December 2013 Issue of the Revista Electrónica de Estudios Internacionales (REEI, Spain)

The latest issue of the REEI has been recently released. These are the contents related to Private International Law (free access, in Spanish):

M.D. Ortiz Vidal: *Distribución y venta en España de productos fabricados en el extranjero. Cuestiones de Derecho Internacional Privado*

Abstract: The distribution and sale, of a product manufactured in a third country, in the European single market, requires the adjustment of the product to the rules of public law and private law. From the point of view of public law, the Conformité Européenne operates as a necessary element in order to market for certain products in the EU single market. From an international private law perspective, European standards applicable to the legal position of the purchaser of a product – manufactured in a Member State of the EU or in a third country – which is distributed and commercialized in the EU single market, will provide a different legal treatment depending on whether the consumer is "active" or "passive".

E. Fernández Massiá: *Arbitraje inversor-estado: De "bella durmiente" a "león en la jungla"*

Abstract: The growing number of cases highlights benefits and deficiencies of international investment arbitration. Most countries consider the investor-state dispute settlement system a key element of international investment protection, but are reforming selected aspects of the same. In this sense, the new international Agreements introduce procedural innovations and changes in the wording of the substantive provisions looking forward a balanced approach that recognizes the legitimate interests of both host countries and foreign investors. But other governments have taken more radical steps. For example, Latin American countries have proposed the creation of a new investment arbitration center alternatively to ICSID. Australia intends no longer to include dispute resolution clauses allowing investor-state arbitration in future treaties, while

South Africa and India are reviewing their external policy about foreign direct investment.

L. Dávalos León: *El contrato internacional en la nueva Ley cubana de Contratación Económica*

Abstract: The enactment of the new regulation on economic contracts in Cuba at the end of 2012 has brought about significant changes to contract law in this country. Although this regulation encompasses principles and international contracting rules based on the UNIDROIT Principles, it also gives rise to problems in relation to the "commercial" and "international" nature of contracts. The difference between commercial contracts and economic contracts is confusing because the provisions governing the former in the Commercial Code have been derogated and there are no other regulations substantively regulating these types of contracts. The new regulation also states that international contracts fall outside its scope of application but, at the same time, includes within its scope contracts executed with foreign natural or legal persons. Therefore, the presence of foreign elements does not suffice for a contract to be considered "international", but other objective links of greater significance are required. All this raises a question: Which rules currently apply to international commercial contracts when the parties, by virtue of the principle of autonomy, choose Cuban law as the governing law? This work analyses certain aspects of the new regulation and its contradictions in order to expose them and to open discussion to find solutions or alternatives.

Chronicles on events and facts concerning Private International Law, International Civil Procedural Law and Public International Law are also provided.

First IALP-MPI Post-Doctoral Summer School on European and Comparative Procedural Law

The first **IAPL-MPI Post-Doctoral Summer School on European and Comparative Procedural Law**, organized by the International Association of Procedural Law (IAPL) and the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, will take place in Luxembourg between the **20th and the 23rd of July 2014**, under the direction of Professor Loïc Cadiet (Université Paris I -Sorbonne) and Professor Burkhard Hess (MPI Luxembourg).

The IAPL-MPI Post-Doctoral Summer School aims to bring together young post-doc researchers in European and comparative procedural law, as well as dispute resolution. It will give them an opportunity to openly exchange experiences and share their ideas with both young and experienced proceduralists. In this regard, Luxembourg is one of the most interesting judicial venues in Europe and offers many opportunities for exchanges between procedural theory and practice.

The participants to the School will present and discuss their research activities. Invited Law professors and practitioners will also make presentations on current topics related to the subject matter of the school.

Candidates shall submit a short paper (3-4 pages) in English on their research profile and briefly present the topic of their current research. They shall in addition submit a CV and a recommendation letter of their supervisor/home institution.

Applications shall be sent to the Institute (email address: summer-school@mpi.lu) **not later than 15 March 2014**.

Applicants are eligible for grants covering accommodation and living expenses.

For more information click here: mpi.lu.

