vienna was just published.

The book is called European Insolvency Law – The Heidelberg-Luxembourg-Vienna Report. It is presented by the authors of the general report: B. Hess, P. Oberhammer and T. Pfeiffer, in cooperation with A. Piekenbrock and C. Seagon.

> *This book presents the results of the External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings (JUST/2011/JCIV/PR/0049/A4) which*

was commissioned by the EU-Commission in March 2012 as a basis for the pending reform of the European Insolvency Regulation. Most of it was prepared within a period of about half a year in which the editors were in constant contact with the EU-Commission and participated in the process that led to the presentation of the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM[2012] 744 final) dated 12 December 2012. Therefore, we believe that it is fair to say that both our initial approach to the relevant reform tools and issues and the findings in the course of the preparation of this study had a significant impact on the reform process which in turn of course also influenced the outcome of the study.

The book contains the document generally known as the Heidelberg-Luxembourg-Vienna Report on the reform of the European Insolvency Regulation and two other documents which served as a basis for this report, i. e. a detailed systematic summary of the national reports based on extracts from the original text and a systematic compilation of the relevant case-law. Unfortunately, it would have gone far beyond the limits of this book to publish all national reports, although most of them were indeed worth publishing. However, these reports are available online at: *http://www.ipr.uniheidelberg.de/InsReg/Study_Annex_II.html*.

The full table of content is available here.

Vacancies at the Hague Conference

The Permanent Bureau of the Hague Conference is seeking to fill two positions

Diplomat Lawyer, with excellent knowledge of private international law

The ideal candidate will possess the following qualifications:

- Excellent law school education in private law, including all aspects of conflicts of laws, preferably in the common law tradition; familiarity with comparative law (substantive and procedural law); good knowledge of public international law (in particular, the law of treaties and human rights law).
- Excellent drafting capabilities (*e.g.*, dissertation, law review or other publication experience will be taken into account).
- At least 10 to 15 years experience (in practice of law, academia, or an international organisation); experience with international negotiations an advantage.
- Excellent command, preferably as native language and both spoken and written, of English; good command of French and knowledge of other languages desirable.
- Personal qualities to contribute to:
    - good, pleasant and co-operative working atmosphere both within the Permanent Bureau and with representatives of Members, non-Member States and other Organisations;
    - the effective administration of the Permanent Bureau;
    - the proper representation of the Hague Conference to other international organisations.

The person appointed will be expected to take a leadership role in respect of particular areas of work within the Permanent Bureau, most likely in the field of family law and child protection (in particular the*Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the*Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*).

Requirements:

- While the job is located in The Hague, it requires regular travel to both near and distant countries.

- Medical clearance is required.
- Finalists will be required to undergo a professional assessment administered by an external consultant.
- For more information on the process of appointment for a diplomat lawyer (Secretary) see Article 5 of the Statute of the Organisation.

Duration of the appointment: initially three years (with a six-month probationary period).

Salary: The position contemplated for the staff member corresponding to the profile would be either grade A3 or A4 of the Co-ordinated Organisations scale for the Netherlands, depending on qualifications and experience.

Entry on duty: between July and September 2014.

Applications: Written applications with a *curriculum vitae*, including publications and contact information for three references, should be addressed by email (secretariat@hcch.net) to the Secretary General of the Hague Conference on Private International Law, **before 1 April 2014**.

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Legal Officer (full-time)

He or she will work mainly in the area of international legal and administrative co-operation and be part of a small team, under the direction of the Secretary General. The Legal Officer will primarily carry out work relating to the relevant Hague Conventions (in particular the Apostille, Service, Evidence, and Access to Justice Conventions).

Duties will include comparative research, preparation of research papers and other documentation, assistance in the preparation (including proof-reading) of materials for publication (in particular Practical Handbooks), assistance in answering requests from States for information relating to the relevant Conventions, assistance in the preparation of meetings (including Special Commission meetings), assistance in the preparation of and participation in conferences, seminars and training programmes, and such other work as may be required by the Secretary General from time to time.

