Collective Arbitration (by Stacie I. Strong)

It is my pleasure to announce the publication of two works of Professor Stacie I. Strong, Associate Professor of Law, Senior Fellow, Center for the Study of Dispute Resolution, University of Missouri.

Class, Mass, and Collective Arbitration in National and International Law, has just been published by Oxford University Press. The book considers class, mass and collective arbitration as a matter of domestic and international law, providing arbitrators, advocates and scholars with the tools they need to evaluate these sorts of procedural mechanisms. The discussion covers the best-known decisions in the field – Stolt-Nielsen S.A. v. AnimalFeeds International Corp. and AT&T Mobility LLC v. Concepcion from the U.S. Supreme Court as well as Abaclat v. Argentine Republic from the world of investment arbitration – while also considering specialized rules on large-scale arbitration promulgated by the American Arbitration Association (AAA), JAMS and the German Institution of Arbitration (DIS). The text introduces dozens of previously undiscussed judicial opinions and covers issues ranging from contractual (or treaty-based) silence and waiver to regulatory concerns and matters of enforcement. The entire timeline of class, mass and collective arbitration is covered, beginning with the devices' historical origins and continuing through the present and into the future. Lawyers in a wide variety of jurisdictions will benefit from the material contained in this text, which is the first full-length monograph to address large-scale arbitration as a matter of national and international law.

The second work is an article entitled *Collective Consumer Arbitration in Spain: A Civil Law Response to U.S.-Style Class Arbitration*, published in 30 *Journal of International Arbitration* 495 (2013). Prof. Strong analyses the Spanish approach, which establishes a statutory form of large-scale arbitration that arises in the post-dispute context. According to the author, because this mechanism is built largely on express rather than implied consent, it could act as a model for reformers in other jurisdictions. In particular, it could provide an answer to the various problems that are anticipated to develop in the United States following the recent Supreme Court decisions in Oxford Health Plans LLC v. Sutter and American Express Co. v. Italian Colors Restaurants.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2013)

Recently, the November/December issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Bernhard Pfister***: "Kollisionsrechtliche Probleme bei der Vermarktung von Persönlichkeitsrechten" – the English abstract reads as follows:

Internationally famous celebrities often commercialize their personality rights in different countries. The following article tries to solve the problem, what national law is applicable in regard to the protection of these rights; the relevant sources of law for a German court are Arts. 42, 40 and 41 EGBGB. In this context, German courts and literature mostly deal with defamation by the press. In those cases, the personality of the defamed is offended and the law of the state, where the injured person lives (Erfolgsort) or where the newspaper is published (Handlungsort), is applicable. The issue of protection of commercially used property rights, however, is a different matter: The personality of the celebrity is not harmed, but the property right gained by her/his achievement. It is situated in the country, where the she/he is known.

Only the law of the state, where the advertisement was placed, has to be applied. This is the place, where the action occurred (Handlungsort) and where the damage was caused (Erfolgsort). Neither the law of the country, where the advertising documents had been written, nor the law of the country of the habitual residence are applicable.

- ***Kurt Lechner:*** "The interplay between the law applicable to the succession and national property law (lex rei sitae) in the EU regulation on successions"

The line the European regulation on successions draws between the law

applicable to the succession on the one hand, and property law on the other hand, raises specific questions in legal practice. The way a legatum vindicationis is to be treated by German law is a good example. Only a thorough analysis of the provisions in the regulation and their historic evolution in the law-making process can illustrate the functioning of the regulatory system. The stipulations of Article 1 (2) lit. l together with recital 18 of the regulation are the result of a carefully considered compromise between the institutions involved in the legislative process. Besides leaving the national register proceedings as such unaffected, the final wording expressly states that it is the national law that determines "the effects of recording or failing to record such rights in a register". Moreover, as far as immovable property is concerned, recital 18 confirms the lex rei sitae principle. The European legislator hence gives precedence to the national property law, the accuracy of registers and the protection of bona fide rights over a more comprehensive application of the law applicable to the succession. As a result, and as far as real estate located in Germany is concerned, neither can rights in rem be created nor ownership be transferred without registration in the German land register. Accordingly, the protection of the integrity of the German land register and the protection of bona fide rights require a formal agreement (Auflassung) between the parties involved in the transfer of ownership.