US Supreme Court Rules on Adjudicatory Jurisdiction over Multinational corporations

By Verity Winship

Verity Winship is Associate Professor, Richard W. and Marie L. Corman Scholar at Illinois University College of Law

Today in *Daimler AG v. Bauman*, the US Supreme Court held that US Courts in California lacked adjudicatory jurisdiction over a German parent corporation. Argentine plaintiffs had sued DaimlerChrysler Aktiengesellschaft (DaimlerChrysler AG) in US federal court in California. They alleged that a wholly-owned Argentinian subsidiary of DaimlerChrysler AG collaborated in the torture and disappearance of plaintiffs and their family members in Argentina in violation of the Alien Tort Statute and Torture Victims Protection Act. The only contacts between the defendant DaimlerChrysler AG and the forum state were through a US subsidiary, and the alleged conduct took place entirely outside the US.

The US Supreme Court had to decide whether the contacts between DaimlerChrysler AG and the state of California were so extensive that the US court could exercise jurisdiction over any cause of action, even one unrelated to the contacts and unconnected to the forum – so-called "general" personal jurisdiction. In terms of US law, the question was whether exercise of personal jurisdiction in these circumstances satisfied constitutional due process requirements. The classic description of these requirements is that the defendant must have "minimum contacts" with the territory of the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."

In rejecting the "exorbitant exercise[] of all-purpose jurisdiction" urged by plaintiffs in *Bauman*, the Court reiterated the standard it established in 2011

in *Goodyear*: the question is whether the defendant corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." The Court refused to expand "all-purpose" jurisdiction beyond the core examples of the corporation's state of incorporation and principal place of business, although it left open the possibility of an exceptional case.

In focusing on the scope of general jurisdiction, the Court treated other issues in the case in less depth. The Court assumed for the purpose of the opinion only that the US subsidiary was subject to all-purpose jurisdiction in California, as defendant had conceded. Moreover, the Court did not give general guidance on whether actions by a subsidiary can be attributed to a corporate parent to establish personal jurisdiction. It merely said that the lower court had gone too far by attributing the subsidiary's contacts to DaimlerChrysler AG based "primarily on its observation that [the subsidiary's] services were 'important'" to the parent company. The Court rejected such expansive attribution, noting that the "inquiry into importance stacks the deck, for it will always yield a pro-jurisdiction answer."

The majority opinion, written by Justice Ginsburg and joined by seven other justices, concluded by highlighting the "transnational context of this dispute." It criticized the lower court for paying "little heed to the risks to international comity its expansive view of general jurisdiction posed," noting the contrast between European and US law on the scope of adjudicatory jurisdiction over corporations.

Volumes 358 and 365 of Courses of the Hague Academy

Volumes 358 and 365 of the Collected Courses of the Hague Academy of International Law were just published.

Volume 358:

1) Transaction Planning Using Rules on Jurisdiction and the Recognition and Enforcement of Judgments by *Ronald A. Brand*, Professor at the University of Pittsburgh

Private international law is normally discussed in terms of rules applied in litigation involving parties from more than one State. Those same rules are fundamentally important, however, to those who plan crossborder commercial transactions with a desire to avoid having a dispute arise — or at least to place a party in the best position possible if a dispute does arise. This makes rules regarding jurisdiction, applicable law, and the recognition and enforcement of judgments vitally important contract negotiations. It also makes the consideration of transactional interests important when developing new rules of private international law. These lectures examine rules of jurisdiction and rules of recognition and enforcement of judgments in the United States and the European Union, considering their similarities, their differences, and how they affect the transaction planning process.

Excerpt of table of contents:
Chapter I. Transaction planning and private international law
Chapter II. Understanding rules of adjudicatory jurisdiction across legal systems
Chapter III. Understanding legal system differences in rules on the recognition and enforcement of foreign judgments
Chapter IV. Party autonomy and transaction planning
Chapter V. consumer protection and private international law
Chapter VI. revisiting jurisdictional issues: tort jurisdiction and transaction planning
Chapter VII. drafting effective choice of forum agreements.

2) The Emancipation of the Individual from the State under International Law by G. *Hafner*, Professor at the University of Vienna

Present international law is marked by two different tendencies: a State oriented and an individual oriented one. Due to these two orientations, the international legal status of the individual is not unequivocally defined. The legal status of individuals widely differs depending on the particular legal order, regional, sub-regional or universal. Hence, the assertion that present international law has already endowed individuals with the status as subjects of international law must be replaced by the acknowledgement that the personality of individuals as a reflection of their emancipation from the States under international law is a relative one, depending on the particular applicable

legal regime.

