ECHR Rules on State Immunity for Civil Claims for Torture

On 14 January, the European Court of Human Rights delivered its judgment in *Jones v. United Kingdom*, and issued the following press release.

ECHR upholds House of Lords' decision that State immunity applies in civil cases involving torture of UK nationals by Saudi Arabian officials abroad but says the matter must be kept under review.

In today's Chamber judgment in the case of Jones and Others v. the United Kingdom (application nos. 34356/06 and 40528/06), which is not final, the European Court of Human Rights held, by six votes to one , that there had been:

> *no violation of Article 6 § 1 (right of access to court) of the European Convention on Human Rights either as concerned Mr Jones' claim against the Kingdom of Saudi Arabia or as concerned all four applicants' claims against named Saudi Arabian officials.*

The case concerned four British nationals who alleged that they had been tortured in Saudi Arabia by Saudi State officials. The applicants complained about the UK courts' subsequent dismissal for reasons of State immunity of their claims for compensation against Saudi Arabia and its officials.

The Court found that the granting of immunity to Saudi Arabia and its State officials in the applicants' civil cases had reflected generally recognised current rules of public international law and had not therefore amounted to an unjustified restriction on the applicants' access to court. In particular, while there was some emerging support at the international level in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials, the weight of authority suggested that the State's right to immunity could not be circumvented by suing named officials instead. The House of Lords had considered the applicants' arguments in detail and dismissed them by reference to the relevant international law principles and case-law. However, in light of the current developments in this area of public international law, this was a matter which needed to be kept under review by Contracting

States.

Commentaries on the case are already available here, here and here. More details (still from the Press Release) after the jump.

Principal facts

The applicants, Ronald Grant Jones, Alexander Hutton Johnston Mitchell, William James Sampson (now deceased), and Leslie Walker, are British nationals who were born in 1953, 1955, 1959 and 1946 respectively.

The applicants all claim that they were arrested in Riyadh in 2000 or 2001, and subjected to torture while in custody. Medical examinations carried out on returning to the United Kingdom all concluded that the applicants' injuries were consistent with their allegations.

In 2002 Mr Jones brought proceedings against Saudi Arabia's Ministry of Interior and the official who had allegedly tortured him claiming damages. His application was struck out in February 2003 on the grounds that Saudi Arabia and its officials were entitled to State immunity under the State Immunity Act 1978.

A claim by Mr Mitchell, Mr Sampson and Mr Walker against the four State officials that they considered to be responsible for their torture was struck out for the same reason in February 2004.

The applicants appealed the decisions, and their cases were joined. In October 2004 the UK Court of Appeal unanimously found that, though Mr Jones could not sue Saudi Arabia itself, the applicants could pursue their cases against the individually named defendants. However, this decision was overturned by the House of Lords in June 2006, which held that the applicants could not pursue any of their claims on the ground that all of the defendants were entitled to State immunity under international law, which was incorporated into domestic law by the 1978 Act.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (access to court), the applicants complained that the UK courts' granting of immunity in their cases meant that they had been unable to pursue claims for torture either against Saudia Arabia or against named State officials. They alleged that this had amounted to a disproportionate violation of

their right of access to court. The applications were lodged with the European Court of Human Rights on 26 July 2006 and 22 September 2006, respectively. The Redress Trust, Amnesty International, the International Centre for the Legal Protection of Human Rights and JUSTICE were given leave to submit written comments.

Judgment was given by a Chamber of seven judges, composed as follows: Ineta Ziemele (Latvia), President, Päivi Hirvelä (Finland), George Nicolaou (Cyprus), Ledi Bianku (Albania), Zdravka Kalaydjieva (Bulgaria), Vincent A. de Gaetano (Malta), Paul Mahoney (the United Kingdom), and also Françoise Elens-Passos, Section Registrar.

Decision of the Court

The Court recalled that everyone had the right under Article 6 § 1 to have any legal dispute relating to his or her civil rights and obligations brought before a court, but that this right of access to court was not absolute. States could impose restrictions on it. However, a restriction had to pursue a legitimate aim, and there had to be a reasonable relationship between the aim and the means employed to pursue it (the restriction must be proportionate).

