ERA / MPI Conference on Arbitration and EU Law

The Academy of European Law (ERA) and the Max Planck Institute Luxembourg will co-organize a conference on Arbitration and EU Law in Trier, Germany, on March 10 and 11, 2014.

Monday, 10 March 2014

I. AFTER THE RECAST OF BRUSSELS I
Moderator: *Stefania Bariatti*

09:30 Consequences and interpretation of the arbitration exception

10:00 *West Tankers*, antisuit injunctions and beyond: recent developments and latest case law
Alexander Layton

10:30-11:00 Discussion

11:30 Brussels I and the New York Convention: recognition and enforcement of judgments and awards
Catherine Kessedjian

12:00 Discussion

Moderator: *Catherine Kessedjian*

12:15-13:00 Panel discussion: How to ensure the effective coordination of judicial and arbitration proceedings?
• *Massimo Benedettelli*
• *Alexander Layton*

II. THE CROSS-OVER BETWEEN INSOLVENCY AND ARBITRATION
Moderator: Burkhard Hess

14:00 Effects of insolvency in arbitral proceedings taking into account the Insolvency Regulation and the proposals for its review
Stefania Bariatti

14:30 Effects of foreign insolvency on arbitration seated in Switzerland
Martin Bernet

15:00-15:30 Discussion

III. PROCEDURE, MINIMUM STANDARDS AND HUMAN RIGHTS

16:00 Innovative systems for dispute resolution in sport – and in other areas?
Dirk-Reiner Martens

16:30 Procedural minimum standards and the applicability of Article 6 ECHR in arbitration
Massimo Benedettelli

17:00-17:30 Discussion

Tuesday, 11 March 2014

IV. INVESTMENT ARBITRATION
Moderator: *Alexander Layton*

09:30 Compatibility of bilateral investment treaties (BITs) with EU law
Luca Radicati di Brozolo

10:00 Investment arbitration under extra-EU BITs
Patricia Nacimiento

10:30-11:00 Discussion

Moderator: *Luca Radicati di Brozolo*

11:30 Recent developments in investment arbitration
Maxi Scherer

12:00 Discussion

12:15 Panel discussion: Challenges and opportunities for investment arbitration
• *Patricia Nacimiento*
• *Maxi Scherer*

13:00 Lunch and end of the conference

Bar Associations Lend Support to Hague Choice of Court Convention

The Hague Conference on Private International Law has announced that the German Bar Association (*Deutschen Anwaltverein*, or DAV) has encouraged the European Union to ratify the Choice of Court Convention. In a statement released in October 2013 (official version in German; a courtesy translation performed by the Permanent Bureau of the Hague Conference can be found here), the DAV, which represents the interests of the German bar at the national, European and international level, emphasised the significance of the Convention for EU litigants, and recommended that the EU extend the recognition and enforcement regime of the Convention to non-exclusive choice of court agreements (pursuant to Art. 22).

The statement follows support for the Convention from other national and international bar associations. In June, the Inter-American Bar Association recommended that States join the Convention. In 2006, the American Bar Association passed a resolution urging the United States to join the Convention, which was followed in 2009 by the US signing the Convention.

Milan Conference on the Reform of the Brussels I Regime (13 December 2013)

The University "Luigi Bocconi" of Milan will host on **Friday 13 December** (9h30 – 13h00) a conference on the recast of the Brussels I reg., organized in collaboration with the International Law Association: **"The Reform of the**

‘Brussels I’ Regime – The Recast Regulation (EU) No 1215/2012”. A substantial part of the colloquium will be held in English. Here’s the programme (available as a .pdf file):

Welcome Address: *Giorgio Sacerdoti* (Università Bocconi)

Opening Remarks: *Alberto Malatesta* (Secretary, ILA-Italy)

Chair: *Fausto Pocar* (Università degli Studi di Milano)

- The Revised Brussels I Regulation – A general outlook: The Rt. Hon. Lord *Jonathan Mance* (Judge, Supreme Court of the UK and Chair, Executive Council, ILA);
- Does the Recast Regulation Make Choice-of-Court Agreements More Effective?: *Gianluca Contaldi* (Università di Macerata);
- The New Rules on Parallel Proceedings with Particular Regard to Relations with Third States: *Pietro Franzina* (Università degli Studi di Ferrara);
- The Abolition of Exequatur and the New Rules on the Free Movement of Judgments: *Paola Mariani* (Università Bocconi).