The successful applicant will possess the following qualifications:

- a good knowledge of private international law, particularly in the areas of legal and administrative co-operation and international civil procedure, familiarity with comparative law and public international law is desirable;
- excellent language skills (oral and drafting) in at least one official language of the Hague Conference (English or French), as well as a good working knowledge of the other (knowledge of a third language is an asset);
- sensitivity with regard to different legal cultures;
- two to four years of relevant subject-matter experience in private practice, public service or academia.

Starting date: May 2014.

Grade (Hague Conference adaptation of Co-ordinated Organisations scale): A/1 subject to relevant experience.

Deadline for applications: 15 March 2014.

Applications should be made by e-mail, with Curriculum Vitae, letter of motivation and contact details for at least two references, to be addressed to the Secretary General, at: secretariat@hcch.net.

French Supreme Court Rules in Pinckney

On 22 January 2014, the French supreme court for civil and criminal matters (*Cour de cassation*) delivered its decision after the *Pinckney* ruling of the Court of Justice of the European Union.

The claim before French courts was one of copyright infringement against an Austrian company for manufacturing CDs which were later sold on the internet by an English company.

The French supreme court held that the accessibility of the website of the English

company in France suffices to found the jurisdiction of French courts over the Austrian company as the alleged loss was suffered in France:

> *l'accessibilité, dans le ressort de la juridiction saisie, d'un site Internet commercialisant le CD argué de contrefaçon est de nature à justifier la compétence de cette juridiction, prise comme celle du lieu de la matérialisation du dommage allégué.*

For years, the Court had ruled that mere accessibility of a website in France was not enough to grant jurisdiction to French courts, and that directed activity had to be demonstrated. Time will tell whether the Court will also give up the directed activity test under the French common law of international jurisdiction.

First Issue of 2014's ICLQ

The first issue of *International and Comparative Law Quarterly* for 2014 includes several pieces on private international law.

Articles

- Elizabeth B Crawford & Janeen M Carruthers, *Connection and Coherence Between and Among European Instruments in the Private International Law of Obligations*

> *This article considers points of connection and coherence between and among the Rome I Regulation, the Rome II Regulation, and Regulation 1215, and relevant predecessor instruments. The degree of consistency in aim, design and detail of conflict of laws rules is examined, vertically (between/among consecutive instruments) and horizontally (across cognate instruments). Symbiosis between instruments is explored, as is the interrelationship between choice of court and choice of law. Disadvantaged parties, and the cohesiveness of their treatment under the Regulations, receive particular attention.*

- Jack Wass, *The Court's In Personam Jurisdiction in Cases Involving Foreign Land*

The Moçambique rule provides that an English court may not adjudicate on title to foreign immovable property. This article considers the primary exception to that rule: where the court assumes jurisdiction in personam to enforce a contractual or equitable claim concerning foreign immovable property against a defendant subject to the court's personal jurisdiction. It addresses two questions: how should the English court decide whether to assume jurisdiction in relation to foreign land, and if the positions are reversed, should an English court recognize or enforce the order of a foreign court affecting English land? As to the first question, this article argues that the orthodox English approach is anachronistic. English law applies the lex fori exclusively to determine whether an obligation exists which the court has jurisdiction to enforce. Instead, modern conflict of laws principles demand that the court should apply the proper law of the substantive claim in determining whether a sufficient equitable or contractual obligation exists. As to the second question, this article argues that despite the prevailing view that foreign non-money judgments are not enforceable in England, foreign orders in relation to English land are in principle entitled to recognition in a subsequent action in England by the successful claimant.

Shorter Articles and Notes

- David Kenny, Re Flightlease: *The 'Real and Substantial Connection' Test for Recognition and Enforcement of Foreign Judgments Fails to Take Flight in Ireland*

The common law rules for recognition and enforcement of foreign judgments were radically reformulated by the Canadian Supreme Court in Beals v Saldanha. Few other common law jurisdictions have considered whether or not to follow Canada in this development in private International Law. In 2012, the Irish Supreme Court definitively rejected the Canadian approach. This note examines the judgment in that case, and assesses the reasoning of the Irish Court.