As to the specific test in State immunity cases, the Court referred to its judgment of 2001 in the similar case of Al-Adsani v. the United Kingdom (no. 35763/97). There, the Grand Chamber had explained that sovereign immunity was a concept of international law under which one State should not be subjected to the jurisdiction of another State and that granting immunity in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty. That being the case. the decisive question when examining the proportionality of the measure was whether the immunity rule applied by the national court reflected generally recognised rules of public international law on State immunity. In Al-Adsani, which concerned the striking out of a torture claim against Kuwait, the Court had found it established that there was not, at the time of its judgment in that case, acceptance in international law of the proposition that States were not entitled to immunity in respect of civil claims for damages concerning alleged torture committed outside the State. There had therefore been no violation of Article 6 § 1.

In the applicants' case, the Court accepted that the restriction on access to court as regards the claims against Saudi Arabia and the State officials had pursued the legitimate aim of promoting good relations between nations. It therefore applied the approach to proportionality set out in Al-Adsani. The main issue of the applicants' case was therefore whether the restrictions on access to court arising from State immunity had been in conformity with generally recognised rules of public international law.

As concerned the claim against the Kingdom of Saudi Arabia, the Court had to decide whether it could be said that at the time Mr Jones' claim had been struck out (in 2006) there was, in public international law, an exception to the doctrine of State immunity in civil proceedings where allegations of torture had been made against that State. The Court considered whether there had been an evolution in accepted international standards on immunity in such torture claims lodged against a State since Al-Adsani. For the Court, the conclusive answer to that question was given by the judgment of the International Court of Justice (ICJ) in February 2012 in the case of Germany v. Italy, where the ICJ had rejected the argument that a torture exception to the doctrine of State immunity had by then emerged. The Court therefore concluded that the UK courts' reliance on State immunity to defeat Mr Jones' civil action against Saudi Arabia had not amounted to an unjustified restriction on his access to court. Therefore there had been no violation of Article 6 § 1 as concerned the striking out of Mr Jones' complaint against Saudi Arabia.

As concerned the claims against the State officials, again the sole matter for consideration was whether the grant of immunity to the State officials reflected generally recognised rules of public international law on State immunity. The Court was of the view, after an analysis of national and international case-law and materials, that State immunity in principle offered State officials protection in respect of acts undertaken on behalf of the State in the same way as it protected the State itself; otherwise, State immunity could be circumvented by the suing of named individuals. It then turned to consider whether there was an exception to this general rule in cases where torture was alleged. It reviewed the position in international law and examined international and national case-law. It noted that there was some emerging support at the international level in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials. However, it concluded that the

weight of authority was still to the effect that the State's right to immunity could not be circumvented by suing named officials instead, although it added that further developments could be expected. The House of Lords in the applicants' case had carefully examined all the arguments and the relevant international and comparative law materials and issued a comprehensive judgment with extensive references. That judgment had been found to be highly persuasive by the national courts of other States.

The Court was therefore satisfied that the granting of immunity to State Officials in the applicants' civil cases had reflected generally recognised current rules of public international law and had not therefore amounted to an unjustified restriction on their access to court. Accordingly, there had been no violation of Article 6 § 1 as regards the applicants' claims against named State officials. However, in light of the developments underway in this area of public international law, it added that this was a matter which needed to be kept under review by Contracting States.

Engel on a Convention on Cross Border Surrogacy

Martin Engel (University of Munich) has posted Cross-Border Surrogacy: Time for a Convention? on SSRN.

> *As the law of parentage is striving to meet the challenges of new reproductive technologies, dealing with cross-border surrogacies emerges as one of the most pressing topics in international family law. The current legal situation as regards surrogacy is quite diverse – throughout the world but also within Europe. Legal diversity has recently made a lot of people engage in so-called "procreative tourism": Coming from a country with a rather strict approach, they commission women in one of the more liberal countries to carry a child for them, and once the baby is born, they try to take it to their home country, thereby obviating the surrogacy ban that prevents them from entrusting a*

surrogate mother at home. European courts struggle with a coherent approach on how to treat those citizens who went abroad to have a baby. Meanwhile, legal research and the Hague Conference on Private International Law think about a convention in order to ease cross-border recognition of surrogacy.

CJEU Rules on Jurisdiction in Cases of Liability for Defective Products

by Jonas Steinle, LL.M.