– – – –

Roundtable (held in Italian): “Il ruolo di Bruxelles I nel contesto globale: quale ruolo per le norme UE?”

Chair: *Riccardo Luzzatto* (Università degli Studi di Milano)

Speakers:

- *Luigi Fumagalli* (Università degli Studi di Milano);
- *Alberto Malatesta* (LIUC Università Carlo Cattaneo);
- *Gian Battista Origoni della Croce* (Attorney at Law, Milan);
- *Fausto Pocar* (Università degli Studi di Milano).

Further information and the registration form are available on the conference’s webpage.

The SDNY Grants Google's Motion to Dismiss the Google Book Search Case

Many thanks to Cristina Mariottini, Senior Research Fellow, Max Planck Institute Luxembourg

After eight years of intense litigation, on November 14th, 2013 the U.S. District Court for the Southern District of New York granted Google's motion to dismiss *The Authors Guild, Inc., et al. v. Google Inc., also known as the Google Book Search Case. This litigation, which captured for such a long time the attention of publishers, authors, libraries and internet users, quite interestingly* included in its different stages unusual procedural passages such as the court's rejection of an amended settlement agreement and the uncertification of a class, and eventually it ended with a rather surprising departure from the SDNY's earlier approach in this case to "fair use" in copyright.

I. Judicial History

In September 2005, the Authors Guild filed a class action lawsuit in the Southern District of New York against Google over Google's scanning of over 20 million library books from several research libraries without the prior authorization of rightsholders. The following month, the Association of American Publishers filed another lawsuit against Google for copyright infringement, seeking injunctive relief. Google responded that its use was a "fair use" because they were only showing "snippets" for books where they did not have permission from a rightsholder. In the spring of 2006 the parties began settlement negotiations, and two years later, in October 2008, Google announced an agreement to pay $125 million to settle the lawsuit. The settlement agreement also included licensing provisions, allowing Google to sell personal and institutional subscriptions to its database of books. However, in November 2009, after the Department of Justice filed a brief suggesting that the initial agreement may violate U.S. anti-trust laws

(in fact, as the Department of Justice observed, it "[gives] Google control over the digitizing of virtually all books covered by copyright in the United States"), the parties filed an Amended Settlement Agreement (ASA). Among the changes it encompassed, the ASA limited the scope to foreign books that are registered with the U.S. Copyright Office or published in the UK, Canada, or Australia; it granted the rightsholder the ability to renegotiate the revenue share and provided Google with added flexibility in discounting; and it created a fiduciary to hold payments due to orphan works: if the rightsholder was never ascertained, the funds would be distributed cy-près instead of redistributed among rightsholders.

However, severe criticism was raised against the ASA by authors, publishers and other stakeholders according to which, in spite of these "improvements", the ASA continued to impose a de facto compulsory license with respect to worldwide digital book copyrights under the guise of an intellectual property class action. Such worldwide coverage was the result of the fact that – regardless of the wording in the agreement – the ASA was not simply limited to authors and publishers in the United States, Canada, the United Kingdom and Australia but, rather, it also extended to international authors who registered with the U.S. Copyright Office (in this regard cf. the Memorandum of law in opposition to the Amended Settlement Agreement on behalf of the Federal Republic of Germany of January 28th, 2010). Subsequently, on March 22nd, 2011 supervising Judge Chin issued a ruling rejecting the settlement, stating that the ASA was "an attempt to use the class action mechanism to implement forward-looking business arrangements that go far beyond the dispute before the Court" and that it would "release Google (and others) from liability for certain future acts". Eventually, Judge Chin urged that the settlement be revised from "opt-out" to "opt-in". Despite a series of status conferences that were held throughout 2011, an amended "opt-in" settlement was not reached, and the ASA was simply rejected. In 2012 Judge Chin recertified the class represented by the Authors Guild, and the case was scheduled to go to court by July 2013. However, in July 2013, the Second Circuit overruled the class certification and remanded the case to the District Court for consideration of the "fair use" issues. In holding that it "believe[d] that the resolution of Google's fair use defense in the first instance will necessarily inform and perhaps moot our analysis of many class certification issues" the appellate court provided clear indication that it deemed that Google's "fair use" defense was grounded and that, once the lower court addressed the Author Guild's claim from a "fair use" perspective, it would find that no class

needed to be certified as there was no claim to be brought.