Volume 365: Chance, Order, Change: The Course of International Law, General Course on Public International Law by J. *Crawford*

> *The course of international law over time needs to be understood if international law is to be understood. This work aims to provide such an understanding. It is directed not at topics or subject headings — sources, treaties, states, human rights and so on — but at some of the key unresolved problems of the discipline. Unresolved, they call into question its status as a discipline. Is international law "law" properly so-called ? In what respects is it systematic ? Does it — can it — respect the rule of law ? These problems can be resolved, or at least reduced, by an imaginative reading of our shared practices and our increasingly shared history, with an emphasis on process. In this sense the practice of the institutions of international law is to be understood as the law itself. They are in a dialectical relationship with the law, shaping it and being shaped by it. This is explained by reference to actual cases and examples, providing a course of international law in some standard sense as well.*

US Supreme Court to Review Argentina v. NML Capital

See this post of Ted Folkman over at Letters Blogatory.

> *On Friday, the Supreme Court granted Argentina's petition for a writ of certiorari in Republic of Argentina v. NML Capital, Ltd. to review the Second Circuit's decision in EM Ltd. v. Republic of Argentina, 695 F.3d 201 (2d Cir. 2012), in which the court held that Argentina's judgment creditors could take post-judgment discovery generally, without showing that the discovery was aimed at particular assets that would be liable to attachment or execution under the FSIA. The Second Circuit's decision was squarely at odds with Rubin v. Islamic Republic of Iran, 637 F.3d 783 (7th Cir. 2011), cert. denied, 133 S. Ct. 23 (2012), which the Supreme Court took a pass on in 2012.*

I will be following the case closely. Here are some resources:

1. *Argentina's petition*
2. *NML's opposition*
3. *Argentina's reply*
4. *The United States's amicus brief*
5. *Argentina's supplemental brief*
6. *NML's supplemental brief*
7. *SCOTUSBlog's case page*

New PIL Workshop Series at Nanterre University

The University of Paris Ouest Nanterre la Defense, formerly known as Nanterre or Paris X University, will host a private international law workshop series starting 29 January 2014.

One purpose of the series will be to allow exchange between practitioners and academics. The first conference will discuss **pre-nuptial agreements**. The speakers will be two practitioners, and the discussant will be an academic.

> *Le Centre de droit international de Nanterre (CEDIN) est heureux de vous convier à son premier atelier pratique en droit international privé qui aura lieu mercredi 29 janvier 2014, à 18h30 en salle F 352 sur le thème :*
>
> ***L'anticipation matrimoniale : du contrat de mariage traditionnel au prenuptial agreement moderne***
>
> *Ou comment en pratique l'utilisation sur mesure des outils du droit international privé – et notamment ceux des règlements européens récents – permet d'améliorer la sécurité juridique des époux et de définir, non seulement, le statut de leurs biens mais également les conséquences pécuniaires en cas de divorce, le tout dans un contexte de mobilité internationale.*

Exposants :

- *Me Isabelle REIN-LESCASTEREYRES (Avocat)*
- *Me Bertrand SAVOURE (Notaire)*

Discutant : Marie-Laure NIBOYET (Professeur à l'Université de Nanterre)

Contacts :

- *CEDIN – Mme Stéphanie Millan, ingénieur d'études, cedin@u-paris10.fr – tel : 01 40 97 77 22*
- *François de Bérard, maître de conférences en droit privé, coordinateur scientifique, deberardf@gmail.com*

En 2014 les thèmes abordés seront : L'anticipation matrimoniale : le contrat prénuptial / La saisie d'actifs d'Etats étrangers sur le sol français / L'obtention des preuves en France et à l'étranger / L'anticipation successorale.

Third Issue of 2013's Rivista di diritto internazionale privato e processuale

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

The third issue of 2013 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features four articles and two comments.

Sergio Maria Carbone, Professor Emeritus at the University of Genoa, provides an assessment of party autonomy in substantive and private international law in

“Autonomia privata nel diritto sostanziale e nel diritto internazionale privato: diverse tecniche e un’unica funzione” (Party Autonomy in Substantive and Private International Law: Different Techniques and a Single Function; in Italian).

