Latest on Spanish Journals (I)

Vol. VII (2014, 2) of the Spanish journal *Arbitraje. Revista de Arbitraje Comercial y de Inversiones* has just been released. The following contributions are to be found therein:

Under the heading *Estudios*

> Franco FERRARI: Forum shopping: la necesidad de una definición amplia y neutra
>
> Ana FERNÁNDEZ PÉREZ: Los contenciosos arbitrales contra España al amparo del Tratado sobre la Carta de la Energía y la necesaria defensa del Estado.

As *Varia*

> Miguel GÓMEZ JENE: Hacia un estándar internacional de responsabilidad del árbitro
>
> Marco DE BENITO LLOPIS–LLOMBART: El arbitraje y la acción
>
> Simon P. CAMILLERI: Anti–suit injuctions en el régimen de Bruselas I: ¿una cuestión de principios?
>
> Álvaro SORIANO HINOJOSA: El Estado y demás personas jurídicas de Derecho público ante el arbitraje internacional
>
> José Pablo SALA MERCADO: La actualidad de la inversión extranjera en Argentina. Una realidad que despierta inseguridad.

As usual, the issue provides as well with the notice of relevant recently adopted legal texts, case law (sometimes commented) of several jurisdictions, reviews of books and other journals, and of events.

Save the Date: Next Conference of the German Academic Association for International Procedural Law

The next biannual conference of the German Academic Association for International Procedural Law (Wissenschaftliche Vereinigung für Internationales Verfahrensrecht e.V.) will take place from 25 to 28 March 2015 in Luxemburg. It will be hosted by the Max Planck Institute for International, European and Regulatory Procedural Law and will be dedicated to three topics:

- The European Court System
- International Dimensions of European Procedural Law
- International Commercial Arbitration

The conference language will (for the most part) be German. More information is available here.

Colloquium on Collective Redress in Zurich in October 2014

On 3 and 4 October 2014, Tanja Domej from the University of Zurich will host a colloquium on collective redress in Zurich. Speakers from various European jurisdictions and the US will discuss their experiences with existing instruments and possible future developments. The draft programme is available at http://www.rwi.uzh.ch/lehreforschung/alphabetisch/domej/tagungen/ccr.html. The working language will be English.

Attendance is free of charge but registration is required as the number of places is limited. You can register online at http://www.rwi.uzh.ch/lehreforschung/alphabetisch/domej/tagungen/registratio

n.html or via e-mail (lst.domej@rwi.uzh.ch).

New SSRN eJournal on Private International Law

We are pleased to announce a new Legal Scholarship Network (LSN) Subject Matter eJournal – **Transnational Litigation/Arbitration, Private International Law, & Conflict of Laws eJournal**.

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Editors: Donald Earl Childress III, Associate Professor of Law, Pepperdine University School of Law, and Linda Silberman, Martin Lipton Professor of Law, Co-Director, Center for Transnational Litigation, Arbitration, and Commercial Law, New York University School of Law

Description: This eJournal includes working and accepted paper abstracts dealing with private international law, transnational litigation, and arbitration. The topics include private international law (conflict of laws), extraterritoriality, jurisdictional issues, enforcement of foreign judgments and arbitral awards, international commercial arbitration, and investor-state arbitration.

We hope our readers will find this eJournal useful.

Another Alien Tort Statute Case Moving Forward

A few weeks back, the Unite States Court of Appeals for the Fourth Circuit revived an Alien Tort Statute case that was at first dismissed in Kiobel's wake. The four plaintiffs in *Al Shimari v. CACI Premier Technology Inc*. are foreign nationals who allege that they were tortured and otherwise mistreated by American civilian and military personnel while detained at Abu Ghraib prison on Iraq. The plaintiffs allege that employees of CACI—a private, U.S.-based defense contractor— "instigated, directed, participated in, encouraged, and aided and abetted conduct towards detainees that clearly violated the Geneva Conventions, the Army Field Manual, and the laws of the United States." Based on the decision in Kiobel, the district court dismissed all four plaintiffs' ATS claims, concluding that the court "lack[ed] ATS jurisdiction over Plaintiffs' claims because the acts giving rise to their tort claims occurred exclusively in Iraq, a foreign sovereign."

