Spanish Yearbook of International Law: Call for Papers

The Call for Papers for Vol. 18 (2013-2014) of the **Spanish Yearbook of International Law** (SYbIL), in **now open**. Manuscripts dealing with any topic of interest in the field of Public and Private International Law and International Relations should be submitted to the editors by **31 October 2014**. The manuscripts shall conform to the Style Guide of the *SYbIL* (available here) and must be submitted to the Editor's address at editor@sybil.es.

A few words on the journal

The **Spanish Yearbook of International Law** (SYbIL) was founded in 1991, and is edited by the *Asociación Española de Profesores de Derecho Internacional y relaciones Internacionales* (AEPDIRI). It provides an annual report on new developments in international law . From 1991 to 2012 (vols. 1-17), the Yearbook was published by Martinus Nijhoff/Brill. From vol. 18 onwards, the Editor decided to go entirely on-line under a complete open-access philosophy.

Since its first volume, the Yearbook has endeavored to make a significant academic contribution to the on-going development of international law, with a particular focus on Spanish doctrine and practice. In 2013, with the election of a new Editorial Board, **a new editorial plan was adopted** and the *SYbIL* changed its purpose, structure and editorial model. This new website (www.sybil.es) tries to offer the contents of this new epoch of the Yearbook as well as all the old printed volumes of the SYbIL (except last volume, by the moment). This editorial decision will enable the Yearbook to be accessible to the entire international readership, offering current research in Spanish academic institutions but other research of what Oscar Schachter labelled as the "invisible college of international law" as well.

Fully aware of the paramount importance of international practice, the Yearbook publishes contributions in English from active practitioners of international law on a regular basis. The Yearbook also includes critical comments on Spanish State practice relating to international and EU law, as well as international reactions to that practice. The General Articles section gives authors an opportunity to submit

original manuscripts (15,000-18,000 words) on a broad range of topics in international law and international relations.

Note: The SYbIL is a double blind peer-review publication**.**

Forthcoming Title: Private International Law in the English Courts

Prof. Adrian Brigg's new ouvrage on PIL, of more than 1.000 pages and which has been described as "a major restatement of the rules of Private International Law in the English Courts", is about to appear at OUP.

The book offers a restatement of European and English Private International Law as it applies in the English courts. The author has set out to create a contemporary approach to private international law which is distinguished from the traditional approach of describing private international law through its common law foundations. The author places European Regulations, and related statutory material, at the front and centre of the book, reorganising private international law according to the principles that the law is increasingly European and decreasingly insular. As such the work constitutes an approach to the area which is essential for litigators dealing with questions of private international law influenced by forty years of European legislation. The in-depth discussion will also be valuable to academics specialising in private international law. Written by an academic who is also a practising barrister, this book seeks to highlight the techniques and principles which provide the hidden infrastructure and support mechanisms for the private international law rules of European law, as well as the remaining standing of the common law rules of private international law.

The book will be useful to practising lawyers tackling issues of private international law as it now is, after forty years of European legislation, but the in-depth discussion will also be valuable to academic lawyers specialising in private

international law. Written by an academic who is also a practising barrister, this book seeks to highlight the techniques and principles which provide the hidden infrastructure and support mechanism for the private international law rules of European law, as well as (albeit second) for the common law rules of private international law.

The release of the book is expected next month; the table of contents is already available here.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2014)

The latest issue (September/October) of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** contains the following articles**:**

- ***Christian Schall/Johannes Weber***: "The precautionary choice of the law applicable to divorce according to Rome III"

The Regulation (EU) No. 1259/2010 (Rome III) has put conflict of law rules in cross-border divorce cases on a new footing. By implementing a wide range of possibilities to designate the applicable law, Rome III establishes party autonomy as a key principle in international divorce law. This article focuses on contractual choices of law prior to divorce proceedings and analyses substantial and formal provisions of choice of law clauses in marriage contracts.

- ***Deniz Halil Deren***: "The effect of a Swiss insolvency on domestic proceedings"

Foreign insolvency proceedings can force a temporary stay of domestic court proceedings. In respect of insolvency proceedings in Member States of the EU,

Article 15 EIR (Insolvency Regulation (EC) 1346/2000) provides for a temporary stay of domestic court proceedings; for insolvency proceedings in non-Member States, the governing provision is § 352 InsO (German Insolvency Act). This article discusses whether the requirements of § 352 InsO are met in the event of a Swiss insolvency (Konkurs) as per Article 197 et seq SchKG (Swiss Insolvency Act). This question is of current importance in light of the recent judgment by the Bundesgerichtshof (German Supreme Court) of December 2011 which rejects the view that domestic court proceedings should be stayed following a Swiss moratorium (Nachlassstundung) under Article 293 et seq SchKG (old version). The article takes into account the new Swiss provisions on moratoria, Article 293 et seq SchKG (new version, in force since 1 January 2014).

