

# Cuniberti on Lex Mercatoria

I (University of Luxembourg) have posted Three Theories of *Lex Mercatoria* on SSRN.

*One of the most remarkable developments in international commercial law over the last fifty years has been the gradual acceptance of the existence of a new merchant 'law', or lex mercatoria, spontaneously generated by the international community in the shadow of national legal orders. While the notion that there might be law beyond the state aroused the interest of legal scholars and theorists around the world, few wondered whether international commercial actors had a genuine interest in the development of an autonomous transnational law. This Article offers empirical evidence suggesting that commercial parties almost never opt into lex mercatoria pursuant to their freedom to contract, but instead use that freedom to select a particular national law to govern their contracts. This conclusion begs the question of whether anybody else might benefit from lex mercatoria.*

*In a groundbreaking article published in 2005, Christopher Drahozal argued that the idea had lost practical significance and offered a signaling theory of lex mercatoria: the interest in the idea can be explained by the willingness of would be arbitrators to market themselves. While essentially agreeing with Drahozal, this Article offers two other theories explaining the development of lex mercatoria. First, I argue that deciding disputes on the basis of lex mercatoria can bring important benefits to international arbitrators. If that is the case, though, their interests may conflict with that of the parties who hired them. That raises an agency problem which needs to be both acknowledged and addressed. Secondly, I demonstrate how lex mercatoria can also benefit organizations which are involved in the business of producing model contracts and maintain that the active promotion of the use of non-state law – thereby side-stepping mandatory rules of national law – is intended to reduce the costs of producing international model contracts by such organizations.*

The article is forthcoming in the *Columbia Journal of Transnational Law*.

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# Nehne on Methodology and Principles of European Private International Law

Timo Nehne, University of Cologne, has written a new book on methodology and general principles of European Private International Law (*Methodik und allgemeine Lehren des europäischen Internationalen Privatrechts*. Tübingen, Mohr Siebeck 2012). The author has kindly provided us with the following summary:

*The Private International Law regulations adopted by the European Union so far stipulate issues of methodology and “general principles” in fragments only. The dissertation “Methodik und allgemeine Lehren des europäischen Internationalen Privatrechts” (Methodology and General Principles of European Private International Law) focuses on their examination. The book encompasses six chapters. In chapter 1, the conceptual and methodological basis for the work is established. After the definition of the term “European Private International Law” and a short description of its history (§ 1), the introduction of a uniform terminology for this field of law is discussed (§ 2). Afterwards, dogmatic fundamental questions for the construction of European Union Private International Law (EU PIL) and for filling its gaps are scrutinised (§ 3). On that basis, methodic proposals of how to interpret EU PIL (§ 4) and how to close existing gaps (§ 5) are developed. Beside the creation of homogeneous Latin technical terms, both of these techniques are applied in chapters 2 to 5 to work out further methods for the handling of European conflict of laws and to fathom its principles. In doing so, the dissertation follows the path of application of EU PIL regulations. Thus, chapter 2 deals with the scope of European Private International Law (§ 1) and its relationship with national law, EU law as well as international conventions (§ 2). Subsequently, subjects concerning the legal category of a European choice of law rule are investigated (chapter 3) namely characterization (§ 1) and the solving of preliminary questions (§ 2). After having identified the applicable legal category, a European legal practitioner*

*will be faced with a specific connecting factor. What kind of connecting factors EU PIL provides, is depicted in chapter 4. After an introducing summary (§ 1) it broaches the issues of party autonomy (§ 2) and “objective” connecting factors (§ 3). In any case, the connecting factor of a EU choice of law rule leads to the legal system governing the case at hand. In this respect, European conflict of laws follows the principle of exclusion of renvoi (chapter 5 § 1) which gives rise to the question whether it allows exceptions (§ 2). A further problem consists in the handling of the applicable law of states with more than one legal system (§ 3). Finally, chapter 6 compiles the results of the preceding chapters (§ 1) and closes with a suggestion which rules a Rome I Regulation or a EU PIL code should comprehend at least (§ 2).*

Further information is available on the publisher's website.

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# **Keitner on Human Rights Enforcement through Transnational Litigation**

Chimene Keitner (UC Hastings College of Law) has posted Transnational Litigation: Jurisdiction and Immunities on SSRN.