- ***Matthias Weller***: "Keine Drittwirkung von Gerichtsstandsvereinbarungen bei Vertragsketten" – the English abstract reads as follows:

In Refcomp the ECJ rejected any binding effect of a choice of forum clause on following buyers in the distribution chain raising an "action directe" under French law against the first seller. The judgment is unconvincing both in its reasoning and its result. It appears preferable to characterise as contractual the direct claim against the first seller if and to the extent the claim aims at compensating the contractual interests in full performance. The characterisation as delictual results in unforeseeable places of jurisdiction at the domicile of the respective buyer in the distribution chain. If the applicable law grants a direct claim to a third party, thereby transgressing the relativity of the contract, it appears justified to bind the privileged third party to what the contractual parties agreed for each other in respect to claims compensating the contractual interest.

- ***Jan von Hein***: "The applicability of Art. 5 No. 3 Brussels I-Regulation to damages caused by multiple tortfeasors"

In Melzer v. MF Global UK Ltd, the CJEU refused the application of article 5 no. 3 of the Brussels I Regulation in a case in which the plaintiff who claimed to have been harmed by multiple tortfeasors had sued only the alleged accomplice, a London broker, at the place where the main perpetrator, a German company, had committed the relevant acts, i.e. defrauded the claimant. The German courts had so far applied a principle of "reciprocal attribution of the place where the event occurred" amongst multiple tortfeasors in such cases. The CJEU argued, however, that there is no equivalent autonomous concept in the Regulation, that art. 5 no. 3 must be interpreted restrictively and that the plaintiff could instead have sued under art. 5 no. 1 or art. 6 no. 1 of the Regulation. In his critical note, Jan von Hein argues that, given the substantial convergence of Member States' laws on joint and several liability of multiple tortfeasors, the Court should have contributed to the development of an autonomous rule on attribution. The doctrine of restrictive application of art. 5 no. 3 is not absolute, but must be balanced against the principle of effet utile. The alternatives suggested by the CJEU – generously re-characterizing claims sounding in tort as contractual or suing all alleged tortfeasors at the same time – are, in a large number of cases, either not available or lead to unsatisfactory consequences. Particularly in the given case, a suit against the main perpetrator would not have been admissible because of its insolvency. The note concludes with an outlook on pending cases concerning infringements of intellectual property rights.

- ***Wulf-Henning Roth: "***Choice-of-law clauses in consumer contracts – a difficult matter?"

The judgment of the Bundesgerichtshof (BGH) deals with the use of a choice-of-law clause in the standard terms of a consumer contract. Applying German law to the relevant clause the Court holds that a choice-of-law clause may not be misleading and has to stand up to the standard of transparency. The implications of this approach need to be discussed further on. The Court classified the action for injunctive relief brought by a trade organisation as delictual, applying German private international law of torts, thereby disregarding the Rome II-Regulation. Moreover, the Court hold that the

question whether the relevant choice-of-law clause stands up to the standard of transparency shall be determined by the applicable law of torts, instead of classifying this issue as a contractual one. It is suggested that this classification should be reconsidered.

- ***Stefan Arnold***: "Claims for Damages by Private Investors in Foreign Funds – Some Aspects Concerning International Private and Procedural Law"

The Federal Court of Justice (Bundesgerichtshof) reaffirms its jurispru- dence concerning the jurisdiction of German courts in consumer matters under sec. 13 and 14 Lugano Convention 1988. These provisions give German courts jurisdiction in proceedings brought to by German consumers concerning investments in Switzerland. Actions based on an infringement of § 32 German Banking Act (Kreditwesengesetz), on culpa in contrahendo (here: breach of precontractual duties of disclosure) and on prospectus liability according to sec. 127 German Investment Act (Investmentgesetz) are considered as „proceedings concerning a contract" in the sense of sec. 13 Lugano Convention 1988. This wide interpretation is not mirrored at the Conflict of Laws level however. Here, it is argued, the law applicable to damage claims based on an infringement of § 32 German Banking Act and on sec. 127 German Investment Act does not follow the law applicable to the contracts. It must rather be determined according to the Conflict of Law rules as it regards non-contractual obligations.

- ***Marc-Philippe Weller/Bettina Rentsch***: "The Combination Theory (Kombinationslehre) and cross-border Company Conversion: Incentives from EU Law"

The ECJ VALE Case (ECJ, 12.7.2012 – C-378/10 – VALE Építési kft) concerns an Italian Company's conversion into a Hungarian legal form, but being refused to register according to Hungarian corporate law. The Court, with reference to its well-known Cartesio Judgement, considers the refusal, firstly, to fall under the scope of Art. 49, 54 TFEU, and, secondly, to interfere with the EU freedom of establishment. The article examines the consequences of this reasoning for Private International Law. Especially, it adapts the requirements of the so-called Combination Theory, developed by Beitzke, to the requirements of the

Freedom of Establishment.

