Strong on Discovery under 28 USC 1782

Stacie Strong (University of Missouri School of Law) has posted Discovery Under 28 U.S.C. §1782: Distinguishing International Commercial Arbitration and International Investment Arbitration on SSRN.

> *For many years, courts, commentators and counsel agreed that 28 U.S.C. §1782 – a somewhat extraordinary procedural device that allows U.S. courts to order discovery in the United States "for use in a proceeding in a foreign or international tribunal" – did not apply to disputes involving international arbitration. However, that presumption has come under challenge in recent years, particularly in the realm of investment arbitration, where the Chevron-Ecuador dispute has made Section 1782 requests a commonplace procedure. This Article takes a rigorous look at both the history and the future of Section 1782 in international arbitration, taking care to distinguish between requests made in the context of international commercial arbitration and requests made in the context of international investment arbitration. In so doing, the Article considers issues relating to grants of jurisdiction, state interests and standard interpretive canons.*

The paper is forthcoming in the *Stanford J. of Complex Litigation.*

Second Issue of 2013's Journal du Droit International

The second issue of French *Journal du droit international* (*Clunet*) for 2013 was just released. It contains articles addressing issues of public international law only. The table of contents is available here.

2013 Summer Seminar in Urbino

The Faculty of Law of the University of Urbino will host this summer its 55th Seminar of European Law.

Many of the courses taught over the two weeks of the seminar (19-31 August 2013) will deal with conflict issues. Although courses can be taught in English, this is a franco-italian seminar where courses are typically taught in French or Italian, with a translation in the other language.

Speakers are leading academics and practitioners, including Professors Bertrand Ancel, Tito Ballarino, Luigi Mari and Cyril Nourissat.

The full programme can be found here.

Three New Papers of Professor Veerle Van Den Eeckhout

Professor Veerle Van Den Eeckhout , who teaches private international law at the Universities of Antwerp and of Leiden, has just published three new papers on SSRN.

The first one is entitled “The Instrumentalisation of Private International Law: Quo Vadis? Rethinking the “Neutrality” of Private International Law in an Era of Globalisation and Europeanisation of Private International Law”. The abstract reads as follows:

> Private International Law is known as a very abstract, legal-technical and inaccessible discipline. Yet it is striking that PIL issues are conspicuously often interwoven with a number of heated, topical socio-legal debates, see for

example 1) the debate on transnational corporate social responsibility, 2) the debate on posting of employees from Eastern to Western Europe, 3) the debate on residency and social-security entitlements of foreigners based on family relationships. Although at first glance the role of PIL in discussions about how these subjects should be regulated may seem rather modest, on further consideration it turns out to be crucial how the PIL questions that can be recognised are (or are not) identified and addressed. PIL is a "silent force". If one looks closer, it is clear that PIL often even functions as a hinge between legal branches in these debates – e.g. between migration law and family law. But scholars – both PIL-lawyers and lawyers from other disciplines – have, so far, essentially left unexplored the PIL-issues of these debates.

Meanwhile, recent developments show that PIL is, occasionally, "instrumentalised" in a policy-related way, both by European and national authorities. There are, for example, tendencies on a Dutch national level to make PIL subservient to migration policy, ultimately transforming PIL into an instrument of restrictive migration policy. PIL could, thus, function as the "Achilles heel" of the legal protection of migrants. In several areas, there is pressure on PIL "from outside". The question arises how the phenomenon of instrumentalisation of PIL – in its various forms – must be valued from the perspective of PIL: the PIL of European countries has of old been set up as a neutral reference system; the classical PIL paradigm implies that, independent of any legal political consideration or policy objective, the law applied to an international relationship is the law most closely connected to that legal relationship. Recognition of ongoing dynamical developments in the sense of instrumentalisation of PIL c.q. attempts to instrumentalise PIL thus raises a number of fundamental questions in respect of essential characteristics of PIL and the interaction of PIL with other branches of law: an analysis of the "instrumentalisation" of PIL requires a) research into the foundations of PIL b) as well as research into PIL's "hinge-function". Both where it concerns situations governed by European PIL rules and where it concerns situations that are not (yet) governed by European PIL rules, the question arises what position PIL should take in the forces at play and to what extent PIL can or should still adopt a "neutral" position. Could PIL be modelled, for example, into an instrument in the fight against international environment pollution, or into an instrument to guarantee labour protection?

In this project, all three above-mentioned debates will be analysed as "case-studies". The project thus includes several broad and complex themes, all of them with major international relevance and national relevance for each of the EU-countries, in a context of globalisation, in order to make it possible to come to a general, over-all view: the overall ambition of the project is to arrive – through the thorough analysis of these cases and the exploration of future scenarios for each of them – at more synthetic insights on a) the essential characteristics of PIL itself and b) the characteristics of PIL in its hinge-function, in interaction with other disciplines. There is at present a very great need for a further and thorough study of each of the case studies as such, but as the case-studies have been well-selected, it will ultimately be possible to achieve a theoretical model and a typology.