*Through transnational litigation, national courts enforce human rights norms “horizontally.” Jurisdictional doctrines and immunity principles both shape the permissible contours of horizontal enforcement. Conflicts may arise between the principles of state sovereignty and non-interference, on the one hand, and the goals of promoting accountability and providing remedies for victims, on the other. This chapter in the forthcoming Oxford Handbook of Human Rights explores the bases for asserting jurisdiction in human rights cases and focuses on the development, and limits, of foreign official immunity and foreign state immunity. It also discusses claims against non-state actors including private corporations for committing or assisting human rights violations. While the*

*horizontal enforcement of human rights norms by national courts carries the potential for both salutary and disruptive effects, national courts remain important developers and enforcers of international human rights law.*

*The pre-publication text of this chapter will be available on SSRN while the Oxford Handbook of Human Rights is still in production.*

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# Deinert on International Labor Law

Olaf Deinert, Professor at the Georg-August-University Göttingen, has written a book on (German and European) international labor law (*Internationales Arbeitsrecht. Deutsches und europäisches Arbeitskollisionsrecht*, Tübingen, Mohr Siebeck 2013). The official summary reads as follows:

*Olaf Deinert studies all the issues pertaining to applicable law in labor law cases with a foreign element. He gives a detailed description of the conflict of law rules and, in a discussion which includes all fields of labor law, looks at the extent to which applicable law (lex causae) is superseded by overriding mandatory rules of private law and public law. He examines this from the perspective of comparative law, since this is significant for the uniform interpretation of European regulations on international labor law, illustrating as it does the problems involved and serving as an example of how to solve individual issues in the conflict of laws.*

Further information is available on the publisher's website (in German).

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# Kroll-Ludwigs on Party Autonomy in European Private International Law

Kathrin Kroll-Ludwigs, University of Bonn, has authored a book on the role of party autonomy in European Private International Law (*Die Rolle der Parteiautonomie im europäischen Kollisionsrecht*, Tübingen, Mohr Siebeck 2013). It provides a broad overview of the design of party autonomy in the law of contractual and non-contractual obligations, family and succession law. The official summary reads as follows:

*Why did the European legislator decide on a broad freedom of choice of law in the law of contractual and non-contractual obligations on the one hand and on a limited choice in family law and the law of succession on the other hand? Kathrin Kroll-Ludwigs' analysis of the reasons for this divergency leads to the very basis of party autonomy as a fundamental right of individual freedom. She suggests a change of paradigm.*

Further information is available at the publisher's website (in German).

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## Van Calster on European Private International Law

Geert Van Calster, Professor at the University of Leuven, authored a new text book on European Private International Law that has just been published: 

Geert Van Calster, *European Private International Law*, Hart Publishing 2013 (382 pages). This book is a valuable addition to the existing text books on European Private International Law. It focuses on those instruments and developments that are most important in the commercial area.

The blurb reads:

*Usable both as a student textbook and as a general introduction for legal professionals, European Private International Law is designed to reflect the reality of legal practice throughout the EU. The private international law of the Member States is increasingly regulated by the EU, making private international law ever less 'national' and ever more EU based. Consequently, EU law in this area has penetrated national law to a very high degree, making it an essential area of study and an area of increasing importance to practising lawyers throughout the EU. This book provides a thorough overview of core European PIL, including the Brussels I, Rome I and Rome II Regulations (jurisdiction, applicable law for contracts and tort), while additional chapters deal with PIL and insolvency, freedom of establishment and corporate social responsibility.*

More information is available [here](#).

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## **5th Journal of Private International Law Conference, Madrid, 12-13 Sep 2013**

Building on the very successful Journal of Private International Law conferences in Aberdeen (2005), Birmingham (2007), New York (2009), and Milan (2011) the **5th Conference of the Journal will take place in Madrid on 12-13 September 2013**. The organization of the Conference is shared by the Law Faculties of Universidad Autónoma de Madrid and Universidad Complutense. The Programme is reproduced in full below. All of the details on venue, accommodation and registration can be found on the **conference website**.

