Shill on Boilerplate Shock

Gregory Shill (Denver Sturm College of Law) has posted Boilerplate Shock on SSRN.

> *No nation was spared in the recent global downturn, but several Eurozone countries arguably took the hardest punch, and they are still down. Doubts about the solvency of Greece, Spain, and some of their neighbors are making it more likely that the euro will break up. Observers fear a single departure and sovereign debt default might set off a "bank run" on the common European currency, with devastating regional and global consequences. What mechanisms are available to address — or ideally, to prevent — such a disaster?*
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> *One unlikely candidate is boilerplate language in the contracts that govern sovereign bonds. As suggested by the term "boilerplate," these are provisions that have not been given a great deal of thought. And yet they have the potential to be a powerful tool in confronting the threat of a global economic conflagration — or in fanning the flames.*
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> *Scholars currently believe that a country departing the Eurozone could convert its debt obligations to a new currency, thereby rendering its debt burden manageable and staving off default. However, this Article argues that these boilerplate terms — specifically, clauses specifying the law that governs the bond and the currency in which it will be paid — would likely prevent such a result. Instead, the courts most likely to interpret these terms would probably declare a departing country's effort to repay a sovereign bond in its new currency a default.*
>
> *A default would inflict damage far beyond the immediate parties. Not only would it surprise the market, it would be taken to predict the future of other struggling European countries' debt obligations, because they are largely governed by the same boilerplate terms. The possibility of such a result therefore increases the risk that a single nation's departure from the euro will bring down the currency and trigger a global meltdown.*
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> *To mitigate this risk, this Article proposes a new rule of contract interpretation that would allow a sovereign bond to be paid in the borrower's new currency under certain circumstances. It also introduces the phrase "boilerplate shock"*

to describe the potential for standardized contract terms drafted by lawyers — when they come to dominate the entire market for a given security — to transform an isolated default on a single contract into a threat to the broader economy. Beyond the immediate crisis in the Eurozone, the Article urges scholars, policymakers, and practitioners to address the potential for boilerplate shock in securities markets to damage the global economy.

Second PIL Workshop at Nanterre University

The University of Paris Ouest Nanterre la Defense will host its second private international law workshop on 19 March 2014.

Professor Géraud de la Pradelle (Emeritus Nanterre University) and Mr. Elie Kleiman (Freshfields) will discuss attachment of sovereign assets in France after the 2013 judgments of the French Supreme Court in the *NML v. Argentina* case.

Professor Mathias Audit (Nanterre University) will act as a discussant.

For more information, please contact:

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ECJ Rules on Lis Pendens and

Submission to Jurisdiction

On February 27th, 2014, the Court of Justice of the EU delivered its ruling in Cartier Parfums Lunettes v. Ziegler (case 1/13).

The issue before the court was whether the lis pendens rule in the Brussels I Regulation also applies when the jurisdiction of the court first seized was founded in a submission to its jurisdiction.

The court held that it does.

> *38 It follows that the system established by Regulation No 44/2001, as is clear from Articles 24 and 27 thereof, was devised in order to avoid prolonging the length of time for which proceedings were stayed by the court second seised, when, in reality, the jurisdiction of the court first seised may no longer be challenged, as set out in paragraph 36 above.*
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> *39 Such a risk does not arise where, as in the case in the main proceedings, the court first seised has not declined jurisdiction of its own motion and none of the parties has contested its jurisdiction prior to or up to the time when a position is adopted which is regarded under national procedural law as the first defence.*
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> *40 In the second place, as regards the purpose itself of Regulation No 44/2001, it must be recalled that one of the aims of that regulation, as is clear from recital 15 in the preamble thereto, is to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given where a number of courts have jurisdiction to hear the same dispute. It is for that purpose that the European Union legislature intended to put in place a mechanism which is clear and effective in order to resolve situations of lis pendens. It follows that, in order to achieve those aims, Article 27 of Regulation No 44/2001 must be interpreted broadly (Overseas Union Insurance and Others, paragraph 16).*
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> *41 It must be stated that an interpretation of Article 27(2) of that regulation, according to which, in order to establish the jurisdiction of the court first seised within the meaning of that provision, it is necessary that that court has impliedly or expressly accepted jurisdiction by a judgment which has become final would, by increasing the risk of parallel proceedings, deprive the rules*

intended to resolve situations of lis pendens, laid down by that regulation, of all their effectiveness.