The Fourth Circuit reversed, adopting a narrow read of the *Kiobel* decision. As noted before on this site, the Supreme Court in *Kiobel* said that "even where [ATS] claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." Reading this directive, the Fourth Circuit:

"observe[d] that the Supreme Court used the phrase 'relevant conduct' to frame its 'touch and concern' inquiry, . . . [and] broadly stated that the 'claims,' rather than the alleged tortious conduct, must touch and concern United States territory with sufficient force. [This] suggest][s] that [lower] courts must consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action, [when assessing whether the presumption is overcome]."

"The Court's choice of such broad terminology," according to the Circuit, "was not happenstance." The "clear implication" is that "courts should not assume that the presumption categorically bars cases that manifest a close connection to United States territory. Under the 'touch and concern' language, a fact-based analysis is required in such cases to determine whether courts may exercise jurisdiction over certain ATS claims."

In this case, the plaintiffs' claims allege acts of torture committed by United States citizens who were employed by an American corporation which has corporate headquarters located in Virginia. These employees were hired in the United States; the contract was concluded in the United States; and CACI invoiced the U.S. government in the United States. Finally, the plaintiffs allege that CACI's managers located in the United States were aware of reports of misconduct abroad, attempted to "cover up" the misconduct, and "implicitly, if not expressly, encouraged" it.

These facts dictated a different result that *Kiobel*, even if the tortious acts occurred abroad, so the case was remanded to the District Court for further proceedings on the merits. Like *Doe v. Nestle* in the Ninth Circuit, and other cases discussed on this site, the ATS is far from dead.

Once Again: German Federal Supreme Court Refers Question on Art. 15(1) lit. c) Brussels I to the CJEU

On 15 May 2014 the German Federal Supreme Court has – once again – referred a question relating to Art. 15(1) lit. c) to the Court of Justice of the European Union (Court order of 15 May 2014, III ZR 255/12). Here is an (unofficial) translation:

> *May the consumer in accordance with Art. 16(1) Brussels I-Regulation sue in the state where he is domiciled if the contract that is the immediate basis for the claim was not concluded under the conditions set out in Art. 15(1) lit. c) Brussels I Regulation, but serves to ensure the economic success of another contract concluded between the same parties under the conditions set out in Art. 15(1) lit. c) Brussels I-Regulation?*

The question arises in a case based on the following facts: the claimant, a consumer domiciled in Germany, entered into a contract with the defendant, a Spanish real estate agency. On the basis of this contract the defendant arranged the conclusion of an option contract between the claimant and a German construction company relating to the purchase of a yet to be built apartment in a Spanish holiday complex. This option contract eventually led to the conclusion of a sales contract between the consumer and the construction company. After payment of the first two installments under the sales contract, the construction company ran into financial difficulties. This, in turn, jeopardized the completion of the holiday complex. The defendant, therefore, turned to the claimant and offered to look into the matter. The claimant happily accepted – and travelled to Spain to sign a contract to that effect with the defendant. In the following months the claimant made several payments to the defendant under the second contract. Then the relationship fell apart. The claimant cancelled the second contract and filed a law suit in Germany asking the defendant to refund all payments made under that contract.

The court of first and second instance declined to hear the case for lack of jurisdiction arguing that the Spanish real estate agency – regarding the second contract and the service offered under that contract – had not directed its activities towards Germany. The Federal Supreme Court, however, was not so sure and decided to refer the above question to the CJEU. How the CJEU will decide, remains to be seen. Chances are that the highest European court will continue its extremely consumer-friendly interpretation of Art. 15(1) lit. c) (cf. CJEU, C-190/11 – Mühlleitner, CJEU, C-218-12, Emrek) and allow consumers to sue at home even if only an economically related, but not the immediate contract was concluded under the conditions set out in Art. 15(1) lit. c) Brussels I-Regulation. A narrow interpretation, however, would rather argue against application of Art. 15 et seq Brussels I-Regulation: Art. 15(1) lit. c) makes clear that the contract in dispute must fall into the scope of the professional's directed activities *("In matters relating to a contract concluded by a … consumer … jurisdiction shall be determined by this Section … if … (c) … the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.")*