II. Upholding the "Fair Use" Doctrine

The "fair use" doctrine is codified in § 107 of the Copyright Act (17 U.S.C. § 107), which provides that in order to assess the fair use of a copyrighted work certain factors must be considered, including:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Judge Chin's analysis of the four factors in the Google Book Search decision may be summarized as follows:

Factor No 1. *Purpose and character of the use*: Google Books serves several important educational purposes: Google's use of the copyrighted works is highly transformative. Google Books digitizes books and transforms expressive text into a comprehensive word index that helps readers, scholars, researchers, and others find books. Google Books is also transformative in the sense that it has transformed book text into data for purposes of substantive research. Words in books are being used in a way they have not been used before. Google Books has created something new in the use of books. Google Books does not supersede or supplant books because it is not a tool to be used to read books. Instead, it adds value to the original and allows for the creation of new information, new aesthetics, new insights and understandings. Fair use has been found even where a defendant benefitted commercially from the unlicensed use of copyrighted works. Google does not sell the scans it has made of books; it does not sell the snippets that it displays. Google does, of course, benefit commercially in the sense that users are drawn to the Google websites by the ability to search Google Books. Even assuming Google's principal motivation is profit, the fact remains that Google Books serves several important educational purposes.

Factor No 2. *Nature of the copyrighted work*: While works of fiction are entitled to greater copyright protection, the vast majority of the books in Google Books are non-fiction.

Factor No 3. *Amount and substantiality of the portion used in relation to the copyrighted work as a whole*: Google scans the full text of books. On the other hand, courts have held that copying the entirety of a work may still be "fair use". As one of the keys to Google Books is its offering of full-text search of books, full-work reproduction is critical to the functioning of Google Books. Moreover, Google limits the amount of text it displays in response to a search.

Factor No 4. *Effect of the use upon the potential market for or value of the copyrighted work*. Google does not sell its scans, and the scans do not replace the books. To the contrary, a reasonable fact finder could only find that Google Books enhances the sales of books to the benefit of copyright holders. Google Books provides a way for authors' works to become noticed, much like traditional in-store book displays.

Overall, in granting Google's motions for summary judgment and for dismissal Judge Chin held that Google Books has given scholars the ability, for the first time, to conduct full-text searches of tens of millions of books. Google Books preserves books, in particular out-of-print and old books, and it gives them new life. It generates new audiences and creates new sources of income for authors and publishers. As Judge Chin eventually stated in his conclusions, "Indeed, all society benefits".

III. The Aftermath of the SDNY's Dismissal of the Google Book Search Case

The SDNY's decision left many commentators puzzled, especially with a view to Judge Chin's major change of heart with regard to this case. On the one hand, Judge Chin had expressed major skepticism about the Google Book Project in his highly-publicized 2010 ruling that rejected the ASA which, in spite of its undisputable deficiencies, would at least have created a market for the scanned books. On the other hand, in complying with the Second Circuit Court of Appeals' indication that Google had a compelling "fair use" defense that would end the case without the aggravation of going through a full class action, Judge Chin appears to have been suddenly struck by the transformative and beneficial powers of the Google Book Project, and accordingly granted Google a sweeping

“fair use” blessing.

As a result of the Second Circuit’s ruling vacating the class certification, from a res judicata point of view the SDNY’s decision may be deemed as binding only upon Authors Guild and the named plaintiffs (affecting only the books whose copyrights are owned by Authors Guild, in addition to those of the three named plaintiffs: Betty Miles, Joseph Goulden, and Jim Bouton), thus greatly narrowing its impact on the community of authors and publishers. From a case-law standpoint, by being a lower court’s ruling, the decision may be considered as persuasive but certainly not authoritative by other courts, which further limits its impact in similar cases. Moreover, it is likely that the Authors Guild will appeal the decision, just as it is currently doing in *Authors Guild v. HathiTrust* (2012), a lawsuit in which the Authors Guild claimed that the HathiTrust digital library had violated copyright, and the SDNY (represented by a judge other than Judge Chin) ruled against the Authors Guild, finding that HathiTrust’s use of books scanned by Google was “fair use” under U.S. copyright law. And while it is unlikely that the Second Circuit reverses Judge Chin’s decision, one may still hope that the appellate court will at least set narrower boundaries to Judge Chin’s far-reaching construction of the “fair use” doctrine.

