Lex Mercatoria, International Arbitration and Independent Guarantees

What is the relationship among the new *lex mercatoria*, international commercial arbitration, and independent contract guarantees?. Under the title "*Lex Mercatoria*, International Arbitration and Independent Guarantees: Transnational Law and How Nation States Lost the Monopoly of Legitimate Enforcement", a recently published essay by Cristian Gimenez Corte analyses how these elements interact; whether their interaction may have led to the establishment of a new, truly autonomous, transnational legal system; and, if it does, whether and how the transnational legal system is related to, and impacts on, national legal systems. Accordingly, the essay does not seek to provide an in-depth analysis of the nature of each of these legal institutions separately; it rather studies the relations among them, and the outcome of these relations.

Let's start with the relationship between the new *lex mercatoria* and international commercial arbitration. An international contract may be governed solely on the basis of the transnational *lex mercatoria*, without reference to any national law. However, if a dispute arises, one of the parties may bring a claim before a national court, and then national law will necessarily come into play. The parties to an international contract may still, nonetheless, circumvent the jurisdiction of national courts, which are the constitutional organs of the state with the power to adjudicate legal disputes, and refer their dispute to arbitration. This interplay between the substantive *lex mercatoria* and international commercial arbitration as a dispute settlement mechanism has been seen as establishing an 'autonomous' legal system, independent from national legal systems.

Yet, if the arbitral award is not executed voluntarily, the wining party will have to request the assistance of a national court, and of national law, to *enforce* the arbitral award. Thus, at the end of the day, the transnational legal system would not be entirely autonomous; it would depend upon national law, because at the moment of truth, legitimate enforcement remains a monopoly of the governments of nation states.

At this point, independent contract guarantees enter into play. Parties to an international contract may choose the new *lex mercatoria* as the substantive law of the contract; they may also incorporate an arbitration clause; and, finally, they may agree on an independent contract guarantee as a warrant for the execution of the award. In accordance with the terms and conditions of the independent contract guarantee, the guarantor will pay the winner of the arbitration upon demand, accompanied by the award. Hence, the arbitral award will be enforced without the intervention of any national court.

As seen, the *classical* theory of the *lex mercatoria* as an autonomous system of law finds its own limits at the enforcement stage. The incorporation of independent contract guarantees, however, allows that limit to be exceeded by providing the *lex mercatoria* with its own means of enforcement, thus establishing a truly autonomous and transnational system of law.

In this scenario, the transnational legal system is composed of substantive transnational customary law, which is implemented by private arbitrators, who may even enforce their own decisions without support from national courts. Hence, there is no participation or control by the constitutional organs of national states over the production, adjudication, or even enforcement of transnational law. This situation should necessarily lead to the question of the formal validity and the legitimacy of transnational law—that is, how and on whose behalf this 'law' is invoked and applied.

As said, these arguments are developed in depth in an article published in the *Transnational Legal Theory* journal, which further examines whether and how national law 'validates' transnational law, by analysing the interplay and linkages between them. As a conclusion, the study briefly addresses the issue of the legitimacy of the transnational legal system.

Source: Transnational Legal Theory, Volume 3, Number 4, 2012, pp. 345-370. Click here to access. Also available at SSRN.

Rolph on Australia as a Destination for 'Libel Tourism'

David Rolph (University of Sydney Law School) has posted Splendid Isolation? Australia as a Destination for 'Libel Tourism' on SSRN.

> *The phenomenon of 'libel tourism' has caused tension between the United States and the United Kingdom. The issue highlights the differences between American and English defamation laws and conflict of laws rules. Both in the United States and the United Kingdom, there has been legislation proposed or enacted to address the real or perceived problem of 'libel tourism'. This article analyses 'libel tourism' and the responses to it in both countries. Given that Australia's defamation laws and conflict of laws rules are arguably more restrictive than those of the United Kingdom, this article examines the prospect of Australia becoming an attractive destination for 'libel tourism'.*

The paper was published in the *Australian International Law Journal* in 2012.

Brand on Implementing the 2005 Hague Convention

Ronald A. Brand (University of Pittsburgh School of Law) has posted Implementing the 2005 Hague Convention: The EU Magnet and the US Centrifuge on SSRN.