- ***Dieter Martiny***: "Deutscher Kündigungsschutz für das Personal ausländischer Botschaften?" – the English abstract reads as follows:

The case note analyses a judgment of the Federal Supreme Labour Court (Bundesarbeitsgericht; BAG) as well as a related judgment of the European Court of Justice in a case concerning the dismissal of a member of the local staff of the Algerian Embassy in Berlin. The case first required determining whether sovereign immunity of the Algerian State barred German jurisdiction. The Federal Supreme Labour Court expressed some sympathy for the argument of the Algerian State that the employed driver also performed other duties, such as translation services, which could justify immunity. The Federal Court reversed the judgment of the Appellate Labour Court of Berlin-Brandenburg for insufficient findings of fact and remanded the matter back to the Appellate Court. In respect of the law applicable to the employment contract, there was an implied contractual choice of Algerian law, and therefore the so-called "principle of favourability" under Article 6 of the Rome Convention of 1980 had to be applied. Subsequently, after it again rejected immunity, the Appellate Labour Court of Berlin- Brandenburg referred the case to the European Court of Justice for clarification on whether an embassy constitutes a branch, agency or other establishment within the meaning of Article 18(2) of Regulation No. 44/2001. The Court of Justice ruled that Article 18(2) must be interpreted as meaning that an embassy of a third State situated in a Member State is an "establishment" within the meaning of that provision in a dispute concerning a contract of employment concluded by the embassy on behalf of the sending State, where the functions carried out by the employee do not fall within the exercise of public powers (an act iure gestionis). It is for the national court seized to determine the precise nature of the functions carried out by the employee. There is no uniform European approach for the interpretation of international law criteria, and the European Court of Justice has insofar no competence to render such a decision. However, the European Court of Justice affirmed the rejection of immunity as concerns the preliminary reference procedure. According to the European Court of Justice, an embassy may be equated with a centre of operations which has the appearance of permanency and contributes to the identification and representation of the State from which it emanates. A dispute in the field of employment relations has a sufficient link

with the functioning of the embassy in question with respect to the management of its staff.

The agreement on jurisdiction in favour of the Algerian courts did not preclude the jurisdiction of German labour courts. Article 21(2) of Regulation No. 44/2001 must be interpreted as meaning that an agreement on jurisdiction concluded before a dispute arises falls within that provision in so far as it gives the employee the possibility of bringing proceedings not only before the courts ordinarily having jurisdiction under the special rules in Articles 18 and 19 of that regulation, but also before other courts, which may include courts outside the European Union. However, a jurisdiction clause depriving the employee of a possibility to sue would have no effect.

The case note discusses the concept of immunity in cases of employment of embassy personnel. It argues that performance of additional duties like translation services cannot justify an exclusion of jurisdiction. The application of the pro- visions on jurisdiction in labour cases by the European Court of Justice is correct. The applicable law on the employment contract is discussed not only under the Rome Convention of 1980 but also under Article 8 of the Rome I Regulation on contractual obligations of 2008. It is argued that unfair dismissal provisions protecting a single employee are not overriding mandatory provisions under the Convention of 1980 and also not under the Rome I Regulation. However, since the employee habitually carried out his work in Germany and there was no closer connection to Algeria, the standard of protection is German law in any event.

- ***Ulrich Spellenberg***: "Form und Zugang" – the English abstract reads as follows:

The sole director of a German private limited company (GmbH) wants to resign and sends his notice to the sole shareholder of the company, a Californian Incorporated Company. The reception of the notice is confirmed by a fax sent by a person whose position or function in the Incorporated Company remains unclear. The Commercial Register in Hamburg and the lower German courts who dealt with the case refuse to enter the termination of the director's function in the commercial register because he didn't establish that his notice reached a competent person or organ of the American Incorporated Company.

The federal Court (BGH) allows the appeal by applying the German rules to decide when a notice is deemed to have reached its addressee since it was sent from Germany. The outcome in this case is correct but the reasoning is not. In contradiction to its former ruling and to the general opinion the Court falsely classifies "reception" as matter of form of legal acts in the sense of Article 11 EGBGB which alternatively applies the law of the place of sending and the law of the contract. However, reception is not a matter of "form" and the Court would at least have needed to support its new classification with reasons.