The irony of the case, however, is that the question referred to the CJEU by the German Federal Supreme court does not actually arise in the case at bar: according to the court's (undisputed) statement of facts the defendant, i.e. the Spanish real estate agency, turned to the consumer and offered his help when the German construction company ran into difficulties. The court doesn't say how the defendant turned to the claimant and how he offered his help. But there is little doubt that the consumer was sitting at home in Germany and was actively approached by the defendant. Therefore, the defendant clearly directed his activities towards the consumers habitual residence. And the contract that was eventually concluded clearly fell into the scope of these activities since it was the direct result of the defendant's efforts. That the consumer eventually travelled to Spain to conclude the contract doesn't hinder application of Art. 15 et seq Brussels I Regulation (cf. CJEU, C-190/11, Mühlleitner).

But why keep things simple?

Save the date: Conference on Coherence in European Private International Law in October 2014

On 10 and 11 October 2014, *Jan von Hein* from the University of Freiburg and *Giesela Rühl* from the University of Jena will host a conference on coherence in European private international law. Speakers from Germany, Austria and Switzerland will critically assess the current state of European private international law including the law of international civil procedure. They will uncover inconsistencies, contradictions as well as frictions and discuss how they can be overcome. Should the European legislator continue to enact separate legal acts for individual legal fields (contracts, torts, divorce, maintenance, succession, etc.)? Should the European legislator regulate choice of law and international civil

procedure in separate legal acts? By asking these and other questions the conference seeks to contribute to the ongoing debate about the future of European private international law.

The conference is funded by the Fritz Thyssen Stiftung and will take place in Freiburg im Breisgau (Germany). The conference language will be German. Registration will be open soon.

Essays in Honour of Professor Emeritus Spyridon Vrellis

Essays in Honour of Professor Emeritus Spyridon Vrellis, a long-term affiliate of the University of Athens, are issued under the title In Search for Justice. The volume contains an extensive curriculum vitae and bibliography of Professor Vrellis. It also includes 71 paper in four languages (Greek, French, English and German). According to the official information from the publisher, the contributors are:

Adamopoúlou P., Basedow J., Bogdan M., Borrás A., Voúlgaris I., Burian L., Yeoryiádis Ap., Gkórtsos Khr., Cordero J. Sanchez, Davrádos N., Deliyiánni-Dimitrákou Khr., Delikostópoulos I., Doúnga Al., Koumplí V., Drillerákis I., Dintjer Tebbens H., Dorís Ph., Frank R., Gaudemet-Tallon H., Grammaticaki-Alexiou A., Hartley T., Jessurun D?Olivira H. U., Kaïsis A., Karayiannis S., Karampatzós A., Katiphóris N., Kiraly M., Klamarís N., Kondíli I., Kotsíris L., Kourákis N., Kríspis I., Lagarde P., Lando O., Lipp V., Mantákou Á., Meeusen J., Meïdánis Kh., Moura Ramos R. M., Moustaïra E., Nafziger, J., Özsunay E., Pampoúkis Kh., Panópoulos G., Papadélli A., Papadopoúlou-Klamarí D., Papanikoláou P., Papasiópi-Pasiá Z., Pataut E., Pauknerová M., Pvifver M., Pelleni A., Pintens W., Poúlou E., Rethimiotáki E., Siehr K., Stathópoulos M., Stamatiádis D., Stribis I., Sturm F., Sturm G., Symeonides S., Sotiropoúlou M., Tagarás Kh., Tadaki M., Tarman Zeynep D., Tzákas D. -P., Tsavdarídis A., Tsevás A., Tsikrikás D., Tsoúka Khr.,

Vassilakakis E., Khristodoúlou K. and Zervoyiánni E.

Many contemporary topics on private international law are examined in the published papers. These are the contents (for which I thank Professor Vassilakakis) and other information about the Essays are available here.

"Judgments on Awards" in "Secondary Jurisdictions": The D.C. Circuit Decision in Commisimpex v. Congo

Over fifteen years ago, on the 40th anniversary of the of the New York Convention, Jan Paulsson wrote that it was high time for the Convention "to discover its full potential." *See* Paulsson, *Enforcing Arbitral Award Notwithstanding Local Standard Annulments*, 6 Asia Pac. L. Rev. 1 (1998). He "propose[d]" that "the annulment of an award by the courts in the country where it was rendered should not be a bar to enforcement elsewhere unless the grounds of that annulment were ones that are internationally recognized." In his view, an "enforcement judge . . mak[es] a decision which will have practical consequences on resources located in his or her jurisdiction," and need not take another enforcement court's assessment of local or even international standards as "controlling."