Hague Conference Special Commission on the Service of Process, Evidence and Access to Justice Conventions (Questionnaires)

At its meeting of April 2012 and 2013 the Council on General Affairs of the HCCH agreed for work to be undertaken with a view to preparing a meeting of the Special Commission on the practical operation of the Service of Process, Evidence and Access to Justice Conventions, in May this year. With this aim the Permanent Bureau has elaborated three questionnaires as a follow up of those prepared in 2008 in view of the previous Special Commision meeting, held in 2009, to ensure that the basic information then gathered is up-to-date. States -both contracting and non-contracting- are requested to answer by **7 March 2014**.

Clik here to see the questionnaires.

International Seminar on Private International Law (Program)

Patricia Orejudo Prieto (Universidad Complutense, Madrid), informs me that the program of the new edition of the International Seminar on Private International Law organized by Prof. Fernández Rozas and Prof. de Miguel Asensio, May 8-9, 2014, is ready. This will be the main speakers and presentations:

Thursday

Hans Van Loon (former General Secretary, the Hague Conference): *Private International law before the World Court: looking back and looking ahead*

Johan Erauw (Ghent University): *New packages for patent disputes across Europe*

Pedro de Miguel Asensio (Complutense University): *El Tribunal Unificado de Patentes y la revisión del Reglamento Bruselas I bis*

Stefania Bariatti (Milan University): *La reforma del Reglamento 1346/2000*

Marta Requejo Isidro (Max Planck Institut for International, European and Regulatory Procedural Law, Luxembourg): *La cooperación en los procedimientos de insolvencia en la propuesta de Reglamento de reforma del Reglamento 1346/2000*

Friday

Dario Moura Vicente (Lisbon University)- *La culpa in contrahendo en el Derecho internacional privado europeo*

Catherine Sargenti (President of ACP Legal) – *La OHADAC y su evolución*

José Carlos Fernández Rozas (Complutense University) – *Ley modelo de la OHADAC de DIPr*

Nathanael Concepción (Funglobe- IGlobal)- *Anteproyecto de Ley de DIPr de la República Dominicana*

Rodolfo Dávalos (La Habana University) – *La armonización del Derecho de sociedades en el ámbito de la OHADAC*

Leonel Péreznieto (Autonomous University of Mexico); Jorge A. Silva (Autonomous University of Ciudad Juárez); Virginia Aguilar (Autonomous University of Mexico): *Codification in Mexico. Ley modelo de Derecho internacional privado de México*

The whole program, including the rest of the speakers and the topics of their papers, can be downloaded here. To register send an email to

seminariodiprucm@gmail.com, indicating full name and institution of origin, between 1 February and 30 April 2014.

For further information click here.

Strong on Procedural Choice of Law

Stacie Strong (University of Missouri School of Law) has posted Limits of Procedural Choice of Law on SSRN.

Commercial parties have long enjoyed significant autonomy in questions of substantive law. However, litigants do not have anywhere near the same amount of freedom to decide procedural matters. Instead, parties in litigation are generally considered to be subject to the procedural law of the forum court.

Although this particular conflict of laws rule has been in place for many years, a number of recent developments have challenged courts and commentators to consider whether and to what extent procedural rules should be considered mandatory in nature. If procedural rules are not mandatory but are instead merely "sticky" defaults, then it may be possible for commercial actors to create private procedural contracts that identify the procedural rules to be used in any litigation that may arise between the parties.

This Article considers the limits of procedural choice of law as both a structural and substantive matter. Structural concerns involve questions of institutional design and the long-term understanding of a sovereign state prerogative over judicial affairs. Structural issues are considered from both a theoretical perspective (including a comparison of consequentialist and deontological models) and a practical perspective (including a discussion of relevant decisions from the Third and Seventh Circuit Courts of Appeals). Substantive concerns focus on matters of individual liberty and the content of fundamental due process rights. These issues are analyzed through analogies to certain non-

derogable procedural rights that exist in international commercial arbitration.