> *The paper focuses on the techniques through which party autonomy may operate in contractual relationships with the aim of assessing that (i) such techniques are, in practice, more and more difficult to define as to their respective fields of application; (ii) irrespective of which of such different techniques is actually deployed, they all share the common objective and the unified task to accomplish, in the most exhaustive way, the plan that the parties intended to implement by executing their contract. Indeed, party autonomy may operate either as a tool for the regulation of an entire relationship or of parts thereof, or as a conflict of laws rule or, again, as a direct or indirect source of regulation of contractual relationships. Whatever the specific role played by party autonomy with regard to a given contract, party autonomy eventually pursues the aim of executing the parties’ underlying programme, provided that the fulfillment thereof is consistent with public policy, overriding mandatory rules and with the mandatory rules of the State with which the contract is exclusively connected. In this view, it is also confirmed the gradual establishment of the so-called material considerations method with regard to private international law solutions and, in particular, to the choice of the national legal system which may come into play in determining the law applicable to contractual relationships.*

Cristina Campiglio, Professor at the University of Pavia, examines the history of private international law from the Statutaries to the present day in **“Corsi e ricorsi nel diritto internazionale privato: dagli Statutari ai giorni nostri”** (History Repeating Itself in Private International Law: From the Statutaries to the Present Day; in Italian).

> *Private international law (“PIL”) aims at pursuing its basic mission, i.e. coordinating the different legal systems and underlying legal cultures, by providing an array of practical solutions. However, no rigid recipe proves to be completely satisfying. As a matter of fact, a growing evidence is accumulating that a merely dogmatic approach is often inconclusive and that PIL implementation cannot be reduced to a mere sum of rigid techniques. Rather, it*

has turned into an art of its sort, where theories and legal sensibilities may be compounded time to time in different ways. Due to the difficulty (the impossibility, at times) to define a clear-cut hierarchy of values – whether arising from the national legal systems or inherent to individual rights – the legal operator has to come to terms with juridical relativism and, in the absence of any binding guidance, search the most suitable solution to the case in point. Concerning the family law field, which has been known to be the most affected by normocultural differences (i.e., differences in law which are a reflection of cultural differences), it appears that the preferred solution should be the one that assures the continuity of individual status both in time and in space. In the past few years, this need of continuity has led scholars to revaluate old legal theories and to develop a new method (the so-called recognition method), which essentially put aside conflict rules. This method has been used occasionally by the domestic legislator, who has developed a number of "receptive" choice-of-law rules. However, the recognition method is hard to be applied when the foreign legal institution is unknown to the local court and an adaptive transposition is required. In such an event, another aged theory can be resurrected, i.e. the substitutive method. The main goal of this contribution is on the one hand to provide evidence of the persisting relevance of the old legal theories mentioned above (some of which dating back to the seventeenth century), while suggesting on the other hand the need to give methodological rigor up, in favor of a more eclectic and efficient exploitation of the variety of methods that PIL makes available.

Carla Gulotta, Associate Professor at the University of Milano-Bicocca, addresses jurisdiction over employers domiciled abroad namely with reference to the *Mahmadia* case in **"L'estensione della giurisdizione nei confronti dei datori di lavoro domiciliati all'estero: il caso *Mahamdia* e il nuovo regime del regolamento Bruxelles I-*bis*"** (The Extension of Jurisdiction over Employers Domiciled Abroad: The *Mahamdia* Case and the New Regime under the Brussels Ia Regulation; in Italian).

After years of doctrinal debate, public consultations and normative efforts, the Recast of the Brussels I Regulation was finally adopted on 12 December 2012. Among the most innovative features of the new Regulation is the extension of the jurisdiction of EU Member States' courts towards employers not domiciled in the Union. According to the author the new rules cannot be labeled as giving

raise to "exorbitant grounds of jurisdiction", nor can they be entirely understood unless they are read as the outcome of the efforts of the EU's Legislator and judges to guarantee the enforcement of European rules aimed at employees' protection in international employment cases. The article also argues that while waiting for the new Regulation to become effective, the European Court of Justice is anticipating its effects through an unprecedented wide construction of the expression "branch, agency or establishment" ex Art. 18(2) of Regulation No 44/2001. Lastly, the author suggests that the difficulties envisaged as for the recognition and the enforceability of the judgments given on the new grounds of jurisdiction might be overcome in respect of those Countries knowing similarly extensive rules of protective jurisdiction, or otherwise recurring to a principle of comity.