This week, before the United States Court of Appeals for the D.C. Circuit, we see somewhat of an opposite scenario. A party wins an international arbitration in Paris in 2000. It successfully enforces the award in London in 2009—thus making that award an English judgment. But the creditor is unable to collect on the judgment in England, and pivots west to the United States. But the three-year statute of limitations has run under the Federal Arbitration Act ("FAA"), meaning that the award can't be enforced there. The applicable statute of limitation for foreign judgments, however, is 10 years, so it seeks to enforce that instrument

instead. Though Professor Paulsson says that each enforcement court must make its own decision on the enforceability of foreign arbitral awards, does the conversion of that award into a national court judgment take it out of the arbitration context altogether? Stated more bluntly, can a litigant "launder" the award in this manner?

Earlier this year, the District Court said no. In its view, enforcement of a judgment pregnant with an arbitral award "would create an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA and the New York Convention which it sought to codify. In its view, the "maneuver" attempted by the award-judgment-creditor here would "outsource[e]" the question of timeliness to litigants and foreign states and "upset the balance between promoting arbitration, on the one hand, and protecting potential defendants' interest in finality," on the other.

Just last week, the D.C. Circuit disagreed. Siding with the United States as amicus curiae, and prior decisions of the Second Circuit—the only other court to address the issue—it observed that "the overriding purpose of [the] FAA . . . is to facilitate international commercial arbitration by ensuring that valid arbitration agreements are honored and valid arbitral awards are enforced. . . . [The purpose] is not undermined — and frequently will be advanced — through recourse to parallel enforcement mechanisms that exist independently of the FAA." "Although an arbitral award and a court judgment enforcing an award are closely related, they are nonetheless distinct from one another, and that distinction has long been recognized." In a nod to Professor Paulsson's view, the Circuit acknowledged that England is a "secondary jurisdiction" with respect to the French arbitral award, so its decisions "have 'no preclusive effect' in recognition proceedings in the United States." But in this context, the U.S. court is not being asked to "automatically to accord preclusive effect to the English Court's determinations on the Award under the Convention, but rather to assess the English Judgment under the separate (and clearly distinct) factors for judgment recognition under [state] law."

Parallel coverage by Ted Folkman is on Letters Blogatory today, too.

Research on Child Abduction

Professor Paul Beaumont of the University of Aberdeen, in collaboration with ***Dr Lara Walker*** of the University of Sussex, has received funding from the Nuffield Foundation to carry out empirical research on **Child Abduction** in the European Union. The project started on 1st April 2014 and lasts for 20 months.

The project concerns the place of adjudication of cases of international child abduction.

The Hague Convention on Child Abduction makes the presumption that it is generally in the interests of abducted children to be returned to the country of origin for adjudication, so that the courts there can carry out a full assessment of their interests. But under Article 13, the state of refuge can issue a 'non-return order' where there are concerns about a return to the stage of origin. The study will focus on the operation of the Brussels IIa regulation, which allows the courts of origin to overturn this non-return order.

The study will involve collation of data from Central Authorities in all the relevant states, to estimate the number and basic characteristics of cases where the courts of origin have overruled a non-return order. More detailed analysis of case reports will enable the researchers to examine the processes which led the courts of origin to reach this decision. The study will also consider the relationship between decisions about the place of adjudication and the outcome of the case – in other words, does the decision to return a child to the state of origin also result in custody provision being made? The findings from this study will inform a forthcoming consultation to review the Brussels IIa regulation and associated practice guidance.

How can you help?

The Centre for Private International Law is interested in receiving information from anyone who has details of judgments in child abduction cases involving both Article 13 of the Hague Child Abduction Convention and Article 11 (8) of the Brussels IIa Regulation to further our research.

Confidentiality will be respected.

Information should be sent to Jayne Holliday at jayne.holliday@abdn.ac.uk

More information on the project can be found here.