> *Competence for the development of rules of private international law has become more-and-more centralized in the European Union, while remaining diffused in the United States. Nowhere has this divergence of process in private international law development been clearer than in the approach each has so far taken to the ratification and implementation of the 2005 Hague Convention on Choice of Court Agreements. In Europe, ratification has been preceded by*

the 2012 Recast of the Brussels I Regulation, coordinating internal and external developments, and reaffirming Union competence for future developments, both internally and externally. In the United States, debate has arisen over whether the Convention should be implemented in a single federal statute – as was done for the New York Convention in the Federal Arbitration Act – or through state-by-state enactment of a Uniform Act promulgated by the National Conference of Commissioners on Uniform State Laws. These differences in approach are important to future negotiations in multilateral fora such as The Hague Conference on Private International law, UNCITRAL, and UNIDROIT. They demonstrate a coherence of approach within the EU which attracts not only its own Member States, but also external constituencies in international negotiations, and diffuse development of the law in the United States, which tends to make leadership in multilateral negotiations difficult.

The paper is forthcoming in the *Liber Amicorum Alegrias Borras*.

TDM Special Issue: "Reform of Investor-State Dispute Settlement: In Search of A Roadmap."

Investor-State Arbitration has become a salient feature of international dispute settlement, but its continued vitality is not beyond reproach. I myself have waded into the debate with an article published this month in the ICSID Review. Furthering this dialogue, TDM is pleased to announce a forthcoming TDM special issue: "Reform of Investor-State Dispute Settlement: In Search of A Roadmap."

Co-edited by Jean E. Kalicki (Arnold & Porter LLP and Georgetown University Law Center) and Anna Joubin-Bret (Cabinet Joubin-Bret and World Trade Institute), this special issue will explore recent calls for reform of the investor-State dispute settlement system, along with the viability of five "reform paths" recently proposed for discussion by UNCTAD, the United Nations Conference on

Trade and Development (see UNCTAD IIA Issues Note, “Reform of Investor-State Dispute Settlement: In Search of a Roadmap,” 29-30 May 2013).

You can find an extensive call for papers on the TDM website.

Publication is expected in October or November 2013. Proposals for papers (e.g., abstracts) should be submitted to the editors by 15 September 2013. Contact info is available on the TDM website.

Low on the Psychology of Choice of Laws

Gary Low (Singapore Management University School of Law) has posted A Psychology of Choice of Laws on SSRN.

> *There is certainly a lot of choice going around in the market for contract law. This is a good thing, since choice is key to self-determination and may help improve our laws. Yet there may be such a thing as choice overload, and the introduction of the Common European Sales law is a timely reminder to consider its and effect for the market for contract law. This article does just that. It explains what choice overload is, why it comes about, and what can be done to ameliorate its effects. The conclusion is that CESL will not cause choice overload but will not help in that respect either. Given the prospect of overload, this article evaluates the possible solutions to the problem, and advances the argument in favour of categorizing laws in order to help decision-makers to choose prudently.*

The paper was published in the *European Business Law Review* in 2012.

Third Issue of 2013's ICLQ

The third issue of *International and Comparative Law Quarterly* for 2013 includes one short article by Cameron Sim on *Choice of Law and Anti-Suit Injunctions: Relocating Comity.*

English private international law generally gives a potential role, where appropriate, to foreign law, by allowing for the application of choice of law rules to determine its relevance. Yet in the context of anti-suit injunctions granted otherwise than in aid of a contractual right not to be sued, choice of law is conspicuously absent. In those cases, courts simply apply the lex fori without paying any regard to foreign law, although the notion of comity is taken into account in the final decision on whether to grant anti-suit relief. Clearer identification of the grounds for granting such relief should limit application of the lex fori to instances where the anti-suit injunction serves as a form of ancillary relief to protect the judicial processes of the forum, and in which comity plays no role. In all other cases, which ultimately concern private justice between the parties, comity is best understood as an expression of justice in cases involving foreign elements, and better reflected through choice of law rules, which might lead to the application of foreign law. This approach is preferable to invoking comity as a consideration relating to the manner in which the court regulates the grant of anti-suit relief, because courts tend to bestow rights, which parties may not otherwise have, under the cloak of comity. Understanding comity as the catalyst for taking account of foreign law assuages concerns about interfering with foreign courts, acts as a deterrent to remedy shopping, and provides greater certainty as regards the vindication of rights. The case for widening the application of choice of law in this context does not depend on Rome II, but if the principle is accepted, courts must follow the process which it specifies.

Brand on the New Hague Judgments Project

Ronald A. Brand (University of Pittsburgh School of Law) has posted Jurisdictional Developments and the New Hague Judgments Project on SSRN.