Click here to download.

Two other, shorter papers entitled "The Role of Private International Law in Achieving Social Justice" and "New Possibilities for Argumentation in International Labour Law and Corporate Liability Coming Up?", can be downloaded clicking here and here.

The Max Planck Institute Luxembourg has been inaugurated

It is my great pleasure to announce that the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law has been officially inaugurated. The Opening Ceremony took place on Wednesday in Luxembourg in the presence of the Grand Duke Henri, the Luxembourgian Prime Minister Jean-Claude Juncker, the Minister for Higher Education and Research of Luxembourg, the German Ambassador, the State Secretary at the Federal Ministry of Education and Research, Germany, and the President of the Max Planck Society. The event was attended by more than 150 prominent persons from the ECJ, the

Luxembourgian University and the academia of different countries. The following authorities addressed their Opening Remarks :

- Professor Peter Gruss, President of the Max Planck Society
- Ms Martine Hansen, Minister for Higher Education and Research, Luxembourg
- Ms Cornelia Quennet-Thielen, State Secretary at the Federal Ministry of Education and Research, Germany
- Professor Rolf Tarrach, President of the University of Luxembourg
- Ms Viviane Reding, Vice-President of the European Commission and Commissioner for Justice, Fundamental Rights and Citizenship (by means of a video message).

After these Welcome speeches, the Institute was presented by Professor Wolfgang Schön, Vice-President of the Max Planck Society, and by the Executive Director of the Institute, Professor Burkhard Hess.

The Opening Ceremony was preceded by an Opening Symposium on "Dispute Resolution and Law Enforcement in the Financial Crisis", held on Tuesday with the participation of Professor Eddy Wymeersch (University of Ghent), Professor David Skeel (University of Pennsylvania), Professor Stefania Bariatti (University of Milan) and Professor Paolo Giudici (Free University of Bozen-Bolzano), as well as Professor Burkhard Hess (Executive Director of the Institute) and Professors Verica Trstenjak and Marco Ventoruzzo (External Scientific Members of the Institute).

The MPI Luxembourg has the ambition to promote research at the highest international standard. Its activity in this regard has already commenced and will go on with a carefully designed programme of lectures and seminars announced at the website of the Institute (www.mpi.lu). The Library, *noyau dur* of the Institute already established in the fall of 2012 is already open to researchers from other academic institutions.

All the best to the new Institute.

Ancel, Marion and Wynaendts on One Sided Jurisdiction Clauses

Marie Elodie Ancel (Université Paris Est), Lea Marion and Laurence Wynaendts (Clifford Chance Paris) have posted Reflections on One-Sided Jurisdiction Clauses in International Litigation (About the Rothschild Decision, French Cour de Cassation, 26 September 2012) on SSRN. It is the English version of a paper published in a French law journal.

> *By criticising the "potestative nature" of one-sided jurisdiction clauses, the Rothschild decision may be construed as imposing on litigants perfect equality in their access to justice. This decision therefore threatens many of our jurisdiction clauses. In fact, if clauses that give one party unfettered discretion to choose where to sue have to be set aside, the other type of one-sided jurisdiction clauses, those that are simply dissociative, should be upheld as long as they do not substantially disadvantage one of the parties.*

Ontario Court Refuses to Hear Chevron/Ecuador Enforcement Action

As many of you know, in 2011 several residents of Ecuador won a judgment in the courts of that country against Chevron Corporation for some $18 billion. In 2012 the successful plaintiffs sued Chevron Corporation and Chevron Canada Ltd. in Ontario, seeking to have the Ecuadorian judgment enforced there. The defendants brought a motion challenging the Ontario court's jurisdiction to hear

the action. The Ontario Superior Court of Justice has now released its decision, siding with the defendants. The decision has not yet been posted on CanLII but is available here. The plaintiffs' lawyer has publicly indicated that his clients will appeal.

Key aspects of the decision have been summarized by Roger Alford on the Opinio Juris website (here).

Articles on the SCC's Van Breda v Club Resorts

Things have been pretty quiet on the conflict of laws front in Canada over the past several months. But lower courts and academics have been working to understand the new framework for taking jurisdiction set out in April 2012 by the Supreme Court of Canada in *Van Breda v Club Resorts* (available here).