42 Furthermore, as is clear from the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1) and the case-law of the Court on Article 21 thereof, which corresponds to Article 27 of Regulation No 44/2001, the aim of the rule on lis pendens is also to avoid negative conflicts of jurisdiction. That rule was introduced so that the parties would not have to institute new proceedings if, for example, the court first seised of the matter were to decline jurisdiction (see Overseas Union Insurance and Others, paragraph 22).

43 Where the court first seised has not declined jurisdiction of its own motion and no objection of lack of jurisdiction has been raised before it, the fact that the court second seised declines jurisdiction cannot result in a negative conflict of jurisdiction since the jurisdiction of the court first seised can no longer be contested.

Ruling:

Article 27(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, except in the situation where the court second seised has exclusive jurisdiction by virtue of that regulation, the jurisdiction of the court first seised must be regarded as being established, within the meaning of that provision, if that court has not declined jurisdiction of its own motion and none of the parties has contested its jurisdiction prior to or up to the time at which a position is adopted which is regarded in national procedural law as being the first defence on the substance submitted before that court.

Is Private Enforcement of Competition Law Still an Option in Germany?

Some thoughts on the judgment of LG Düsseldorf from December 17th, 2013, 37 O 200/09 (Kart), by Polina Pavlova, Max Planck Institute Luxembourg.

On December 17th, 2013, the District Court Düsseldorf dismissed a claim for damages against the participants in the German cement cartel. The case at issue can be regarded as a pilot one in the area of private cartel law enforcement in Germany. The judgment, although a first instance one, is the result of a long lasting litigation. In April 2009, the Federal Court of Justice confirmed the admissibility of the claim. Particularly against this background, the dismissal on the merits by the Regional Court came as a surprise.

The case started originally in 2003, when the German Federal Cartel Office issued record fines against the participants in the German cement cartel which had been operating since 1988. In 2005, Cartel Damage Claims (CDC), a Belgian publicly held corporation, brought an action for damages against the former cartel members. The Belgian corporation had been established with the aim of bringing the present lawsuit as a plaintiff in German courts. The corporation acquired the claims of 36 companies who had purchased cement from producers participating in the anti-competitive agreement. CDC bought each claim at a modest price and additionally arranged for the cartel victims to receive a share of the damages obtained in case of success of the action. The claims were assigned to CDC; their total value amounted to 131 million Euro. In an interlocutory judgment from 2007, subsequently upheld by all instances, the District Court of Düsseldorf confirmed the admissibility of the lawsuit.

On the merits, however, the District Court dismissed the claim because of invalidity of the assignments to CDC; as a result, CDC had no standing to sue. According to the District Court, the assignments initially performed before July 1st, 2008 were invalid due to the violation of the German Act on the Prohibition of Legal Advice. This Act, which dates back to 1935, has no equivalent in other

European legislations. Its purpose was to guarantee the quality of legal advice, i.a. by preventing debt-collection agencies from taking advantage of consumers. The constitutionality of the Act has repeatedly been questioned on the grounds that it restricts severely the constitutional guarantee of professional freedom. However, the German Federal Constitutional Court has given its support to the Act in several decisions, arguing it protects the general public against unprofessional legal advice. Similar doubts regarding the fundamental freedom of services under Article 49 TFEU were dispelled by the ECJ in case C- 3/95, *Reisebüro Broede v. Sandker*.