### **The Programme**

**Thursday 12<sup>th</sup> September 2013**

## **9.00 - 9.30 Registration**

## **9.30 - 10.00 Welcome session (J. Harris + local judicial or academic authorities)**

## **10.00 - 11.30 Panels**

### **Group 1 - MINORS & NAME**

|                           |                                                                                                                      |
|---------------------------|----------------------------------------------------------------------------------------------------------------------|
| CARPANETO,<br>Laura       | Few proposals on the “adaptation” of Brussels II-bis with specific reference to the rules on parental responsibility |
| FIORINI, Aude             | The Hague Child Abduction Convention and the Habitual Residence of Newborns - a Comparative Study                    |
| GONZÁLEZ<br>MARTÍN, Nuria | International Child Abduction and Mediation: Feasibility and Suitability of a Guide of Good Practice                 |
| TRIMMINGS,<br>Katarina    | Embryo transfer in international context                                                                             |
| GUZMÁN<br>ZAPATER, Mónica | The right to a name: observatory on the progress made by the EU on the continuity of civil status                    |
| Mikša, Katažyna           | New rule - old problem? The law applicable to surnames in new Polish Act on Private International Law                |

### **Group 2 - CODIFICATION**

|                                                   |                                                                                                                        |
|---------------------------------------------------|------------------------------------------------------------------------------------------------------------------------|
| FRANZINA, Pietro                                  | Codifying Private International Law - Some Thoughts on the Reasons of a Resurgent Trend                                |
| ERDÖS, Itsvan                                     | Unity or Diversity? Should there be a European Code of Private International Law?                                      |
| PAUKNEROVA,<br>Monika &<br>PFEIFFER,<br>Magdalena | New Act on Private International Law in the Czech Republic: Starting Points and Perspectives within the European Union |

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|-----------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ALMEIDA, Bruno & ARAUJO, Nadia    | Two steps forwards, one step back? Recent developments and pending challenges of PIL practice in Brazil                                                                                          |
| Deskoski, Toni & Dokovski, Vangel | Choice of court agreements in Macedonian Private International Law and in the Brussels I Regulation (and the influence of the Brussels I Regulation on the legal systems of the third countries) |

### Group 3 - TORTS - JURISDICTION

|                       |                                                                                                                                                                                                                                                                              |
|-----------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| DYRDA, Lukas          | Autonomous interpretation in European private international law – several remarks on the notion of “the place where the harmful event occurred or may occur” under the Brussels I Regulation and the new Regulation No 1215/2012 in intellectual property infringement cases |
| CORDERO, Clara Isabel | The need for an EU coordinated legislative approach on cross-border violations of privacy                                                                                                                                                                                    |
| VALLAR, Julia         | Is art. 5.3 of EC Reg. NO. 44/2001 applicable in respect of an action for a negative declaration in tort matters?                                                                                                                                                            |
| KNÖFEL, Oliver        | Taming the Leviathan – Liability of States for Sovereign Acts (Acta Iure Imperii) as a Challenge for EU Private International Law                                                                                                                                            |

### Group 4 - ARBITRATION

|                                 |                                                                                                            |
|---------------------------------|------------------------------------------------------------------------------------------------------------|
| ASON, Agnieszka                 | The Revised Brussels Regulation: A New Approach To Arbitration in the European Rulemaking                  |
| HAUBERG<br>WILHEMSEN,<br>Louise | European Perspectives on International Arbitration                                                         |
| ZACARIASIEWICZ,<br>Maciej       | Vindicating public interest through application of mandatory rules in international commercial arbitration |
| GROSSU, Manuela                 | Waving the Right to Challenge Arbitral Awards as the Outcome of Hybrid Procedures                          |

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|---------------------|---------------------------------------------------------|
| Hacibekiroglu, Ekin | Taking evidence in international commercial arbitration |
|---------------------|---------------------------------------------------------|

### **11.30 - 12.00 Coffee Break**

### **12.00 - 13.30 Panels**

#### **Group 5 - MARRIAGE & MATRIMONIAL PROPERTY**

|                  |                                                                                                                                                                     |
|------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| RAITIERI, Marco  | Citizenship as a connecting factor in private international law for family matters                                                                                  |
| SHAKARGY, Sharon | Marriage by the State or Married to the State? On Choice of Law in Marriage and Divorce                                                                             |
| QUINZA, Pablo    | The establishment of an optional common European matrimonial property regime: an alternative way for international couples.                                         |
| TORGA, Maarja    | Establishing the 'cross-border' nature of a matrimonial property dispute under the proposed EU regulation on the matrimonial property regimes                       |
| SAPOTA, Anna     | Compromise or enhanced cooperation - the possible ways to deal with EU proposal on matrimonial property regimes and property consequences of registered partnership |