Rosario Espinosa Calabuig, Profesora Titular at the University of Valencia, examines the interface between the 1999 Geneva Convention on the Arrest of Ships and Regulations Brussels I and Brussels Ia in **"¿La desarmonización de la armonización europea? A propósito del Convenio de Ginebra de 12 de marzo de 1999 sobre embargo preventivo de buques y su relación con los reglamentos Bruselas I y Bruselas I *bis*"** (The Disharmonization of the European Harmonization? Remarks on the Geneva Convention of 12 March 1999 on the Arrest of Ships and Its Interface with Regulations Brussels I and Brussels Ia; in Spanish).

The International Convention on Arrest of Ships of 1999 came into force on September 14, 2011, and so far it has been ratified by only four EU Member States, including Spain. As the precedent Convention of 1952 – which is still in force in most of the EU Member States – the 1999 Convention prescribes rules on both international jurisdiction, and recognition and enforcement of decisions. Accordingly, the European Union seems to be the one entity having standing to ratify the 1999 Convention, at least with regard to those rules. To this effect, doubts arise about the legality of the aforementioned accession of EU Member States to the Convention but, in particular, about the EU interest in the ratification of the Convention of 1999. Such ratification ought to be encouraged by other Member States, but this is not granted at all. Still, the EU might authorize Member States to ratify the 1999 Convention as previously occurred with reference to other maritime Conventions, such as the 2001 Bunkers or the 1996 HNS. Meanwhile, the 1999 Convention is already

operating in countries like Spain. Hence, conflicts arising from the non-coordination between its provisions and those of the Brussels I Regulation ought to be addressed. Among such conflicts are, for example, those arising from a provisional measure being adopted inaudita parte by different courts within the European area of justice. Furthermore, the Brussels I Regulation was recast by Regulation No 1215/2012 which will be in force as of 2015, and among other innovations abolishes exequatur. This paper aims at unfolding those conflicts which might be solved by resorting to the ECJ case-law, in particular Tatry and TNT Express.

In addition to the foregoing, the following comments are featured:

Lidia Sandrini, Researcher at the University of Milan, **"Risarcimento del danno da sinistri stradali: è già tempo di riforma per il regolamento Roma II?"** (Compensation for Traffic Accidents: Has the Time Come to Amend the Rome II Regulation?; in Italian).

This article addresses Regulation EC No 864/2007 in so far as it deals with traffic accidents, at the aim of investigating whether there is an actual need for amendments to the rules applicable in this field. It is submitted that the coordination between the Regulation and the Motor Insurance Directives can be achieved through the interpretation of the different legal texts in the light of their respective scopes and objects. On the contrary, the impact of the application of the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents definitely needs to be addressed by the EU legislator, in order to ensure the consistency of the solutions in the European judicial area. Finally, with regard to the interpretation of specific connecting factors provided for by the Regulation, it appears that most of the difficulties highlighted by Scholars and faced by judges are due, on one hand, to an inaccurate drafting, and, on the other hand, to the lack of explicit and detailed solutions with regard to general problems, such as the treatment of foreign law, the law applicable to the preliminary questions, and characterization.

Luigi Pintaldi, Law Graduate, **"Il contrasto tra lodi arbitrali e decisioni dei giudici degli Stati dell'UE nel regolamento (CE) n. 44/2001 e nuove prospettive"** (The Conflict between Arbitral Awards and EU Courts Decisions under Regulation No 44/2001 and New Perspectives; in Italian).

This article addresses the exclusion of arbitration from the scope of Regulation EC No 44/2001, as interpreted by the Court of Justice of the European Union in the well-known case West Tankers. In West Tankers the Court maintained that the validity or the existence of an arbitration agreement determined as an incidental question comes within the scope of the Brussels Regulation when the subject-matter of the dispute comes within the scope of it. This unsatisfactory result raised the issue of recognition and enforcement of a judgment from a Member State in conflict with an arbitral award recognised and enforced in another Member State. The recognition and enforcement of a judgment may be refused in conformity with paragraphs 3 and 4 of Article 34 affirming that the arbitral award is treated like a judgment with res judicata effects. Alternatively, the recognition and enforcement of a judgment may be refused in accordance with the paragraph 1 of Article 34 stating that the New York Convention prevails over the Brussels I Regulation. Recently, the precedence of the New York Convention was explicitly provided by paragraph 2 of Article 73 and Recital 12 of the new Brussels I Regulation, i.e., Regulation EU No 1215/2012. The exclusion of arbitration was retained by the new Brussels I Regulation with further details: in fact, the ruling rendered by a Court of a Member State as to the validity or the existence of an arbitration agreement now falls within the scope of application of the Regulation, regardless of whether the Court decided on this as a principal issue or as an incidental question. In the light of the new Brussels regime, it seems clearer that the question whether a judgment from a Member State shall be recognized and enforced when it is in conflict with an arbitral award is left to each national law and international conventions.

