New Greek Blog on International Civil Litigation

Apostolos Anthimos has founded a new blog on International Civil Litigation in Greece, which will survey Greek case law in the field.

The latest post discusses a recent case where two Greek lawyers had sued Facebook on the ground of breach of privacy.

Welcome to the Blogosphere!

Bomhoff on the Constitution of Conflict of Laws

Jacco Bomhoff (LSE Law) has posted The Constitution of the Conflict of Laws on SSRN.

> *Private international law doctrines are often portrayed as natural, largely immutable, boundaries on local public agency in a transnational private world. Challenging this problematic conception requires a reimagining of the field, not only as a species of public law or an instrument of governance, but as a constitutional phenomenon. This paper investigates what such a 'constitution of the conflict of laws' could look like. Two features are given special emphasis. First: the idea of the conflict of laws as an independent source of constitutionalist normativity, rather than as a mere passive receptacle for constraints imposed by classical, liberal, constitutional law. And second: the possibility of a local, 'outward-looking' form of conflicts constitutionalism to complement more familiar, inwardly focused, federalist conceptions.*

Volume 366 of Courses of the Hague Academy

Volume 366 of the Collected Courses of the Hague Academy of International Law was just published. It includes the two following courses:

"Trusts" in Private International Law by **David Hayton**.

> *The course first deals with « What is a 'trust' in the global arena ? » because the concept has developed from English trusts that create proprietary rights binding third parties to complex offshore trusts with additional flexible features and to trusts in civil law and mixed jurisdictions that confer on beneficiaries a specially preferred obligation in respect of particular property. Once this range affecting the family and the commercial sphere is understood, it is possible properly to go on to deal with « Trusts Jurisdiction and Recognition and Enforcement of Judgments under Brussels 1 and the Recast Regulation » and then with « Trusts within the Hague Trusts Convention, the Applicable Law and Recognition of Trusts»*
>
> - *Chapter I. What is a "trust" in the global arena;*
> - *Chapter II. Trusts jurisdiction and recognition and enforcement of judgments under Brussels 1 and the Recast Regulation;*
> - *Chapter III. "Trusts" within the Hague Trusts Convention: the applicable law and recognition of trusts.*

Res Judicata and *Lis Pendens* in International Arbitration by **Kaj Hobér**

> *The increase in the number of international courts and tribunals combined with the significant growth of international arbitrations has led to a corresponding increase in overlapping and competing jurisdictions, and in the risks thereof. One method of resolving such jurisdictional conflicts is to apply the principles of res judicata and lis pendens. These lectures discuss and analyze these two principles in so far as international arbitrations are concerned, including*

international commercial arbitration, interstate arbitration and investment treaty arbitration.

- *Chapter I. Introduction*
- *Chapter II. Res judicata and lis pendens in national law*
- *Chapter III. International arbitration, res judicata and lis pendens*
- *Chapter IV. Final comments.*

Scoreboard Favors Chevron

For those who are not yet aware -the news has been immediately published in national and local newspapers all around the world- yesterday a US federal judge ruled in favor of Chevron Corp., saying that the $9.5 billion environmental judgment in Ecuador (the Lago Agrio saga: for background and developments see here) against the oil giant was "obtained by corrupt means."

The decision can be downloaded here.

Colangelo on International Law and False Conflicts

Anthony Colangelo (Southern Methodist University – Dedman School of Law) has posted International Law in U.S. State Courts: Extraterritoriality and "False Conflicts" of Law on SSRN.

With the U.S. Supreme Court recently cutting back the reach of federal jurisdiction over causes of action arising abroad for violations of international law, questions have arisen about the ability of state law to provide the vessel through which plaintiffs may bring suits alleging such violations. Here litigants

and courts must address two key questions: First, to what extent may state law implement or incorporate international law as a rule of decision? And second, to what extent may state law incorporating international law authorize suits for causes of action arising abroad? The second question is both especially urgent because it involves a potential alternative avenue for litigating foreign human rights abuses in U.S. courts, and especially vexing because it juxtaposes different doctrinal and jurisprudential conceptualizations of the ability of forum law to reach inside foreign territory.