> *A Working Group of the Hague Conference on Private International Law is revisiting possible multilateral rules on the recognition of foreign judgments. This was the subject of broader negotiations on jurisdiction and judgments that ran from 1992 until 2005, concluding in the Hague Convention on Choice of Court Agreements. Any effort to coordinate judgments recognition rules necessarily requires consideration of the jurisdictional bases of authority of the court from which a judgment originates. Problems of coordination are exacerbated because differences in existing jurisdictional bases are colored by: (1) basic differences between civil law and common law approaches to judicial analysis, (2) differences in the extent to which jurisdiction is a constitutional matter, and (3) differences in focus on the interests of plaintiffs and defendants. Recent developments in both the United States and the European Union have both highlighted existing differences in approaches to adjudicative jurisdiction, and demonstrated some areas in which there may be greater hope for common ground. While rules on general jurisdiction may be moving closer together, rules on specific jurisdiction seem to be suffering greater divergence. Any new multilateral efforts will also have to take into account the impact on parallel efforts to obtain ratifications of the Choice of Court Convention. While there are jurisdictional bases on which agreement should not be difficult in a new judgments project, those are probably the bases for which recognition and enforcement abroad will be least valuable to the judgment creditor.*

The paper is forthcoming in *A Commitment to Private International Law – Essays in Honor of Hans Van Loon*.

Hague Conference Seeks to Recruit Senior Legal Officer

The Permanent Bureau of the Hague Conference on Private International Law is seeking a

Senior / Principal Legal Officer (full-time)

to carry out work in the fields of international procedural law and commercial law, in particular as regards the Choice of Court Convention, the Choice of Law in International Contracts, and the Judgments Project, as well as such other work as may be required by the Secretary General from time to time, including in the field of legal co-operation.

Duties will include promotion of the instruments mentioned, comparative research, preparation of research papers and other documentation, assistance in the preparation of and participation in conferences, seminars and training programmesthe provision of support services.

The successful applicant will possess the following qualifications:

– Law school education in private law, preferably at the post-graduate level, including private international law (conflict of laws) and international procedural law (jurisdiction, recognition and enforcement of judgments, legal and administrative co-operation), familiarity with comparative law (substantive and procedural law).

– Excellent drafting capabilities (e.g. LL.M. dissertation or doctoral thesis, law review or other publications).

– Seven to ten years experience in private practice, public service or academia.

– Excellent command, preferably as a native language (both spoken and written), of at least one of the working languages of the Hague Conference (i.e., French and English), with good command of the other; knowledge of other languages an asset.

Type of appointment and duration: two-year contract, possibly renewable.

Starting date: October/November 2013.

Grade (Co-ordinated Organisations scale): A2/1 subject to relevant experience.

Deadline for applications: 23 August 2013.

Applications should be made by e-mail, with Curriculum Vitae, letter of motivation and at least two references, to be addressed to the Secretary General, at: secretariat@hcch.net

H/T: Pietro Franzina

Volumes 357, 359 and 360 of Courses of the Hague Academy

Volumes 357, 359, and 360 of the Collected Courses of the Hague Academy of International Law were just published.

- Volume 357
  - J. Dugard, The Secession of States and Their Recognition in the wake of Kosovo
  - L. Gannagé, Les méthodes du droit international privé à l'épreuve des conflits de cultures
- Volume 359
  - D. Opertti Badán, Conflit de lois et droit uniforme dans le droit international privé contemporain: dilemme ou convergence? (conférence inaugurale)
  - Chen Weizuo, La nouvelle codification du droit international privé chinois
  - Christian Kohler, L'autonomie de la volonté en droit international privé: un principe universel entre libéralisme et étatisme
- Volume 360
  - Jürgen Basedow, The Law of Open Societies — Private Ordering

and Public Regulation of International Relations. General Course on Private International Law

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The Kiobel Judgment of the US Supreme Court and the Future of Human Rights Litigation – Seminar at the MPI Luxembourg

On July 4th, 2013, the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law invited experts from the USA and Europe to a colloquium to discuss the consequences of the US Supreme Court's decision in the proceedings *Kiobel v. Royal Dutch Shell Petroleum Co.* The seminar aimed at a broad perspective: Subject of the discussion were the consequences of the judgment with regard to public international law, procedural law and private international law – from the viewpoint of Europe and the United States respectively.