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale.

PhD scholarship in European

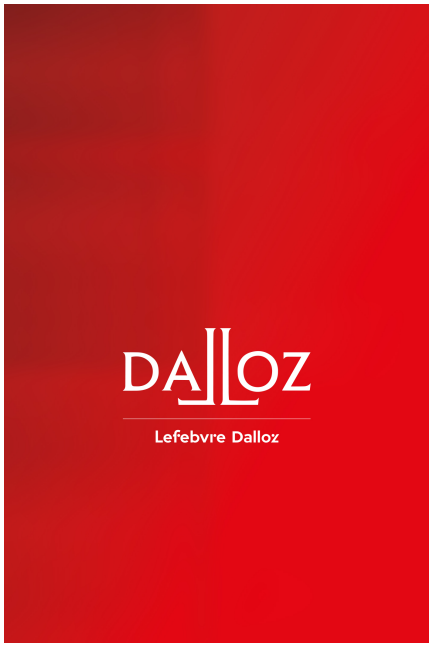
conflict of laws at University of Antwerp

The Universty of Antwerp ofers a position for a PhD candidate in the field of European conflict of laws. The candidate will research “the specific character, principles and objectives of European conflict of laws”. The research project is funded by the Research Foundation – Flanders (FWO) for a period of four years starting as soon as possible, but at the latest on 1 September 2014.

For more information see the vacancy on the University of Antwerp’s website.

Fourth Issue of 2013’s Revue critique droit international privé

The next installment of the *Revue critique de droit international privé* will contain four articles.



-Petra Hammje on the New French Conflict of Law rules on Same Sex Marriage.

> *Changing radically the conception of marriage in the French civil code without proposing a global vision of the family, the French law of 17th May 2013*

asserts a firm will, in respect of cross-border relationships, to encourage the conclusion of same-sex unions whether through the adoption of a « commited » conflicts rule relating to the creation of the union (formal and substantive validity) or through the generous recognition of unions celebrated abroad. However, the law remains silent on the international effects of such unions, often prohibited elsewhere, both in respect of the effects of marriage between spouses and in respect of the access to parent-child relationships through adoption or surrogacy arrangements.

-Symeon Symeonides on The Hague Principles on the law applicable to international contracts.

This Article discusses the Hague Principles on Choice of Law for International Contracts, a new soft-law instrument recently adopted by the Hague Conference of Private International Law. They will apply to "commercial" contracts only, specifically excluding consumer and employment contracts. For this reason, the Principles adopt a decidedly liberal stance toward party autonomy, exemplified inter alia by a strong endorsement of non-state norms. Such a liberality would be unobjectionable, indeed appropriate, if a contract's "commerciality" alone would preclude the disparity of bargaining power that characterizes consumer and employment contracts. The fact that—as franchise contracts illustrate—this is not always the case makes even more necessary the deployment of other mechanisms of policing party autonomy. The Principles provide these mechanisms under the rubric of public policy and mandatory rules, but their effectiveness is not beyond doubt.

The Principles are intended to serve as a model for other international or national instruments and as a guide to courts and arbitrators in interpreting or supplementing rules on party autonomy. Like other international instruments, the Principles are as good as the consensus of the participating delegations would allow. But the real test of success for these Principles depends not on academic approbation but on their reception by contracting parties, courts, and arbitrators. While it is too early to tell whether the Principles will pass this test, there is reason for optimism.

-Dieter Martiny on the PIL dimensions of the 2010 agreement between France and Germany on a new optional matrimonial property regime.

– Horatia Muir Watt on the follow-up to Kiobel (the case of Sexual Minorities v. Lively).

Once More Unto the Breach of Extraterritorial Discovery under Section 1782

We've discussed on this site in the past the various nuances and pervasive disagreements among the U.S. federal courts regarding the scope of discovery in aid of foreign tribunals under 28 U.S.C. § 1782. The longest-running dispute is whether that statute can be used in aid of arbitral tribunals, and the scholarship on this question is rich. (See here, and here.). Another disagreement, however, just won't go away, but hasn't garnered nearly as much public attention: that is, whether the statute can reach documents held outside the United States.