Under Section 1 of the Act of 1935, professional collection of debts required special (and not easy to obtain) authorisation by the competent authority. Initially, CDC had not applied for such authorisation. Therefore, the Regional Court of Düsseldorf decided that there had been a breach of law which, under Section 134 of the German Civil Code, entailed the invalidity of the assignments. In July 2008, the Legal Advice Act was replaced by the Legal Services Act. The current Act essentially pursues the same purpose as its predecessor and sets similar requirements in order to ensure the sufficient qualification of providers of legal services; it nonetheless permits and facilitates the provision of legal services by registered entities. CDC registered under the new Act, and all claims for damages were assigned a second time to it. However, even though the Legal Services Act allows the assignment of claims to registered entities, the District Court denied once more the validity of the operation, this time by asserting it was against public policy (Section 138 of the German Civil Code).

The District Court based its reasoning on the assumption that in the event of losing, the plaintiff would not have the funds required to reimburse the legal costs of the defendants. The argument must be read together with the German procedural "loser pays" rule (Section 91 of the Code of Civil Procedure), according to which the losing party is obliged to cover the full costs of the litigation, including the lawyer's statutory fees incurred by the winning party. Therefore filing a claim entails a financial risk, particularly high in cases like the one at issue (a claim for more than 130 million €). According to the District Court, pushing forward an undercapitalised legal entity as a plaintiff transfers the risk to the defendant; an outcome that was evident for both CDC and the assignors. As a result, the Court concluded that the assignments of the claims violated the good morals and were null and void.

This statement comes as a surprise. It is worth noting that, at the beginning of the proceedings, the plaintiff had formally applied for a reduction of the value of the dispute in order to cut down the costs of the litigation. As the litigation costs in Germany are calculated according to the value of the claim, the diminution of the value of the dispute narrows the litigation risks for both parties. Usually, German courts are not empowered to reduce the value of the litigation unless it is explicitly provided by law; however, this is the case in cartel matters where the court may – at its discretion – reduce the amount of the dispute in order to facilitate private enforcement of competition law.

In the cement cartel case CDC's application for a reduction of amount of the litigation had been surprisingly dismissed – it seems that the Court was uncomfortable with the business model of CDC, aiming at increasing the value of litigation by bundling claims for damages from different victims of the cartel. When evaluating the litigation risks, the District Court relied on the information given by the plaintiff on its financial situation when it had sought the reduction of the amount of the litigation. Accordingly, the District Court held that CDC's own submissions regarding its inability to pay the costs of the litigation at the beginning of the proceedings indicated that the plaintiff would be unable to compensate the litigation costs of the other parties. As a consequence, the Court decided that the assignment of the claims deteriorated the procedural situation of the defendants with regard to the (future) compensation of their litigation costs, and, therefore, it was void. The final outcome of the reasoning of the Court is a shift of the legal framework for encouraging private enforcement to its contrary: first the plaintiff was denied a reduction of the cost risk; then, the claim was dismissed because of the plaintiff's inability to carry that risk. In this respect the line of argument of the District Court seems paradoxical.

Furthermore, it is worth stressing that considerations of EU competition law are completely absent from the Court's reasoning. Again, this line of argument must be criticized: the plaintiff had based its claim for compensation on a general tort provision of the German Civil Code (Section 823 para 2 BGB) in conjunction with Article 81 TEU (now: Article 101 TFEU). Yet the District Court only relied on the infringement of German cartel law by a domestic cartel, i.e., it did not address the right of cartel victims to compensation that derives directly from the TFEU. According to the case-law of the ECJ since *Courage v. Crehan*, victims of cartel infringements are entitled to a full and efficient compensation. However, the

District Court did not consider these principles of Union law when it assessed the legality of the assignment to CDC under Section 138 of the German Civil Code.

All in all, the decision of the District Court shows a remarkable reluctance with regard to the private enforcement of cartel damages. It should be noted that the business model of the plaintiff (CDC) has been challenged in other civil courts in Europe (see recently the interlocutory judgment of the District Court of Helsinki from July 4th, 2013), but it has never been declared illegitimate. Decisions as the one by the Regional Court of Düsseldorf, even first instance ones, could make Germany less attractive as a forum for efficient cartel law enforcement. As a result, plaintiffs will shop to other jurisdictions like the Netherlands, Finland or the United Kingdom. However, it still remains to be seen whether the Court of Appeal and the Supreme Federal Civil Court will uphold the judgment of the first instance.

"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.