- ***Csongor István Nagy***: "Cross-border company conversions in a legal vacuum: the Hungarian Supreme Court's follow-on judgment in VALE"

After the CJEU's judgment in VALE, the EU right to cross-border conversions remains a largely unregulated right. When national law contains no special rules concerning international conversions, the judge has to apply, by analogy, the rules of domestic conversions to cross-border conversions. The Hungarian Supreme Court's judgment in the principal proceeding is a good example for what kind of troubles emerge, if as to cross-border conversions the companies and their founders, instead of concrete requirements, have to fulfill conditions that are interpreted and applied mutatis mutandis. The moral of the Hungarian Supreme Court's judgment is that conversions raise complex issues, which are to be addressed not in the court room but through careful legislation. Cross-border company conversions in a legal vacuum: the Hungarian Supreme Court's follow-on judgment in VALE

Curran on Extraterritoriality, Universal Jurisdiction, and the

Challenge of Kiobel

Vivian Grosswald Curran (University of Pittsburgh – School of Law) has posted Extraterritoriality, Universal Jurisdiction, and the Challenge of *Kiobel v. Royal Dutch Petroleum Co.* on SSRN.

> *This article analyzes Kiobel v. Royal Dutch Petroleum Co. as a point of juncture between extraterritorial and universal jurisdiction, inasmuch as it harks from two lines of case law which have both overlapping and distinctive attributes. It also touches on the comparative law challenge to international law, ending by noting the immense leaps and bounds of the field since the days of the valiant Helmuth von Moltke.*

The article is forthcoming in the *Maryland Journal of International Law.*

UK Supreme Court Rules on European Lis Pendens

On 6 November 2013, the UK Supreme Court delivered its judgment in the three cases *in the Matter of the Alexandros T*.

The Court issued the following press release:

BACKGROUND TO THE APPEALS

On 3 May 2006, the vessel Alexandros T sank and became a total loss 300 miles south of Port Elizabeth with considerable loss of life. Her owners were Starlight Shipping Company ("Starlight"). Starlight made a claim against their insurers, who denied liability on the basis that the vessel was unseaworthy with the privity of Starlight. In response, Starlight made a number of serious allegations against their insurers including allegations of misconduct involving tampering with and bribing of witnesses.

On 15 August 2006, Starlight issued proceedings in the Commercial Court against various insurers ("the 2006 proceedings"). One group of insurers was described as the Company Market Insurers ("CMI") and the other group was described as the Lloyd's Market Insurers ("LMI"). Before the hearing, the 2006 proceedings were settled between Starlight and the insurers and the proceedings were stayed by way of a Tomlin Order.

In April 2011, nine sets of Greek proceedings, in materially identical form, were issued by Starlight although they were expressed as torts actionable in Greece. The insurers sought to enforce the earlier settlement agreements. Starlight applied for a stay of these proceedings, firstly pursuant to Article 28 then Article 27 of Council Regulation (EC) No 44/2001 ("the Regulation")

The judge refused to grant a stay under Article 28 and gave summary judgment to the insurers. The Court of Appeal held that it was bound to stay the 2006 proceedings under Article 27, which provides for a mandatory stay, and it was not therefore necessary to reach a final determination of the position under Article 28. Before the Supreme Court, the insurers challenge the correctness of the Court of Appeal's conclusion under Article 27 and submit that the judge was correct to refuse a stay under Article 28. Starlight cross-appeal on the Article 28 point.

JUDGMENT

Subject to the possibility of a reference to the CJEU on some limited questions, the Supreme Court unanimously allows the CMI's and LMI's appeal. Lord Clarke gives the lead judgment, with which Lord Sumption and Lord Hughes agree. Lord Neuberger agrees adding a short judgment of his own. Lord Mance agrees with the result.

REASONS FOR THE JUDGMENT

Article 27

Article 27 must be construed in its context. The purpose of Article 27 is to prevent the courts of two Member States from giving inconsistent judgments and to preclude, so far as possible, the non-recognition of a judgment on the ground that it is irreconcilable with a judgment given by the court of another Member State [23, 27].

In the case of each cause of action relied upon, it is necessary to consider whether the same cause of action is being relied upon in the Greek proceedings. In doing so, the defences advanced in each action must be disregarded [29]. The essential question is whether the claims in England and Greece are mirror images of each other and thus legally irreconcilable [30]. There are three heads of claim in England: indemnity, exclusive jurisdiction and release [32].

None of the causes of action relied upon in the Greek proceedings has identity of cause or identity of object with the CMI's claim for an indemnity. The subject matter of the claims is different. The Greek proceedings are claims in tort (or its Greek equivalent) and the claims in England are claims in contract. As to object, that of the Greek proceedings is to establish a liability under Greek law akin to tort, whereas the object of the CMI's claim is to establish a right to be indemnified in respect of such a liability and to claim damages for breach of the exclusive jurisdiction clauses [34].