Against this backdrop, I want to make a few points. First, there is nothing wrong as a general matter with state law incorporating international law. Second, the idea of state law having broader extraterritorial reach than federal law is nonetheless in tension with federal foreign affairs preemption. And third, this tension basically disappears when the state law incorporating international law presents what's called a "false conflict" of laws among the relevant jurisdictions' laws. Here the fields of private international law and conflict of laws gain salience and supply a doctrinally and historically grounded mechanism for entertaining claims arising abroad in U.S. courts. More concretely, if state law incorporating international law is fundamentally the same law as that operative in the foreign jurisdiction, there is no conflict of laws and the sole applicable law applies.

In sum, ever-tightening constraints on federal extraterritoriality have generated multilayered tensions with traditional and contemporary fields of conflict of laws and private international law. At present, the flashpoint for these tensions promises to be claims alleging international human rights violations abroad in state court. The concept of "false conflicts" of law can remove the flashpoint's ignition source. False conflicts hold immense jurisprudential, doctrinal, and practical potential to handle these multilayered tensions with an equally multilayered concept capable of capturing principles not only of conflict of laws but also of federal extraterritoriality, foreign affairs, and due process. False conflicts should be the starting point for any evaluation of international human rights claims in state court under state law.

The paper will be presented in the joint American Society of International Law Annual Meeting and International Law Association Biennial Meeting, and will be published in the *American Society of International Law Proceedings*.

Privatizing Delaware Courts

I was not aware of this development in Delaware, which was introduced by a statute of 2009.

For USD 6,000 a day and USD 12,000 filing fees, the prestigious Delaware court and judges can be rented for settling disputes above USD 1 million. One of the parties at least must be a Delaware business entity. The Delaware law maker called it "arbitration", but the resulting decision is an "order of the Chancery Court", not an arbitral award. The scheme is closer to litigation behind closed doors than to arbitration.

One of the goals is to compete to attract business disputes to Delaware by offering a *cheaper* mode of dispute resolution. As a US judge has recently emphasized:

> *The State of Delaware has become interested in sponsoring arbitration as a part of its efforts to preserve its position as the leading state for incorporations in the U.S. One of the reasons that Delaware has maintained this position is the Delaware Court of Chancery, where the judges are experienced in corporate and business law and readily available to resolve this type of dispute. Nevertheless, judicial proceedings in the Court of Chancery are more formal, time consuming and expensive than arbitration proceedings. For that reason, the Court of Chancery, as a formal adjudicator of disputes, may not be able to compete with the new arbitration systems being set up in other states and countries.*

The constitutionality of this law, however, has been challenged, and the Supreme Court may decide to hear the case. In Delaware Coalition for Open Government, Inc. v. Strine, the U.S. Court of Appeals for the Third Circuit found the Delaware law unconstitutional as the proceedings would not be open to the public:

> *Because there has been a tradition of accessibility to proceedings like Delaware's government-sponsored arbitration, and because access plays an important role in such proceedings, we find that there is a First Amendment right of access to Delaware's government-sponsored arbitrations*

See also this Op Ed of Judith Resnik in the *New York Times*.

I have tremendous respect for Judith Resnik, who is a professor at Yale Law School and one of the leading US scholars on civil procedure. Readers unfamiliar with the US legal academy should know, however, that Resnik belongs to a school of thought which is highly critical of alternative dispute resolution. This is probably the result of the development of arbitration for consumer and labour disputes in the US. I am not sure, however, that this peculiarity of US law should impact our perception and analysis of commercial dispute resolution.

Athlete Trapped Between Arbitration and Courts

On February 26, 2014, the Regional Court of Munich rejected the lawsuit of the well known German speed skater Claudia Pechstein. Although the Regional Court decided that arbitration clauses for athletes are invalid because athletes are "forced" to sign them if they want to participate in sport competitions, she nonetheless dismissed the case on the merits, reasoning that the CAS award has *res judicata* effect.