- ***Robert Arts:*** "On the applicability of Regulation (EC) No. 1346/2000 – No unwritten requirement for a connection to more than one Member State to constitute international jurisdiction pursuant to Art. 3 (1) InsReg"

After confirming the applicability of the Insolvency Regulation on actions to set transactions aside in its landmark Seagon-decision, the ECJ now answers the remaining question of whether this applicability requires the defendant to be the resident of a Member State. After examining its wording and purpose as well as considering the practical implications, the Court concludes that the application of the Regulation does not necessitate such an unwritten connection to a second Member State.

Beyond the scope of application of Regulation (EC) No. 1346/2000 itself, the decision has bearing on the underlying issue of whether or not the EU law-maker does have the competence to regulate relationships between individual Member States and third states. The Court's interpretation of Art. 85 TFEU does assume the possibility of such a competence in principle.

- ***Felix Koechel:*** "When is the jurisdiction of the court first seised deemed to be established within in the meaning of Art. 27 of the Brussels I Regulation?"

The question when the jurisdiction of the court first seised is deemed to be

established is vital for the coordination of parallel proceedings under Art. 27 of the Brussels I Regulation (Brussels I). However, a full reply to the question has yet to be achieved, as recent references for a preliminary ruling to the ECJ by, respectively, the French Cour de cassation, the German Higher Regional Court of Munich and the German Federal Supreme Court demonstrate. In particular, it is unclear whether it is necessary that the court first seised has impliedly or expressly rendered a decision on the issue of jurisdiction. Answering to the question referred by the Cour de cassation, the ECJ held that jurisdiction is deemed to be established within the meaning of Art. 27 (2) Brussels I if the requirements of submission according to Art. 24 Brussels I have been met before the court first seised. In that case, the second court must not await a decision of the court fist seised before declining jurisdiction according to Art. 27 (2) Brussels I. Contrary to the ECJ's decision, the second court should be requested to await a decision of the court first seised on its jurisdiction when applying Art. 27 Brussels I, especially when the first court might assume jurisdiction according to Art. 24 Brussels I. The main proceedings in the present case also gave rise to questions regarding the court's obligation to stay proceedings and decline jurisdiction on its own motion under Art. 27 Brussels I. Contrary to the current concept set forth in Art. 27 Brussels I, under Art. 29 of the Brussels I Recast not only the legal requirements for the existence of this obligation but also the procedure to be followed by the second may be should be established autonomously.

- ***Wolfgang Hau:*** "Is there an appeal in law based on a violation of foreign law?"

Under the traditional German rules of civil procedure it was well established that provisions of foreign law were rules of law and not questions of fact. Nevertheless, the Federal Court of Justice would not review the application of foreign law by lower courts. In 2009 the relevant provision in the Code of Civil Procedure (§ 545) was modified. This was widely perceived as good reason to recede from the traditional rule of non-review and to allow an appeal in law based on a violation of the applicable foreign law. However, the Federal Court of Justice has recently refused to draw this conclusion from the new wording of § 545. This article argues that the correctness of this decision is doubtful and that the jury (i.e. the Federal Constitutional Court) is still out.

- ***Hans Jürgen Sonnenberger:*** "Die internationalprivatrechtliche Behandlung der Zession einer Kaufpreisforderung aus einem der CISG unterliegenden Kaufvertrag und der anschließenden Legalzession im grenzüberschreitenden Verhältnis Käufer-Verkäufer-Factor-Warenkreditversicherung"

The judgment of the Higher Regional Court (Oberlandesgericht) Oldenburg concerns the law applicable to a debtor – assignee (by operation of law) relationship in the case of successive cessions in the period prior to application of the Rome I Regulation. The cessions relate to claims originating from a sales contract subject to the CISG and arose as a result of factoring between seller and factor and performance between factor and insurance carrier due to trade credit insurance. The focus of the Higher Regional Court's statements is put on private international law issues concerning the applicable law, to which the following comments will be limited. Moreover, the Higher Regional Court had to consider a set-off by the purchaser, the private international law aspects of which will also be addressed briefly.