Before the holidays, the Southern District of New York decided *In re Application of Kreke Immobilien KG* (S.D.N.Y. 2013), a case brought in U.S. court under § 1782 to obtain documents from Deutsche Bank for use in a German litigation. Deutsche Bank argued that the court had to deny the application because the documents in question were not kept in the United States. To be sure, the statute does not impose such a limitation, but citing Judge Rakoff's decision in *In re Godfrey*, 526 F. Supp. 2d 417 (S.D.N.Y. 2007), Judge Buchwald held that the statute does indeed bar extraterritorial discovery. She therefore denied the application.

Judge Rakoff decided five years ago that the Supreme Court in Intel "implicitly assumed that evidence discoverable under § 1782(a) would be located in the United States." But the evidence of that implicit assumption is merely dictum: "nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, *available in the United States*, may be unobtainable absent § 1782(a) aid." (emphasis added). "Available in the United

States," however, could mean simply that the evidence is obtainable via legal process in the United States; it need not mean that the evidence is physically located in the United States. And this seems the better reading given the metaphysical problem of determining exactly where a document is "located." I'm not the only one to espouse that view; Ted Folkman's recent post on the Kreke Immobilien decision seems to agree.

As Judge Buchwald noted, the federal courts are deeply split on this issue. Some courts have followed Judge Rakoff's decision in *Godfrey* and read § 1782 narrowly. *See, e.g., In re Sarrio S.A.*, No. 9-372, 1995 WL 598988 (S.D.N.Y. Oct. 11, 1995); *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 194, fn. 5 (S.D.N.Y. 2006); *Norex Petroleum Ltd. v. Chubb Ins. Co. of Can.*, 384 F. Supp. 2d 45 (D.D.C. 2005). Other courts, however, read the statute more naturally, and hold that a court's power under § 1782 is coextensive with the Federal Rules. Indeed, this is what the penultimate sentence of § 1782(a) says (stating that discovery should generally proceed "in accordance with the Federal Rules of Civil Procedure"). Under those Rules, a person under subpoena in the United States can be compelled to produce all documents within his "possession, custody or control," *see* Fed. R. Civ. P. 45(a)(1)(A)(iii), "even if the documents are located abroad," *Tequila Centinela, S.A. de C.V. v. Bacardi & Co. Ltd.*, 242 F.R.D. 1, 12 (D.D.C. 2007) (emphasis added); *see also Cooper Indus., Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984). On this basis, a number of federal courts in recent years have ordered Section 1782 discovery of documents located outside the United States when the person is found there. *See, e.g, In re Eli Lilly & Co.*, No. 3:09MC296 (AWT), 2010 WL 2509133, at *4 (D. Conn. June 15, 2010); *In re Gemeinshcaftspraxis Dr. Med. Schottdorf*, No. Civ. M19-88 (BSJ), 2006 WL 3844464, at *5 (S.D.N.Y. Dec. 29, 2006); *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 957 n.3 (D. Minn. 2007); *In re Minatec Fin. S.À.R.L.*, No. 1:08-CV-269 (LEK/RFT), 2008 WL 3884374, at *4 n.8 (N.D.N.Y. Aug. 18, 2008).

Even courts who have come down between this split of authority have still applied Section 1782 and Rule 45 to reach electronically stored information accessible from within this District. In *In re Veiga II*, 746 F. Supp. 2d 8, 25 (D.D.C. 2010), Judge Kollar-Kotelly (who also decided Norex five years earlier) outlined the "split of authority" on the geographic scope of Section 1782; "assum[ed] there is no absolute bar to the discovery of documents located outside the United States"; but nevertheless "exercise[d] [her] discretion to decline to order the production of

[physical] documents abroad." When she did so, however, she still required the Respondent to produce all materials "located within the United States, a category that includes electronically stored information accessible from within this District." *Id*. at 26 (emphasis added). Decisions like this prudently avoid the metaphysical question of where electronic materials are "located," and still give effect to the complementary reach of Rule 45 and Section 1782.

Ultimately, this may be a question for the Supreme Court; but until then, it illustrates the sometimes-difficult intersection of judicial restraint and liberal statutory intent when it comes to extraterritorial issues.