A translation into English of the German press release concerning this interesting decision has been kindly provided by Franz Kaps, Research Fellow of the Max Planck Institute Luxembourg.

Press Release 03 /14

Case law of the Regional Court of Munich I in Civil Matters

No compensation for speed skater after doping suspension

In today's decision the Regional Court of Munich I (Case Number 37 O 28331/12) rejected the suit of a well-known German speed skater. The claimant had requested the declaration that the doping suspension imposed on her was unlawful, as well as the payment of approximately € 3.5 million in damages, a

reasonable compensation for personal suffering of € 400.000, and the acknowledgement to reimburse future damages. The defendants were the German (defendant 1) and the International Skating Union (defendant 2) .

The background:

In 2009 the claimant was suspended for 2 years by the Disciplinary Commission of the defendant 2, after discovering elevated reticulocyte counts in her blood. The claimant had signed with both defendants athlete's agreements in which an arbitration agreement was included. The claimant appealed to the Court of Arbitration for Sport (CAS) and the CAS confirmed the lawfulness of the suspension.

The reasoning of the court:

The appeal before the Regional Court of Munich was not prevented by the arbitration plea of the defendants based on the agreements signed by the athlete: the arbitration clauses concluded between the parties were considered to be invalid, as they had not been voluntarily accepted by the claimant. At the time of the conclusion of the arbitration agreements there was a structural imbalance between the claimant and the defendants; the latter being in a monopoly position, the claimant had no other choice than to sign the arbitration agreements – otherwise, she would not have been allowed to participate in competitions and would thus have been hampered in the exercise of her profession.

However, a decision of the court on the question whether the doping suspension was unlawful was prevented by the *res judicata* effect of the decision of the International Court of Sport (CAS). The 37th Civil Chamber of the Regional Court could not and was not allowed to determine whether the doping suspension was lawful. The *res judicata* of the arbitration award had to be recognized, as at the time of the referral to the CAS there was no structural imbalance between the parties anymore. The competition was over and in the proceeding before the CAS the claimant was represented by lawyers. The alleged errors in the composition of the arbitral tribunal or the selection of the arbitrators were not raised in the proceedings before the CAS. A correlating complaint would have been required and reasonable. The invalidity of the arbitration agreement does therefore not preclude the recognition of the arbitral award: despite her knowledge about the lack of voluntary conclusion of the arbitration agreement, the claimant appealed

to the CAS and did also not reprimand this defect. In addition, the decision by the CAS does not violate fundamental constitutional principles.

The alleged damages and pain and suffering claims were not subject in the proceedings before the CAS. To this extend the lawsuit was admissible. These claims were unfounded, because in order to determine whether such claims actually exist, it would be necessary to assess whether the doping suspension was justified, but with respect to this question the court is bound by the observations of the CAS and therefore had to assume that the suspension was lawful without any further inquiry.

(Judgment of the Regional Court of Munich I, Case Number: 37 O 28331/12; the decision is not final)

Author of the Press Release: Judge at the District Court of Munich I Dr. Stefanie Ruhwinkel – spokeswoman.

Greek Commentary on the Rome II Regulation

The first Greek Commentary on the Rome II Regulation edited by Prof. Dr. Angelos Bolos (Panteion University) and Dr. Dimitrios-Panagiotis Tzakas was just published.

This collective work undertakes an in-depth analysis on the specific provisions of Regulation No 864/2007 (Rome II) and scrutinizes its doctrinal implications with regard to the existing CJEU case law, especially on the Brussels I Regulation. Furthermore, attention is paid to the impact of the Rome II Regulation on sectors characterized by specificities which are not addressed by specific choice-of-law rules (i.e. traffic accidents, capital markets law etc.).

The contributors (V. Athanassopoulou, A. Emilianides, Th. Katsas, V. Koumpli, E. Liaskos, A. Metallinos, A. Bolos, K. Noussia, A. Papadelli, E. Spinellis, T.-E.