Dr. *Clemens Feinäugle* (MPI Luxembourg) started by presenting how the reasoning of the judgment relates to the general principles of jurisdiction in public international law. He emphasized that *Kiobel* can hardly be qualified as a suitable leading case as far as the limits of exercising state jurisdiction in the international context are concerned. In this regard, the judgment (or at least the reasoning of the majority) follows too strictly the decision in *Morrison v. National Australia Bank, Ltd.* on presumption against territoriality which, on its part, is strongly oriented at the prerequisites of US constitutional law. In terms of legal policy, the US Supreme Court passed the buck to the Congress: If US courts were to adjudicate substantially human rights claims against civil actors, this should be authorized by the Congress – just as it had done it in 1997 in the *Torture Victims Protection Act* (in a rather questionable manner). The fact that *Kiobel* is to be read primarily from the viewpoint of the domestic discussion within the US on the

role of International Law as "federal common law" was made clear by Prof. *David Steward* (Georgetown University Law Center). He presented the *Alien Tort Claims Act* (ATCA) in the context of the longstanding discussion on the legal role of international treaties, particularly the question of whether the constitutional separation of powers limits the authority of the federal state with regard to foreign affairs. A further perspective was taken by the following presentations: Prof. *Horatia Muir Watt* brought up the question of the regulatory approach of the US Supreme Court and criticized the unclear notion of "extraterritoriality" in the *Kiobel* judgment. Prof. *Patrick Kinsch* (Luxembourg), on the other hand, noted from an international private and procedural law perspective that the ATCA can hardly be qualified as a suitable and effective instrument for the domestic implementation of international human rights protection: The Act regulates only the subject matter jurisdiction of US federal courts as opposed to state courts rather than the international jurisdiction (personal jurisdiction). From this observation Prof. *Kinsch* derived the forecast that future human rights claims in the USA would be brought increasingly before state courts.

In the second part of the seminar, a round table chaired by Professor B. Hess raised the issue of the practical consequences of the *Kiobel* judgment. Prof. *Jägers* (Tilburg) started with presenting the Dutch parallel judgment to *Kiobel*. On January 30th, 2013, The Hague District Court rejected a damage claim brought by Nigerian victims against Shell as a parent company but upheld the action against the subsidiary. The Dutch court based its judgment on Nigerian tort law – the claim against the parent company was dismissed for lack of evidence. Nevertheless, *Jäger* pointed out the general readiness of Dutch courts to deal with such disputes. Prof. *Catherine Kessedjian* (Paris) referred to the Sofia Declaration of ILA on International Civil Litigation and the Public Interest. It also stipulates the jurisdiction of the courts at the seat of the defendant company – particularly when no effective judicial protection can be obtained at the place of the human rights violations. Dr. *Anke Sessler*, Siemens AG, München, described from the perspective of an internationally operating company that a lawsuit in the USA is connected with substantial workload, time consumption and costs and at the same time is characterized by structural advantages for the plaintiff. Prof. *Trey Childress* (Pepperdine University) reported on the practical consequences of the *Kiobel* judgment: Overall, the last decade was marked by the increasingly restrictive attitude of US courts towards F-cubed litigation. US federal courts have strengthened the requirements with regard to pleading, general jurisdiction,

class certification – also discovery has its limits. *Kiobel*, in particular, has already had a sustainable impact on the 25 currently pending ATCA lawsuits in the USA. Six of them have already been rejected, only one is still admissible: it concerns the bomb attack at the US embassy in Nairobi. In this case, the Federal Court affirmed the prevailing interest of the USA in continuing the proceedings. All things considered, *Childress* could hardly see increasing chances for ATCA claims in the US. This, however, does not mark the end of human rights litigation – the plaintiffs are rather expected to resort to alternative grounds in order to support their claim (such as federal common law or the respective conflict of law rules of the states). This would naturally lead to different defense strategies on the part of the respondent, e.g. removal from state to federal courts and invoking the *forum non conveniens* objection which some federal courts have granted even before examining the personal jurisdiction.

Two rounds of discussions elaborated on and expanded the arguments of the speakers. It became clear that human rights litigation remains a controversial subject. Some discussants assessed *Kiobel* – in line with the judgment of the ICJ in *Germany v. Italy, Greece Intervening* from February 3rd, 2012 – as a "missed opportunity", whereas others welcomed the decision as a politically balanced reflection of the stand of current legal developments. The lively discussion showed that the research profile of the MPI Luxembourg, combining public international law, international litigation and questions of transnational regulation, can give a strong impetus towards understanding important issues of legal policy.