This Article addresses a number of challenging questions, including those relating to the proper characterization of different procedural rules (i.e., whether certain procedures are public or private in nature), the core duties of judges and state interests in procedural uniformity and efficiency. Although the discussion focuses primarily on procedural autonomy in international commercial litigation, many of the observations and conclusions are equally applicable in the domestic realm.

The paper is forthcoming in the *Brooklyn Journal of International Law*.

UK Supreme Court Rules on Concept of Habitual Residence of Children

On 14 January 2014, the Supreme Court of the United Kingdom delivered its judgment In the matter of LC (Children) and In the matter of LC (Children) (No 2).

Lord Wilson summarized the principal question raised by the two appeals as follows:

Now that it is clear that the test for determining whether a child was habitually resident in a place is whether there was some degree of integration by her (or him) in a social and family environment there, may the court, in making that determination in relation to an adolescent child who has resided, particularly if only for a short time, in a place under the care of one of her parents, have regard to her own state of mind during her period of residence there in relation to the nature and quality of that residence? In my view this is the principal question raised by these appeals.

The Court issued the following press summary.

BACKGROUND TO THE APPEALS

The appeal relates to the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Convention") and to section 1(2) of the Child Abduction and Custody Act 1985. It is brought within proceedings issued by a mother (Spanish national living in Spain) against a father (British national living in England) for the summary return of their four children (T' (a girl aged 13), 'L' (a boy aged 11), 'A' (a boy aged 9) and 'N' (a boy aged 5)) from England to Spain. The Convention stipulates that, subject to narrow exceptions, a child wrongfully removed from, or retained outside, his or her place of habitual residence shall promptly be returned to it. The test for determining whether a child is habitually resident in a place is now whether there is some degree of integration by him or her in a social and family environment there.

The principal question in this appeal is whether the courts may, in making a determination of habitual residence in relation to an adolescent child who has resided for a short time in a place under the care of one of his or her parents, have regard to that child's state of mind during the period of residence there. A subsidiary question is whether, in this case, the trial judge erred in exercising his discretion to decline to make the eldest child, T, a party to the proceedings.

The parents met in England and lived in this country throughout their relationship, which ended early in 2012. On 24 July 2012 the mother and the four children, who were all born in the UK, moved to Spain where they then lived with their maternal grandmother. It was agreed that the children would spend Christmas with their father and on 23 December 2012 they returned to England. They were due to return to Spain on 5 January 2013. Shortly before they were due to fly, the two older boys hid the family's passports and they missed the plane. On 21 January 2013 the mother made an application under the Convention for the children's return to Spain. The father applied for T to be joined as a party so that she might be separately represented, which the High Court refused.

The High Court found all four children to be habitually resident in Spain and thus that they had been wrongfully been retained by their father. The judge acknowledged that the eldest, T, objected to being returned to Spain but determined that she should nonetheless be returned along with the three younger

children.

The Court of Appeal dismissed the appeal against the judge's finding that the children's habitual residence was in Spain. However, the Court of Appeal reversed the judge's decision to return T to Spain finding that, so robust and determined were T's objections, they should be given very considerable weight. The Court of Appeal concluded that the appropriate course was to remit to the judge the question whether it would be intolerable to return the three younger children to Spain in light of the fact that T was not going to go with them. The Court of Appeal dismissed the appeals not only of L and A but also of T against the High Court's failure (in T's case, refusal) to make them parties to the proceedings.

JUDGMENT

The Supreme Court unanimously finds that T's assertions about her state of mind during her residence in Spain in 2012 are relevant to a determination whether her residence there was habitual. The Supreme Court sets aside the conclusion that T was habitually resident in Spain on 5 January 2013 and remits the issue to the High Court for fresh consideration. The Supreme Court also sets aside the finding of habitual residence in respect of the three younger children so that the issue can be reconsidered in relation to all four children.