Synodinou, D.P. Tzakas) give particular consideration to the ongoing Europeanization in the fields of the Private International Law and highlight its implications for the jurisprudence of the Hellenic courts after the enactment of a new set of choice-of-law rules.

European Parliament adopts Legislative Resolution on the Common European Sales Law

On 26 February 2014 the European Parliament adopted a legislative resolution on the Proposal for a Common European Sales Law. The full text is not yet available. However, you can find a comment on the plenary debate on "European Private Law News".

Further information on the procedure is available in the Procedure File 2011/0284(COD) on the website of the European Parliament.

The UNCITRAL Rules on Transparency in Investor-State Treaty-based Arbitration

Many thanks to Ana Koprivica, research fellow of the MPI Luxembourg

In July 2013 the United Nations Commission on International Trade Law (UNCITRAL) adopted the Rules on Transparency in Investor-State Arbitration.

The Rules shall enter into force on 1st April 2014 and apply to all investor-state disputes initiated under UNCITRAL Arbitration Rules pursuant to international investment agreements concluded prior to or after this date.

At the outset it should be noted that the range of potentially applicable rules in international investment arbitration today is extremely wide and provides the parties with a lot of room to tailor their procedure in accordance with their specific needs. Consequently, they also make it possible for the parties to limit or constrain transparency in the dispute between them. This triggers the concerns of not having a proper mechanism to safeguard transparency. To that end, the UNCITRAL Working Group II (Arbitration and Conciliation) adopted two approaches when drafting the Rules: one would be the possibility for States to offer to arbitrate disputes under those arbitration rules that *require* transparency (which has so far only been a theoretical possibility) and the other, the option for States to conclude a new treaty which would supplement or replace the already existing investment treaties and require arbitration pursuant to rules requiring transparency. The first approach is reflected in the newly adopted Transparency Rules, whilst the second will possibly result in the adoption of the Transparency Convention, the second reading of which took place two weeks ago in New York at the 60th UNCITRAL session.

Main Features

The New Transparency Rules have become an integral part of the UNCITRAL Arbitration Rules, but they are also made available as a stand-alone instrument for application in disputes that are governed by other arbitral rules. The main aim of the Rules is to make proceedings transparent. In that respect, the provisions mandating disclosure and openness (Articles 2, 3, 6 and 7) and those that govern participation by non-disputing parties (Articles 4 and 5) appear to be the most important features of the Rules.

Access to Documents

As soon as the arbitral proceedings commence, i.e., once there is evidence respondent has received the notice of arbitration (which itself is subject to automatic mandatory disclosure), a basic set of facts will be disclosed: names of the parties, economic sector involved and the underlying treaty (Art.2). The Rules further distinguish between the mandatory automatic disclosure that certain

documents are subject to (all statements and submissions by the disputing parties and non-disputing State parties or third persons; transcripts of hearings; and orders, decisions and awards of the arbitral tribunal); mandatory disclosure on request of any person (witness statements and expert reports), and the disclosure of other documents (such as exhibits) which depend on the exercise of the particular tribunal's discretion (Article 3). To balance the Transparency Rules' provisions on disclosure, Article 7 specifies that disclosure is subject to exceptions for confidential or protected information. It further lists four categories of such information. Whether and what information will fall under the exceptions will be an issue to be decided on a case-by-case basis. Tribunals are also permitted to restrain or limit disclosure when necessary to protect the "integrity of the process", which is only intended to *restrain* or *delay* disclosure in exceptional circumstances.

Amicus Curiae and Submissions from non-disputing Parties

In line with standard practices by tribunals, the Transparency Rules now expressly affirm the authority of investment tribunals to accept submissions from *amicus curiae*, while incorporating detailed rules and guidelines under Article 4. This however concerns "written submissions" and does not address other forms of participation, such as statements at hearings. The Transparency Rules also require that tribunals accept submissions on issues of treaty interpretation from non-disputing State parties to the relevant treaty, provided that the submission does not "disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party" (Article 5). In addition to this, the tribunal may accept submissions on other matters relevant to the dispute from non-disputing State parties to the underlying treaty.