Note from editor. The decision has also been commented by Prof. Pedro de Miguel Asensio (Universidad Complutense de Madrid) in his blog. He discusses the background to the case and focuses on its implications from a European perspective, an issue he had already considered in the light of the failed 2008 legal settlement in this case (see here). Although the November ruling only deals with the interpretation of US copyright law, Prof. de Miguel reflects on the consequences that diverging standards on digitization of books and the offering of related services such as Google Books between the US and the EU may have on authors’ protection, access to culture and the availability of very powerful research tools. Furthermore, he refers to the comparison between the fair use analysis under US law and the EU system of exceptions and limitations to copyright, in connection with international harmonization in this field.

Report on the Application of Regulation (EC) 1393/2007

The European Commission presented today its findings on the application of EU rules governing the 'service of documents' in civil justice proceedings, i.e., Regulation (EC) No 1393/2007. According to the report European rules have helped speed up the service of documents between EU countries, despite an ever increasing caseload. Delivery times for judicial documents have fallen in Austria, Belgium, Finland, Germany, Greece and Portugal.

To further improve the functioning of these rules, the Commission intends to follow up on today's report with a public consultation to be carried out in the course of 2014.

Click here to access the Report.

Greek Book on Service of Process Abroad

Dr. Apostolos Anthimos has published Service of Process Abroad: A Practical Guide (Domestic Law • Bilateral Treaties • Hague Service Convention • Regulations 1348/2000 & 1393/2007) in Greek.

> *This book grew out of the experience of the author's engagement with cross-border legal practice for nearly two decades. It gives the full picture on serving Greek proceedings to litigants abroad. A purely practical approach has been opted: Its main purpose is the immediate access to key information on a state by state basis. This is accomplished by a clear-cut description of the applicable law and the presentation of the reported case law for each country separately.*
>
> *The existing legislative framework is summarized in the introductory chapter. The analysis is based on the 4-level model, well known for many countries*

around the globe, i.e., domestic provisions (Article 134 Greek Code of Civil Procedure), bilateral agreements, the Hague Service Convention, and EC-Service Regulations 1348/2000 & 1393/2007.

The main part of the book elaborates each country separately. The material varies, depending on socio-economic ties and factors. For instance, Germany, Italy, Cyprus, the UK, USA, and Australia are strongly represented on the respective chapters, in comparison with many African, Asian and Latin American legal orders, where no conventional link or case law has been traced. All chapters have the following structure: First, the connecting factors on the legislative level, plus any existing declarations from the state in question. Secondly, the elaboration of Greek case law on the service of process to litigants with residence or seat in the respective country.

The annexes of the book host all bilateral conventions signed by Greece on the matter, the text of the Hague Service Convention, coupled with the declarations made by Greece, and the text of EC-Regulation 1393/2007. The case law coverage is fully updated, and includes all decisions reported until October 2013.

The publisher is Sakkoulas Publications (Thessaloniki, 2013, XX + 325 pages, ISBN/ISSN: 978-960-568-042-8, Price: EUR 28).

US Supreme Court Rules on Forum Selection Clauses

By Verity Winship

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

The US Supreme Court just issued a unanimous decision in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas* about the

effect of forum selection clauses in US federal courts. The Court has considered these clauses only three times before, and this is the first opinion on the subject in 25 years. In this case, the parties agreed that suits would be litigated in the state of Virginia. The plaintiff, however, brought suit in federal court in Texas. Among other things, the defendant moved to transfer the case to federal court in Virginia based on a statutory provision (28 USC 1404(a)). The parties did not dispute the validity of the clause, but disagreed about whether it mandated transfer to the designated forum.