Jonas Steinle is a doctoral student at the chair of Prof. Dr. Matthias Weller, Mag.rer.publ. at the EBS University for Economics and Law in Wiesbaden and a research fellow at the Research Center for Transnational Commercial Dispute Resolution (www.ebs.edu/tcdr) in Wiesbaden. He is also a scholarship holder at the Max Planck Institute for Innovation and Competition in Munich.

On 16 January 2014 the Court of Justice of the European Union (CJEU) has ruled on the interpretation of Art. 5 para. 3 Brussels I Regulation in cases of liability for defective products (C-45/13 – Andreas Kainz ./. Pantherwerke AG). The Court held that in such cases, the place of the event giving rise to the damage is the place where the product in question was manufactured.

The facts:

The claimant, Mr Kainz, is a resident of Salzburg in Austria. In a shop in Austria, he bought a bicycle which he rode in Germany, when the fork ends of that bicycle came loose and caused an accident from which Mr Kainz suffered injury. The bicycle had been manufactured by a company based in Germany. After having manufactured the bicycle, this company had shipped the bicycle to a shop in Austria from which Mr Kainz had finally purchased the item.

As a consequence of the suffered injury, Mr Kainz sued the German manufacturing company before the district court (*Landgericht*) in Salzburg. To establish jurisdiction, Mr Kainz argued that the district court in Salzburg had jurisdiction according to Art. 5 para. 3 Brussels I Regulation, since the bicycle had been brought into circulation in Austria and only there was made available to the end user for the first time.

In the following proceedings, the Supreme Court of Austria (*Oberster Gerichtshof*) referred the question to the CJEU for a preliminary ruling, as to where the place of the event giving rise to the damage should be located in a case like the one at hand where the manufacturer of a defect product is sued. The Supreme Court offered three possibilities to the CJEU: (i) the place where the manufacturer is established, (ii) the place where the product is put into circulation and (iii) the place where the product was acquired by the user.

The ruling:

The CJEU decided for the first option and ruled that the place of the event giving rise to the damage must be located at the place where the product in question was manufactured.

To substantiate this ruling, the CJEU relied on two main arguments: First the Court held that it is at the place where the product in question was manufactured where it is most suitable to take evidence for a dispute that arises out of a defect product (para. 27). And secondly, the Court argued that locating the place where the event giving rise to the damage at the manufacturing site provides foreseeability and thereby legal certainty to the parties involved (para. 28).

In the further course of the reasoning, the CJEU also addressed the argument of the claimant, Mr Kainz, who had suggested to locate the place giving rise to the damage at the place where the product had been transferred to the end consumer (which would have led to a *forum actoris* for him). In this context, the CJEU ruled (para. 30 *et seq.*), that Art. 5 para. 3 Brussels I Regulation does not allow to take into account any such considerations to protect the claimant by determining the place where the harmful event occurred.

The evaluation:

With this ruling, the CJEU has further completed the picture of the application of

Art. 5 para. 3 Brussels I Regulation in cases of liability for defective products. In the former case *Zuid Chemie* C-189/08, the Court had already located the place where the damage occurred (*Erfolgsort*) at the "place where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended." (para. 32). In *Zuid Chemie*, the location of the place giving rise to the damage (*Handlungsort*) had been left open by the Court since the parties of that case had agreed on the fact that this place should be located at the place where the defect product had been manufactured (para. 25). This interpretation has now been confirmed by the CJEU with the case at hand.

Another reason, why the Kainz ruling is interesting, is the statement of the CJEU on the relationship between the Brussels I Regulation and the Rome II Regulation. The Court clarified that these two pieces of legislation are to be interpreted independently, even if the legislator wanted them to be interpreted coherently (see therefore recital 7 of the Rome II Regulation). The interpretation of the Brussels I Regulation must not be influenced by the conception or the wording of the Rome II Regulation if this would be contrary to the scheme and the objectives of the Brussels I Regulation (para. 20).

Cuadernos de Derecho Transnacional, 2013 (2)

The second issue for 2013 of the *Cuadernos de Derecho Transnacional*, has been recently published. It contains articles and a section of "varia" (shorter comments and casenotes) in Spanish, Italian and English, addressing trendy topics and case law of interest for Private International Law as well as for International Civil Procedural Law.

The table on contents can be found here; all contents are fully accessible and downloadable in pdf format.

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.*
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> *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)

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- *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.