Open hearings

The most noteworthy feature of the Transparency Rules is contained in Article 6 and concerns the openness of the hearings. The tribunal is granted authority to determine how to make hearings open, including the option of facilitating public access through online tools. The disputing parties—alone or together—**cannot veto** open hearings. There are, however, three limitations to this: (1) protection of confidential information; (2) protection of the "integrity of the arbitral process"; and (3) logistical reasons.

Significance of the Rules and Open Questions

In what seems to be a great struggle to achieve full transparency for investor–State treaty-based arbitration, the UNCITRAL Transparency Rules represent a huge and important contribution, by making openness a rule rather than an exception and shifting the presumption of confidentiality, much more suitable for commercial arbitration, towards transparency. It seems that the Rules should in the first place bring some advantage to investors by enabling them to assess the risk to their investments in different host States to a more accurate extent, as their application would introduce more consistency and more cohesion, which is something that international investment arbitration still lacks. On the other hand, there is also a fear of the so-called "re-politicisation" of the investor-State disputes as well as the possibility that the investors would rather have their disputes resolved in private. It remains to be seen how this would affect the attractiveness of the UNCITRAL Rules.

Further, granting the right of public access to hearings and documents is important for the institutions' perceived legitimacy. By having more consistent decisions and therefore forming more consistent reasoning in arbitral awards, the whole arbitration system would ensure legal certainty, promotion of effective democratic participation, good governance, accountability, predictability and the rule of law which investors and host States would consequently benefit from. This is of the utmost importance when vital public concerns are involved such as environmental issues or human rights. Under previous versions of the UNCITRAL Arbitration Rules, disputes between investors and States were often not made public, even where vital public concerns were involved or illegal or corrupt business practices were uncovered. In other settings, this level of transparency may also be used as a "scare technique" and a means to extract a settlement from another party.

In relation to this, it will be exciting to see some practical developments, more precisely: the potential change in the way parties draft their pleadings as a consequence of the higher level transparency imposed on them, or the limitation concerning the number or types of documents parties may submit and refer to, resulting from the intention to avoid potential disclosure requests.

In terms of the applicability of the Rules, it should be noted that even though they apply automatically to claims brought under a treaty concluded after 1st April

2014, parties will still have the possibility to opt out from transparency provisions. It will be interesting to see what the outcome of discussions on the Transparency Convention draft will be, since the impact of the Transparency Rules still largely hinges on the political outcome. It is also not certain what kind of an impact this will have on the attractiveness of investment arbitration under UNCITRAL Arbitration Rules and on arbitration under treaties which contain a reference to UNCITRAL Transparency Rules as opposed to those initiated under contracts that contain no such disclosure requirements.

It is further submitted that the Rules leave less room for the abuse of proceedings by reducing the scope of procedural arguments surrounding access to documents. Indeed, by providing a detailed list of documents subject to disclosure, the Transparency Rules will undoubtedly diminish the possibility for such arguments. Nevertheless, the Rules still leave open the likelihood for such discussion in relation to witness statements, expert reports and exhibits, as these are not to be automatically disclosed. Needless to say, when there is discretionary power of tribunals to restrict disclosure in order to protect confidential or protected documents and the integrity of the arbitral process the potential abuse of such powers is often an issue. In any case, it remains to be seen how frequently and in what circumstances the tribunals will exercise this power.

Therefore, the UNCITRAL Arbitration Rules represent a big step in the direction of increasing transparency. Their biggest achievement seems to be the shift in the underlying presumption toward openness, whereas in other terms they do not seem to introduce much novelty compared to some other international investment arbitration rules. The question that is yet to be answered in the future is if by balancing the public interest and the principle of confidentiality in arbitration we have gone one step too far and have let the former prevail over the latter to a too great an extent.