The Supreme Court held that forum selection clauses should have controlling weight absent "extraordinary circumstances unrelated to the convenience of the parties." US courts ordinarily consider both private and public interest factors in determining whether a case should be transferred among federal courts. The Court concluded that the presence of a valid forum selection clause changes the analysis. First, plaintiff's choice of forum receives no weight. Second, courts should not consider the convenience of the parties, but only public factors, which "will rarely defeat a transfer motion." Third, although transferred cases normally get the choice-of-law rule of the pre-transfer court, the Court established an exception for cases filed outside the contractually designated forum in an attempt to limit forum shopping. Although the statutory provision at issue governs movement among courts in the US federal system only, the Court indicated that the same analysis applies to motions to dismiss for *forum non conveniens* when the designated forum is a US state or non-US court.

Scherer on Effects of Award Judgments

Maxi Scherer (Queen Mary, University of London) has posted Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road? on SSRN.

> *This article examines and critically assesses the 'judgment route' in*

international arbitration. The 'judgment' route refers to a growing trend in many jurisdictions to grant effects to foreign judgments relating to international arbitral awards, such as judgments setting aside, confirming, recognizing or enforcing an arbitral award (called 'award judgments' for the purposes of the article). Although there is abundant commentary on the effects of set aside judgments, very little attention has been paid to the other equally important situations where courts confirm, refuse to set aside or simply recognize or enforce an award. This article aims to fill this gap. It is submitted that national courts often err when they grant effects to foreign award judgments. On a theoretical level, the judgment route ignores the distinctive, ancillary nature of award judgments: award judgments differ from other judgments insofar as they relate to a prior adjudication — the award — and thus need to be treated differently. Moreover, on a practical level, the judgment route risks encouraging forum shopping and the multiplication of parallel proceedings, and it increases the likelihood of conflicting decisions. On the basis of these findings, the article concludes that the judgment route taken by courts in many jurisdictions is often the wrong road.

The article was published in the *Journal of International Dispute Settlement*, Vol. 4, No. 3 (2013), p. 587.

ECtHR Rules on Return of a Child to Her Country of Origin under the Hague Abduction Convention

On 26 November 2013, the Grand Chamber of the European Court of Human Rights (ECtHR) delivered its judgment in the case of X v. Latvia (application no. 27853/09).

The case concerned the procedure for the return of a child to Australia, her country of origin, which she had left with her mother at the age of three years and

five months, in application of the Hague Convention on the Civil Aspects of International Child Abduction, and the mother's complaint that the Latvian courts' decision ordering that return had breached her right to respect for her family life within the meaning of Article 8 of the European Convention on Human Rights (ECHR).

The Court considered that the ECHR and the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 had to be applied in a combined and harmonious manner, and that the best interests of the child had to be the primary consideration. In the present case, it considered that the Latvian courts had not complied with the procedural requirements of Article 8, in that they had refused to take into consideration an arguable allegation of a "serious risk" to the child in the event of her return to Australia.

It may be worth noting that since the case concerned the relationship between Australia (as requesting State) and Latvia (as requested State), the special regime applying between member States of the EU bound by the Brussels IIbis Regulation was inapplicable. This explains that the obligations that Article 8 of the ECHR implies for the requesting State applied in this case, contrary to what was the case in Povse v Austria, where the incidence of the Brussels IIbis Regulation was at stake.

H/T: Patrick Kinsch

Sanga on "Choice of Law: An Empirical Analysis"

Sarath Sanga, Yale Law School, has recently published an empirical study on the use of choice of law clauses in the US (in the area of contract law). The paper can be downloaded free of charge via SSRN. The abstract reads as follows:

> *I propose a new measure to study the law and economics of choice of law: "relative use of law." Relative use of law measures the extent to which a state's*

laws are disproportionally over- or under-utilized in contract. It is constructed by normalizing the distribution of choice of law clauses by the extent of contracting activity within each jurisdiction.

Using this measure, I study choice of law by analyzing the nearly 1,000,000 contracts that have been disclosed to the Securities and Exchange Commission between 1996-2012. These are all contracts that companies registered with the SEC deem "material." I find that from 1996 to 2012, (1) only two states are relatively over-utilized: Delaware (an extreme outlier) and New York, and (2) there has been significant and robust convergence both in firms' choice of law and relative use of law toward Delaware, New York, and Nevada.

I offer hypotheses for this convergence that are based on (1) lock-in effects of the choice of state of incorporation and (2) positive network effects of using the same law. I present suggestive evidence that lock-in effects explain convergence toward Delaware and Nevada, while network effects explain convergence toward New York.