“Intellectual Whiplash”: One Day, Two International Cases, And Two Different Results At The U.S. Supreme Court

On December 2, 2013, the case of *BG Group v. Argentina* was argued at the Supreme Court. As the argument neared its end, Justice Anthony M. Kennedy quipped to Argentina’s counsel: “Your – your whole argument gives me intellectual whiplash.” Last Wednesday, when the Court released its decisions in *BG Group* and *Lozano v. Montoya Alvarez*, the same might be said back to the Court. I’m not the first commentator to feel this way.

Lozano concerned the Hague Convention on Civil Aspects of Child Abduction, which in essence says that if one parent unilaterally takes their child to another country, and the child is found within a year, the child must be automatically returned home. Otherwise, a court must consider the best interests of the child, who may have developed ties in the new country. But what to make of the clandestine parent and a child whose location could not be discovered for 16 months? Is there a principle of “equitable tolling” under the Convention, according to which the one-year period should only begin after the child’s location can be ascertained? This is certainly a familiar doctrine under U.S. law—equity tolls statutory limitations periods all the time. So as not to reward a clandestine parent, the father in the Lozano case wanted the same principle applied to his case.

The Supreme Court refused this request. The Convention, they said, was not a federal statute—it was a “contract between . . . nations”—so it would be “particularly inappropriate to deploy this background principle of American law” when interpreting it. Interpreting the Convention to preclude equitable tolling is more consistent with its text; if the drafters of the Convention had wanted the one-year period to start when the left-behind parent actually discovered where the child was, they could have easily said so. Because they didn’t, the uniquely common law notion of equitable tolling could not justify the father’s suit for automatic return.

The notion of a treaty as a contract pervaded the *BG Group* decision, too. On their face, the two cases had some similarities. Both involved UK parties with rights under an international treaty. The similarities, however, ended there. Lonzano was a father seeking the return of his foreign-domiciled daughter. BG Group was a British multinational oil and gas company who had invested in an Argentine gas distribution company, and whose investment was harmed by Argentine emergency legislation. BG Group filed a Notice of Arbitration against Argentina under the UK-Argentina Bilateral Investment Treaty ("BIT"), and sited the arbitration in the United States under the UNCITRAL Rules.

But Article 8(2) of the BIT provides that disputes under the Treaty between an investor and Argentina must first be submitted to a competent court in the sovereign state where the investment was made. Subsequently, the dispute can go to international arbitration at one party's request only if (1) a period of eighteen months has elapsed since the dispute was presented to the court and no decision has been made; or (2) a final decision was made by the court, but the parties still disagree. Argentina opposed jurisdiction of the arbitral tribunal because the dispute had not been submitted to Argentine courts at all. BG Group argued that waiting to meet the requirements of Article 8(2) of the BIT would have been futile. The arbitral tribunal determined that they had jurisdiction because Argentina had enacted laws hindering judicial recourse for foreign investors, and ultimately issued an award on the merits in favor of BG Group.

Both parties filed petitions for review in the United States District Court for the District of Columbia, which deferred to the arbitrators and upheld the arbitration award. The United States Court of Appeals for the District of Columbia Circuit, however, overturned that decision. It found that the arbitral tribunal did not have jurisdiction because BG Group had not complied with the local litigation requirements of Article 8(2) of the BIT. As a result, it set aside the award. The Supreme Court was asked to decide the question that had split the inferior U.S. Courts, namely: "whether a court of the United States, in reviewing an arbitration award made under the Treaty, should interpret and apply the local litigation requirement de novo, or with the deference that courts ordinarily owe arbitration decisions."

Now here comes the "intellectual whiplash." A majority of the Supreme Court "treat[ed] the [treaty] before us as if it were an ordinary contract between private parties." In doing so, Justice Breyer—citing the Court's domestic, commercial

arbitration jurisprudence—found that the local litigation requirement was a procedural condition precedent to arbitration, which determined "when the contractual duty to arbitrate arises, not whether there is a contractual duty to arbitration at all." Thus, as a procedural precondition rather than a substantive bar to arbitrability, Breyer found that, "courts presume that the parties intend arbitrators, not courts, to decide disputes about [the local litigation requirement's] meaning and application." The Court found nothing in Article 8 of the BIT to overcome this presumption, and thus saw "no reason to abandon or increase the complexity of [its] ordinary intent-determining framework" for contractual arbitration clauses. (Of course, it remains an open question of what the Court would do if the Treaty were more express on the obligatory nature of the local litigation provision). Under a deferential review of the arbitrators' decision, the award was allowed to stand.

The dissent, authored by Chief Justice Roberts and joined by Justice Kennedy, harkened back to *Lozano* and took issue with the majority's decision to consider the BIT as an ordinary contract between private parties. In their view, when looking at the BIT as an act of state between co-equal sovereigns, with all deference that comes with that conclusion, the local litigation requirement can only be viewed as a textual precondition to the formation of an agreement to arbitrate against the state. "By focusing first on private contracts, the majority "start[s] down the wrong road" and "ends up at the wrong place," the dissent noted. "It is no trifling matter for a sovereign nation to subject itself to suit by private parties," the Chief Justice said; "we do not presume that any country-including our own-takes that step lightly." Thus, without having submitted to the local courts before it initiated arbitration, the dissent would have held that BG Group had no agreement to arbitrate against Argentina.

In some contexts, sovereign consent to convene an arbitration deserves a special place in the law. At least one federal judge has said that the federal policy in favor of arbitration carries special force when the agreement to arbitrate is contained in a treaty as opposed to a private contract. And take, for example, the recurring situation where parties use the U.S. courts to seek evidence by way of 28 U.S.C. § 1782 for use in international arbitration proceedings. Where that arbitration is convened by treaty and not by contract, U.S. courts will more readily lend their assistance. On its face, the *BG Group* decision runs counter to the idea that U.S. courts will treat investment treaty arbitration with greater deference than

commercial arbitration. On the other hand, however, upholding the award furthers the above jurisprudence, the Supreme Court's recent string of pro-arbitration rulings, as well as the "basic objective of . . . investment treat[ies]." But "intellectual whiplash" still occurs when we consider that, in *Lonzano*, the Court was unwilling to "rewrite the treaty" in order to "advance its objectives."

Brazilian Seminar on National Codification and Regional Unification of PIL

The Federal University of Minas Gerais – UFMG- of Belo Horizonte (Brazil) will host on 13 March 2014 a seminar on *National Codification and Regional Unification of Private International Law – Complementary or Conflicting Trends?*

The event, the first in a series on private international law topics jointly organised by UFMG and the University of Ferrara, will compare European and Latin American experiences.

Participants include Roberto Luiz Silva (UFMG), Eduardo Grebler (PUC-MG, ILA), Fabricio Bertini Pasquot Polido (UFMG) and Pietro Franzina (University of Ferrara).

See here for more information.

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.