- ***Dirk Looschelders:*** "The Legal Situation of Commercial Heir Locators in German-Austrian Legal Relations"

The legal situation of commercial heir locators differs in Germany and Austria. The BGH rejects a right of the heir locator to reimbursement for expenses in negotiorum gestio, whereas the OGH has repeatedly recognized such a claim. Therefore, the heir locator's rights decisively depend on the applicable law pursuant to Art. 11 of the Rome II Regulation. In its decision the LG München I has referred to the place of the heir locator's initial activities. A preferable point of contact is however the location of the estate. In the present case both approaches lead to the application of Austrian law. The Austrian courts allow the heir locator a reimbursement amounting to 30% of the heir's proportional inheritance right. Though this conflict with the principle of the parties' negative freedom of contract and the constitutional guarantee of the right of succession, it does not quite rank as a violation of the ordre public.

- ***Carl Friedrich Nordmeier:*** "Interspousal Gifts in Private International Law: German-Portuguese Cases according to the Introductory Act to the German Civil Code, the Rome I-Regulation and the Proposal for a

Regulation in matters of Matrimonial Property”

Interspousal gifts in cross-border cases cause particular problems if they – as in Portuguese law – have to comply with particular rules regarding form or are freely revocable. This contribution analyses the validation of contracts invalid as to form that is provided for in § 311b (1) (2) German Civil Code if the immovable property is located abroad. Then, the validation of a gift according to § 518 (2) German Civil Code is discussed if effected by a bank transfer to a joint bank account to which foreign law applies. In such a case, there is no disposition related to the transfer of property in terms of art. 11 (4) of the Introductory Act to the German Civil Code. With regard to the Proposal for a EU-Regulation in matters of Matrimonial Property, rules which prohibit interspousal gifts should be classified as being rules of matrimonial property. Regarding procedural law, this contribution discusses under which circumstances the question of the applicable law can be left open for the purpose of an appeal to the German Federal Court of Justice.

- ***Carl Friedrich Nordmeier**:* “The french instituion contractuelle in Private International Law: Questions of conflict of laws and material law from a German and European perspective”

The French institution contractuelle concluded between spouses during the marriage is considered a disposition of property upon death for the purpose of art. 26 (5) (1) of the Introductory Law of the German Civil Code. The present contribution analyses the determination of the law of succession hypothetically applicable at the moment the institution contractuelle is concluded, with special regard to the fixation of the renvoi. In this context, the validation of a disposition of property upon death by the law effectively applicable to the succession is rejected. In a second step, the integration of the institution contractuelle into German material law is discussed. The nomination of a spouse as beneficiary to the greatest possible extent can be interpreted as a donation of the entire succession in accordance with § 2301 German Civil Code. A third step focuses on the new European Private International Law of Successions (Regulation (EU) No. 650/2012). An institution contractuelle is considered an agreement as to succession, meeting the definition in art. 3 (1) (b) of the Regulation. For an implicit choice of law, a distinction should be made between the intention to elect a certain law and to plan the estate in a certain

way according to the material law applicable.

- ***Apostolos Anthimos:*** "On the application of Art. 14 Insolvency Regulation in Greece"

On the occasion of an opening of insolvency proceedings in Bitburg, Germany, the Thessaloniki CoA issued last year a highly interesting judgment on the application of Art. 14 Insolvency Regulation. This is the first decision applying the rule in Greece.

- ***Bea Verschraegen/Florian Heindler***: "Änderungen im russischen Internationalen Privatrecht"

This contribution deals with the amendments of the conflict rules in Chapter VI of the Russian Civil Code that entered into force on 1 November 2013. Special attention is dedicated to the changes regarding the rules on contracts, in particular to consumer contracts and agency, as well as to the increased role of choice of law. The strengthening of party autonomy reveals to be a special feature of the law reform and becomes visible in various areas, such as the conflict rules for the form and torts. In the context of torts the changes regarding the objective attachment as well as the new rule on direct action against the insurer of the person liable, the rule on culpa in contrahendo, and the conflict rules on restriction of free competition are dealt with. Further amendments were made regarding the rules on property and related rights and also regarding the lex societatis. Furthermore, the amendments concerning the public policy-clause and the overriding mandatory rules are discussed by highlighting their different scope and consequences. Finally, the article focuses on the importance of the reform and the impact it has on the development of Russian conflict of law-rules.