The same is true of the CMI's claims in respect of the exclusive jurisdiction clauses in the settlement agreement and/or in the insurance policies [36]. The causes of action based upon an alleged breach of the settlement agreement are not the same causes of action as are advanced in Greece [37].

The same is also true of the claims based on the release provisions in the CMI settlement agreement [40]. The Greek claims are claims in tort and the English proceedings are contractual claims. The factual bases for the two claims are entirely different. Moreover, the object of the two claims is different [41]. The Supreme Court is unanimous that that is the position with regard to the claims for damages for breach of the release provisions in the settlement agreements. However, in so far as the insurers claim declarations, while the majority reaches the same conclusion, Lord Mance reaches a different conclusion on the basis that the claims for declarations in the two jurisdictions are mirror images of each other. The court unanimously decides that, unless the insurers abandon those claims for declarations, the relevant question should be referred to the CJEU for an opinion [59].

In the event, the CMI have now abandoned their claims for declarations based on the release provisions and it is not necessary to refer the question to the CJEU. It follows that the CMI's appeals under Article 27 are allowed. The position of the LMI is essentially the same as in the case of the CMI [55]. If the LMI do the same

within the time permitted, their appeals will also be allowed under Article 27. A similar position has been reached in respect of LMI's submission that the appeals under Article 27 should have been rejected by the Court of Appeal as being too late [123].

Article 28

The discretion to stay claims under Article 28 is limited to any court other than the court first seised [74]. On the assumption that the English court is second seised for the purposes of Article 28, the question arises whether the actions should be stayed as a matter of discretion [91]. The circumstances of each case are of particular importance but the aim of Article 28 is to avoid parallel proceedings and conflicting decisions. In a case of doubt it would be appropriate to grant a stay [92]. However, the natural court to consider the issues raised by CMI and LMI is the High Court in England because they raise contractual questions governed by English law and because it is at least arguable that the parties have agreed that they should be decided by the High Court, where the proceedings are more advanced than in Greece [96]. The decision of the judge in refusing a stay under Article 28 is upheld and the cross-appeal is dismissed [97, 125].

References in square brackets are to paragraphs in the judgment.

A Comparative and Legislative Approach to Human Rights Litigation After Kiobel

As the impact of the Supreme Court's *Kiobel* decision continues to take shape before U.S. federal courts, one recent essay, entitled "Reviving Human Rights Litigation After *Kiobel*" (appearing in the near future in the October 2013 *American Journal of International Law),* encourages a comparative and legislative approach to the Alien Tort Statute. As Professors Vivian Grosswald Curran (Pitt

Law) and David Sloss (Santa Clara Law) explain:

"This essay proposes a legislative response to *Kiobel* that would preserve some of the benefits of ATS human rights litigation, while minimizing the costs. Although the proposed legislation does not address the corporate liability questions that were at issue when the Supreme Court initially granted certiorari in *Kiobel*, the legislation would allow human rights victims to bring civil claims against perpetrators in some foreign-cubed cases. However, plaintiffs could not file such claims until after a federal prosecutor filed criminal charges against the perpetrator. This approach would allow federal executive officials to block claims that raised serious foreign policy concerns by choosing not to prosecute.

It would also promote a more robust dialogue between federal executive officials and groups representing prospective human rights plaintiffs. The proposed legislation is modeled partly on pending French legislation, as well as existing Belgian and German legislation. Statutes in all three countries share two critical features (assuming the French bill becomes law). First, victims of genocide, war crimes, and crimes against humanity have the right to initiate judicial proceedings against perpetrators who committed crimes extraterritorially, including in foreign-cubed cases. Second, public prosecutors in all three countries can block such judicial proceedings if they determine that a victim-initiated case would impair the state's foreign policy interests or would otherwise be contrary to public policy. The next section gives a brief overview of the foreign legislation. The concludingnsection explains and defends our proposal."

The full essay will be available soon at the *American Journal of International Law* website (here). *[Editor's note: the PDF of the article has been removed, on copyright grounds, at the demand of the Journal.]*

Lithuanian Court Asks ECJ

whether Brussels Regime Forbids Recognition of Arbitral Antisuit Injunctions

The Lithuanian Supreme Court has made a preliminary reference to the Court of Justice of the European Union asking whether the Brussels Regime forbids the recognition of arbitral anti-suit injunctions. In this case, after one party initiated court proceedings in Lithuania, the other party commenced arbitral proceedings in Sweden. The arbitral tribunal found that the Lithuanian court proceedings were in breach of the arbitral agreement and issued an antisuit injunction. The beneficiary of the injunction then sought recognition in Lithuania.