The Supreme Court unanimously also concludes that T should have been granted party status and that the Court of Appeal should have allowed her appeal against the judge's refusal of it.

REASONS FOR THE JUDGMENT

- Lord Wilson gives the lead judgment of the Court. Courts are now required, in analysing the habitual residence of a child, to search for some integration of her in a social and family environment [34]. Where a child goes lawfully to reside with a parent in a state in which that parent is habitually resident it will be highly unusual for that child not to acquire habitual residence there too. However, in highly unusual cases there must be room for a different conclusion, and the requirement of some degree of integration provides such room [37].
- No different conclusion will be reached in the case of a young child. Where, however, the child is older, particularly where the child is or has

the maturity of an adolescent, and the residence has been of a short duration, the inquiry into her integration in the new environment may warrant attention to be given to a different dimension [37]. Lady Hale, with whom Lord Sumption agrees, would hold that the question whether a child's state of mind is relevant to whether that child has acquired habitual residence in the place he or she is living cannot be restricted only to adolescent children [57]. In her view, the logic making an adolescent's state of mind relevant applies equally to the younger children, although the answer to the factual question may be different in their case [58].

- The Court notes that what can be relevant to whether an older child shares her parent's habitual residence is not the child's "wishes", "views", "intentions" or "decisions" but her state of mind during the period of her residence with that parent [37].
- The Court rejects the suggestion that it should substitute a conclusion that T remained habitually resident in England on 5 January 2013 [42]. The inquiry into T's state of mind in the High Court had been in relation to her objections to returning to Spain and was not directly concerned with her state of mind during her time there [42 (i)]. In addition, the mother has not had the opportunity to give evidence, nor to make submissions, in response to T's statements to the Cafcass (Children and Family Court Advisory and Support Service) officer regarding her state of mind when in Spain [42 (v)]. Lady Hale expresses grave doubts about whether sending the case back to the High Court for further enquiries into the children's states of mind would be a fruitful exercise [67]. However, in the interest of justice, she concludes that it should nonetheless be sent back [86].
- The majority do not think the state of mind of L or A could alone alter the conclusion about their integration in Spain, but note another significant factor, namely the presence of their older sister, T, in their daily lives [43]. In relation to the habitual residence of the three younger children and in the light of their close sibling bond, the majority query whether T's habitual residence in England (if such it was) might be a counterweight to the significance of the mother's habitual residence in Spain [43]. Lady Hale agrees with this analysis when applied to the youngest child. [65].
- With regard to the subsidiary appeal, the Court notes that an older child in particular may be able to contribute relevant evidence, not easily

obtainable from either parent, about her state of mind during the period in question [49]. However, it is considered inappropriate to hear oral evidence from T even as a party. Instead, a witness statement from T; cross-examination of the mother by T's advocate; and the same advocate's closing submissions on behalf of T should suffice to represent her contribution as a party [55].

Kinsch on PIL in Totalitarian States

Patrick Kinsch (University of Luxembourg) has posted Private International Law in Totalitarian States on SSRN.

> *The study of the private international law of three now-defunct totalitarian, quasi-totalitarian or post-totalitarian European regimes (Fascist Italy, National Socialist Germay and the Soviet Union) shows that the political orientation of these societies had an influence even on private international law.The racial and eugenic laws of National Socialist Germany contained provisions on their international efficiency, and the spirit of the racial laws was perceptible in much of the private international law cases involving Jews. There were some incidences of the Nazi Maßnahmenstaat in Germany; an emphasis on reciprocity and the possibility of retortion in the Soviet Union; in both states a redefinition of the substantive content of public policy; and much rhetoric. All in all though, it is the survival of the techniques of private international law in these states that is striking. These techniques were not abolished, nor did they end up being replaced, in any one of the regimes, by systematic application of the lex fori, by conflict rules using as connecting factors völkisch or racial characteristics in Nazi Germany, or more simply by arbitrariness. The civilising value of private international law could not be totally suppressed, even in totalitarian states.*

The article was published in the *Essays in Honour of Michael Bogdan* (2013).