- ***Erik Jayme/Sebastian Seeger:*** "Internationales Kunstrecht – Tagung in Basel"

Towards a New Model of Judicial Cooperation in the European Union

The inaugural lecture of the first IAPL-MPI Summer School, which took place in Luxembourg last July, was delivered by the President of the International Association of Procedural Law, Prof. Loïc Cadiet of the University Paris I-Sorbonne. He has kindly provided me with the text: a recommended reading that can be downloaded here, or at the website of the MPI.

Enjoy it.

Recent Developments in European Private and Business Law

Under the general heading of "Recent developments in European Private & Business Law", an upcoming conference of the Academy of European Law (ERA) will take place in Trier next November, 20-21, with the following key topics:

- Recast of Brussels I, to be applied from 10 January 2015 – including its interaction with the new Choice of Court Convention which will enter into force in the first half of 2015
- Freezing of bank accounts and the forthcoming changes after the entry into force of Regulation (EU) No 655/2014 establishing a European Account Preservation Order procedure
- Free movement of companies and the law applicable to companies
- Scheme of arrangements, restructuring and insolvency in the EU

The presentations will be in English or German with simultaneous interpretation.

They are addressed, in particular, to lawyers in private practice dealing with civil litigation and dispute resolution; in-house counsel; business, companies and banking lawyers; representatives of business organizations; notaries; and academics.

For the program detailing contents, speakers, as well as practical infos click here (German version here)

The Draft UNCITRAL Model Law on Secured Transactions: Why and How?

19 September 2014. *9:00 – 17:30* Hôtel Métropole, Geneva

A Model Law on secured transactions over movables is currently being drafted under the auspices of UNCITRAL. The aim is to prepare a simple, short and concise text, proposed for adoption (or as a source of inspiration) to countries wishing to adapt their legislation to the current developments.

The conference will start with the presentation and analysis of the Model Law by several of its drafters. It will then give experts from various legal systems the opportunity to comment on the project. The last part will be devoted to other recent developments in the field of secured transactions and their relationship with the Model Law.

Ample time will be reserved for discussions and questions. The sessions will be chaired by Monique Jametti Greiner, of the Swiss Federal Office for Justice; Georges Affaki, Chair of the Legal Committee of the ICC Banking Commission, Bénédict Foëx and Luc Thévenoz, both of University of Geneva.

9:00 Introduction

Prof. Christine Chappuis, Dean of the University of Geneva Faculty of Law

Spyridon V. Bazinas, Senior Legal Officer, UNCITRAL Secretariat; Lecturer, University of Vienna Law School

9:45 Why do we need a Model Law?

Michel Deschamps, Partner, McCarthy Tétrault (Montreal); Professor, Faculty of Law, University of Montreal

10:30 Coffee break

10:50 What issues should the Model Law address?

Jean-François Riffard, Professor, Université de Clermont-Ferrand

11:35 Reactions to the current draft of the Model Law

From a Swiss law point of view: Dr. Hans Kuhn, Counsel, Schellenberg Wittmer (Zurich); Lecturer, University of Lucerne

12.20 Standing lunch

13:00 Reactions to the current draft of the Model Law (continued)

US law: Neil B. Cohen, Professor, Brooklyn Law School

German law: Leif Boettcher, Notary

Islamic finance: Michael McMillen, Partner, Curtis, Mallet-Prevost, Colt & Mosle LLP (New York); Lecturer, University of Pennsylvania Law School

15:45 Coffee break

16:10 Lessons to be taken from other recent developments

The International Finance Corporation's secured transactions program: Alejandro Alvarez de la Campa, Global Product Leader, Secured Transactions and Collateral Registries, IFC Advisory Services, World Bank Group

The recent reform of secured transactions in Belgium: Michèle Grégoire, Professor, Université libre de Bruxelles ; Partner, Willkie Farr & Gallagher LLP

(Brussels)

17:20 Concluding remarks

Bénédict Foëx, Professor, University of Geneva; Counsel, Schellenberg Wittmer (Geneva)

17:30 Cocktail party hosted by the Swiss Federal Office for Justice.

Registration fee: CHF 150.

Number of participants is limited; early registration is advised. Registration on www.cdbf.ch/events/model-law/, or with Gervais Muja: gervais.muja@unige.ch, +41 22 379 86 52

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.