The Lithuanian Supreme Court is therefore asking the CJEU whether the Brussels Regime forbids arbitral antisuit injunction as well, and whether this might mean that the Brussels Regime would have impact on the recognition of arbitral awards issuing such injunctions.

See this report of John Gaffney @ OGEMID:

> *In proceedings before the Lithuanian Supreme Court (LSC) concerning the recognition and enforcement of an arbitral award in SCC arbitral proceedings between Gazprom and the Lithuanian Ministry of Energy, the LSC has decided to make a preliminary reference to the Court of Justice of the EU (CJEU).*
>
> ***Background***
>
> *In 2004, Gazprom and the Ministry of Energy of Lithuania and other shareholders in the Lithuanian natural gas company, Lietuvos Dujos, entered into a shareholders' agreement ("SHA"), which required all disputes arising out of or in connection with it to be resolved by arbitration under the Rules of the Stockholm Chamber of Commerce (SCC).*
>
> *In 2011, the Ministry of Energy commenced proceedings before the Lithuanian courts in respect of the actions of Lietuvos Dujos in relation to the terms of a gas supply and gas transit concluded with Gazprom.*
>
> *Gazprom commenced the SCC arbitration proceedings, arguing that Lithuania's*

attempt to litigate certain matters relating to the management of Lietuvos Dujos before the Lithuanian courts was a breach of SHA.

In a 2012 award, the arbitral tribunal (Derains, Nappert, Lamb) declared that the Ministry's initiation and prosecution of the Lithuanian court proceedings was partially in breach of the arbitration agreement contained in the SHA and ordered the Ministry to withdraw certain requests in the court proceedings and to limit its request in the same proceedings to measures that would not jeopardize the rights and obligations established in the SHA and that the Ministry could not request before an arbitral tribunal constituted pursuant to the arbitration clause of the SHA.

West Tankers

In the West Tankers case, which also involved a preliminary reference concerning the relationship of arbitration and the Brussels I Regulation, but which involved a court-ordered anti-suit injunction, the CJEU held that it is incompatible with the Brussels I Regulation for a court of an EU Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement, where such proceedings come within the scope of the Regulation.

Preliminary reference

In the Lithuanian proceedings brought by Gazprom to recognize and enforce the SCC award, the question arose, whether, by analogy with West Tankers – if an EU Member State court should not recognize a court-ordered anti-suit injunction, and if an arbitral tribunal were treated as an equivalent to a court – an EU Member State court should not enforce an arbitral award that constitutes an anti-suit injunction or limits claims in court proceedings.

In this regard, the LSC decided to refer three questions to the CJEU:

1. Does an EU Member State court have a right to refuse to recognize an arbitration award, which constitutes a form of anti-suit injunction, on the grounds that such an award limits the jurisdiction of the national court to rule on its own competence in examining the case in accordance to the rules of jurisdiction of the Brussels I Regulation?

2. If the answer to 1. is yes, does the same apply in the case where the arbitral tribunal orders a party to limit its claims in proceedings before an EU Member State court?

3. Can a national court, for the purpose of ensuring the supremacy of the EU law and full effectiveness of the Brussels I Regulation, refuse to recognise the arbitral award if such an award limits the right of the national court to rule on its own jurisdiction and authority in a case that falls under the jurisdiction of Brussels I Regulation?

The premise of the questions, i.e., that arbitral tribunals should be considered as equivalent to courts, has a special resonance in EU law, considering that they are not considered as such under the Article 234 EC procedure itself.

The ECJ and ECHR Judgments on Povse and Human Rights – a Legislative Perspective

by Dorothea van Iterson

Dorothea van Iterson is a former Counsellor of legislation, ministry of Justice of the Netherlands[1]

In the contributions published last month on this topic, the blame for what is felt to be the unsatisfactory operation of article 11 Brussels II bis is put on the parties who negotiated the relevant provisions of the Regulation. For those who are unfamiliar with the history of the Regulation and wish to participate in the debate about a possible recast of Brussels II bis, it may be helpful to recall how these provisions came into being[2].