Several useful articles have now been written about this decision:

Tanya Monestier, "(Still) a 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2013) 36 Fordham International Law Journal 396

Vaughan Black, "Simplifying Court Jurisdiction in Canada" (2012) 8 Journal of Private International Law 411

Joost Blom, "New Ground Rules for Jurisdictional Disputes: The *Van Breda* Quartet" (2012) 53 Canadian Business Law Journal 1

Brandon Kain, Elder Marques & Byron Shaw, "Developments in Private International Law: The 2011-12 Term – The Unfinished Project of the *Van Breda* Trilogy" (2012) 59 Supreme Court Law Review (2d) 277

In addition, two reference works contain discussion and analysis of the case:

Walker, *Castel & Walker: Canadian Conflict of Laws*, 6th ed looseleaf (Markham, ON: LexisNexis Butterworths, 2005–) and Black, Pitel & Sobkin, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act.* The former is a looseleaf and the most recent releases discuss the case in detail. The latter is a text which was published after the case was decided.

New French Book on European Divorce Law

A commentary of European private international law instruments applicable in divorce proceedings was just published by the University of Burgundy (CREDIMI) under the supervision of Professor Sabine Corneloup.

> *There are approximately a million divorces in the European Union each year, of which 140 000 have an 'international' element. 13% of European couples are bi-national and the trend is increasing, due especially to the freedoms of movement. The European Union has adopted two regulations in the area of divorce which are meant to simplify the life of EU citizens: regulation n° 2201/2003 « Brussels II bis » and regulation n° 1259/2010 « Rome III ». The scope of application of these rules on private international law covers not only 'European spouses', but also Third States nationals if at least one of the spouses has his/her habitual residence within a Member State. As the national divorce laws of the Member States have not been harmonized, considerable differences are remaining not only regarding the substantial but also the procedural aspects of divorce. There is not even a consensus on the very concept of marriage, as shows the current debate on same-sex marriage. In such a context of major differences between the national divorce laws of the Member States, the EU regulations on Private international law have a fundamental role to play.*
>
> *The book is conceived as a commentary, article by article, of the regulations Brussels II bis and Rome III. It is written in French or in English, according to the authors. A comprehensive analysis of comparative law precedes the*

commentary itself, in order to provide practitioners with the necessary information to deal with an international divorce. The national divorce laws of six Member States are presented: Germany, Belgium, France, Spain, Italy and Portugal. The book concludes with transversal thoughts on the most important issues the European Divorce Law is currently facing.

With the contributions of :

Alegría Borrás, Hubert Bosse-Platière, Maria Novella Bugetti, Christelle Chalas, Sabine Corneloup, Alain Devers, Christina Eberl-Borges, Marc Fallon, Aude Fiorini, Estelle Gallant, Cristina González Beilfuss, Urs Peter Gruber, Petra Hammje, Rainer Hausmann, Natalie Joubert, Marco Jung, Paul Lagarde, Elena Lauroba Lacasa, François Leborgne, Yves-Henri Leleu, Luís de Lima Pinheiro, Eric Loquin, Alberto Malatesta, Françoise Monéger, Horatia Muir Watt, Valérie Parisot, Carlo Rimini, Thomas Simons, Miguel Teixeira de Sousa.

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More information is available here.

ADR and ODR for (Cross-Border) Consumer Contracts

On 22 April 2013 Council of the European Union adopted a Directive on Alternative Dispute Resolution (ADR) and a Regulation on Online Dispute Resolution (ODR) for (cross-border) consumer contracts. Building on two proposals of the European Commission of November 2011 the two instruments are meant to improve the cross-border enforcement of consumer rights. The official press release reads as follows (footnotes omitted):

> *The Council today adopted a directive on Alternative Dispute Resolution (ADR) and a regulation on Online Dispute Resolution (ODR) (PE-CO□S 79/12 and PE-CO□S 80/12). The new system, which is part of the "Single Market Act" package, will provide for simple, fast and low-cost out-of-court settlement procedures designed to resolve disputes between consumers and traders arising from the sales of goods and services. It will ensure the establishment of ADR schemes where none exist today. These will fill current gaps in coverage and ensure that consumers are able to take their disputes to an ADR. In addition, it establishes a common framework for ADR in the EU member states by setting out common minimum quality principles in order to ensure that all ADR entities are impartial, transparent and efficient. Existing national ADR schemes should be able to continue to operate within the new framework. The ADR system will be supplemented by an ODR mechanism involving the setting up of a European online dispute resolution platform (this will be an interactive website free of charge in all languages of the Union2).*
>
> *As a general rule, the outcome of an ADR procedure should be made available within a period of three months from the date on which the ADR entity has received the complaint file. ADR schemes, also known as "out-of-court mechanisms", already exist in many countries to help consumers involved in disputes which they have been unable to resolve directly with the trader. They have been developed differently across the EU and the status of the decisions adopted by these bodies differs greatly. The new directive will apply to*

domestic and cross-border disputes submitted by consumers against traders in almost all areas of commercial activity across the EU, including to online transactions, which is particularly important when consumers shop across borders. Member states will have two years to incorporate the new provisions into their national legislation.