The articles of Brussels II bis relating to the return of a child who has been wrongfully abducted reflect a political compromise which was reached with great

difficulty after discussions of 2 ½ years in the Council working party dealing with the topic. This explains some of the ambiguities in the text. The main elements of the compromise were the following:

1) The 1980 Hague Child Abduction Convention, to which all Member States of the EU are parties, was preserved in relationships between Member States. Consequently, the courts of the Member State of the child's refuge continues to have jurisdiction in respect of requests for the return of an abducted child. The procedures under the 1980 Hague Convention seek to ensure a speedy voluntary return of the child. If a voluntary return cannot be secured, the courts of that State are required to hand down an order restoring the *status quo ante****[3]***. There are very limited grounds for refusing the child's return. Return orders under the Convention are no judgments on the merits of custody. No decision on the merits may be taken by the courts of the child's State of refuge until it has been determined that the child is not to be returned under the Convention (article 16). As long as such determination has not been made, the courts of the child's habitual residence at the time of the removal are competent to deal with the merits of the custody issue. The conditions for the passage of jurisdiction as to the merits to the courts of the Member State of refuge are specified in article 10 of the Regulation.

2) Article 11, paras 2 to 5, Brussels II bis were agreed upon as a complement to the Hague system. They reflect policy guidelines developed over the years. These paragraphs were intended for the courts of the Member State of refuge of the child, not for the courts of the Member State of the child's habitual residence prior to the removal.

3) Article 11, paras 6 to 8, as included in the compromise, specifically address the situation in which the courts of the Member State of refuge have handed down a non-return order based on article 13 of the Convention. The three paragraphs were accepted as a package. Paragraph 7 cannot be isolated from paragraphs 6 and 8. The competent court in the Member State of the child's habitual residence prior to the removal has to be informed of any non-return order given in the Member State of refuge. This court can then examine the merits of custody. The Council compromise did not purport to provide for immediate "automatic" enforceability abroad of a *provisional* return order handed down by those courts. "Any subsequent judgment which requires the return of the child", as referred to in paragraph 8, was to be understood as "any decision on

the merits of custody which requires the return of the child"[4]."Custody" comprises the elements stated in article 2, point 11, sub b, which corresponds to article 5 of the Hague Convention. It includes, among other rights and duties, the right to determine the child's residence.

4) Abolition of exequatur was accepted by way of an experiment for a very narrow category of judgments. According to the Council compromise, exequatur was to be abolished only for judgments *on the merits of custody* entailing the return of the child handed down following the procedural steps described in article 11, paras 6 and 7. It was considered that the issue of the child's residence should be finally resolved as part (or as a sequel) of the other custody arrangements and that the judgment on custody should put an end to the proceedings between the parents on the child's place of residence following the abduction. Successive provisional changes of residence were considered to be contrary to the child's interests.

5) Abolishing exequatur in this context means that once a certificate has been issued in accordance with article 42 Brussels II bis, the judgment is enforceable by operation of law in another Member State. No recourse can be had in the Member State of refuge to the grounds of non-recognition (and enforceability) stated in article 23. The tests mentioned in article 23 are carried out by a judge of the court which has handed down the judgment and who is asked to issue the certificate (article 42, second paragraph). The issuance of a certificate is therefore unlikely to be refused. The Aguirre/Pelz ruling of the ECJ has shown that questions may then arise about the statements made in the certificate.

6) "Enforceability by operation of law" means that the judgment is eligible for enforcement as if it had been given in the Member State where enforcement is sought (article 47 Brussels II bis). The judgment is not enforced "automatically", as the procedures for enforcement are governed by the law of the requested Member State. The enforcement laws of the EU Member States were left untouched by the Brussels II bis Regulation. Many of those laws make enforcement conditional on a court decision in the requested State. Enforcement may be stayed or stopped in exceptional cases where human rights are in issue. The radical interpretation given by the ECJ in the Povse and Aguirre/Pelz rulings leaves us with questions regarding the meaning of article 47 and the actual approach to be taken by enforcement bodies if they find that there is an immediate danger for the child. Is it realistic to require them to enforce

“automatically” a provisional order which contradicts an order of the same type which has just been handed down by the courts of their own country?

7) The implication of the Council compromise was that a *provisional* return order handed down by the courts of the Member State of the child’s habitual residence prior to the removal should be enforceable in the Member State of refuge *only* after the issuance of an exequatur in the latter State. The intention was that the checks provided for in article 23 should to be made in the exequatur proceedings.

8) The proceedings before the ECHR on Povse were about the judgment *on the merits of custody* which was finally handed down in Italy. See the ECHR judgment, point 69. The ECHR did not dwell on the provisional return order on which the ECJ answered a number of preliminary questions. Would the outcome of the ECHR proceedings have been the same if it had been asked to assess the provisional return order?

9) On the face of it, the ECJ’s ruling that article 11, para 8, Brussels II bis applies to a provisional return order of the courts of the Member State of habitual residence prior to the removal, seeks to reinforce the return mechanism of the 1980 Hague Convention. In reality it brings the EU closer to an abandonment of the Hague system. This is a matter for regret. If, in the forthcoming revision of Brussels II bis, exequatur were abolished in all matters relating to parental responsibility, the left-behind parent would resort to the courts of his own country immediately rather than seeking to obtain a return order in the State of refuge. It may be questioned whether such an approach would be conducive to balanced solutions which would, in the end, be accepted by the parties involved in an abduction case[5].

[1] The views expressed in this post are personal views of the author.

[2] For a detailed account see Peter McEleavy, The New Child Abduction Regime in the European Union, Journal of Private International Law, 2005, Vol.1, No.1.

[3] See the Explanatory Report by E. Perez-Vera, para 106, which states: “..the compulsory return of the child depends in terms of the Convention on a decision having been taken by the competent authorities of the requested State”.

[4] Cf. the ECJ's correct statement in the Povse judgment that a "judgment on custody that does not entail the return of the child" in article 10 is to be understood as a final decision.

[5] See, on another regrettable development, Mr J.H.A. van Loon and S. De Dijcker, LL.M., The role of the International Court of Justice in the Development of Private International Law, Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht, No. 140, 2013, p. 109-110.

Cuniberti on the New Provision of the Unidroit Principles on Contracts Infringing Mandatory Rules

I (University of Luxembourg) have posted A Critical Appraisal of Article 3.3.1 of the PICC on Contracts Infringing Mandatory Rules (*Le Nouvel Article 3.3.1 Des Principes Unidroit 2010 Sur Le Contrat Violant Une Règle Impérative: Un Regard Critique Du Point De Vue Du Droit International Privé*) on SSRN. The English abstract reads:

> *The 2010 UNIDROIT Principles of International Commercial Contracts include several new provisions on illegality. This paper offers a critical appraisal of one of them, Article 3.3.1 on Contracts Infringing Mandatory Rules. First, the paper wonders the extent to which applicable mandatory rules will tolerate the attempt of Article 3.3.1 to regulate their application. The paper then focuses on the distinction between effects of the infringement upon the contract expressly prescribed by the applicable mandatory rule and effects non expressly prescribed. It argues that, while the distinction makes sense in the context of the American Restatement (Second) on Contracts, which inspired the drafters, it does not in the context of a private instrument which will essentially be used by arbitrators to decide particular disputes. Finally, the paper discusses the*

relevance of the distinction between effects of the infringement of a mandatory rule upon the contract and the right to exercise remedies under the contract.

Note: Downloadable document is in French.

The paper is forthcoming in the *Uniform Law Review*.

Fourth Issue of 2013's ICLQ

The fourth issue of *International and Comparative Law Quarterly* for 2013 includes several pieces on private international law.

Simon Camilleri, Recast 12 of the Recast Regulation: a New Hope?

This article seeks to consider the EU's new approach to arbitration as set out in Recital 12 of the Brussels I Regulation (Recast). The article first considers the Court of Justice of the European Union's West Tankers decision and the foremost English authority applying that case (The Wadi Sudr) in order to provide some background to the problem which gave rise to Recital 12. Following this, the article goes on to consider whether Recital 12 does in fact act as a solution to the problem created by the West Tankers decision.

Justine Pila, The European Patent: an Old and Vexing Problem.

In December 2012, the European Parliament supported the creation of a European patent with unitary effect. For the next year at least, the international patent community will be on the edge of its proverbial seat, waiting to see whether the proposal becomes a reality. If it does, it will be a significant event in both the long and rich history of patent law, and in the equally rich and understudied history of attempts to create a European patent system. In this article I consider the three post-war European patent initiatives of the most direct and enduring relevance in that regard with a view to answering the following questions. First, what drove them? Second, what issues confronted

them? And third, how were those issues resolved and with what ultimate effect? In the concluding section I relate the discussion back to the present by offering some remarks on the current European patent proposal in light of the same.

Csongor István Nagy, The Application Ratione Temporis of the Insolvency Regulation in the New Member States.

Third Issue of 2013´s Belgian PIL E-Journal

The third issue of the Belgian bilingual (French/Dutch) e-journal on private international law *Tijdschrift@ipr.be / Revue@dipr.be* is out. It does not contain any articles, only case law.