#### **Group 6 - GENERAL PIL**

|                                    |                                                                  |
|------------------------------------|------------------------------------------------------------------|
| CANOR, Iris                        | The Principle of Non-Discrimination in Private International Law |
| FULLI-LEMAIRE, Samuel              | Characterisation - a problem reborn?                             |
| MAUNSBACH, Ulf                     | Justifying the exclusion of choice                               |
| HOLLOWAY, David<br>&SCHULTZ, Tomas | Comity in European PIL                                           |

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|------------------------|----------------------------------------------------------------------------------|
| SHRIVASTAVA,<br>Vishal | A Case Study on the Need for Strengthening the<br>International Court of Justice |
|------------------------|----------------------------------------------------------------------------------|

## **Group 7 - RECOGNITION AND ENFORCEMENT IN THE EU**

|                                                 |                                                                                                                                                                                                   |
|-------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| TORRALBA, Elisa &<br>RODRÍGUEZ<br>PINEAU, Elena | What's in a Judgment? Reflections on res judicata,<br>jurisdiction and ECJ's activism                                                                                                             |
| AZCÁRRAGA<br>MONZONÍS,<br>Carmen                | New Developments in the Scope of Free Movements of<br>Public Documents in the European Union                                                                                                      |
| SERRANO,<br>Giuseppe                            | Private enforcement of administrative acts adopted by a<br>foreign competition authority: a PIL perspective                                                                                       |
| DOWERS, Neil                                    | Underpinning the internal market: the doctrine of mutual<br>trust, the fundamental freedoms, and European private<br>international law                                                            |
| GILLIES, Lorna                                  | Assessing the Role of Public Policy and the Utility of<br>Jurisdiction and Choice of Law Rules for the Effective<br>Return of Cultural Property Objects Unlawfully Removed<br>from a Member State |

## **Group 8 - COMPANY LAW & FINANCE**

|                               |                                                                                                                          |
|-------------------------------|--------------------------------------------------------------------------------------------------------------------------|
| MUCCIARELI,<br>Federico Maria | Company's private international law in the 21st Century:<br>dealing with complexity                                      |
| WINSHIP, Verity               | Jurisdiction Over Corporate Groups                                                                                       |
| Yüksel, Burcu                 | The Choice of Law Aspects of International Funds<br>Transfers                                                            |
| WAHAB, Mohamed<br>S. Abdel    | The Law Governing Public Private Partnership<br>Agreements: Between Party Autonomy and Overriding<br>Regulatory Policies |

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|---------------|----------------------------------------------------|
| AKSELI, Orkun | Assignment of Receivables and the Conflict of Laws |
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**13.30 - 15.00 Lunch (a short guided visit to “La Corrala” will be available at 14.30)**

**15.00 - 16.30 Panels**

### **Group 9 - SUCCESSION**

|                         |                                                                                                                            |
|-------------------------|----------------------------------------------------------------------------------------------------------------------------|
| Yatsunami, Ren          | Characterization of Trust in Consideration of Neighboring Legal Relationships                                              |
| HOLLIDAY, Jayne         | Habitual residence: room for improvement?                                                                                  |
| PERONI, Giulio          | From the principle of unity to the principle of divisibility of the patrimony: new tendencies in international private law |
| NAGY, Csongor<br>Itsván | The functions of party autonomy in international family and succession law – an EU perspective                             |
| WYSOCKA-BAR,<br>Anna    | Modification and revocation of professio iuris under the EU Succession Regulation                                          |

### **Group 10 - CONTRACTS**

|                           |                                                                                                                                                                                                |
|---------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| RESZCZYK                  | Law applicable to voluntary representation                                                                                                                                                     |
| Van Hoek, Aukje           | Private international law for cross-border posting of workers: one union, many models of protection                                                                                            |
| ÁLVAREZ ARMAS,<br>Eduardo | Private International Law and the rights of air and sea passengers in the EU: A puzzle and a lock in the access to justice.                                                                    |
| POLIDO, Fabricio          | Critical interactions between Private International Law and the Vienna Convention on Contracts for the International Sale of Goods of 1980 – CISG: A view from the Brazilian legal environment |

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|----------------|------------------------------------------------------------------------------------------------|
| ÖZGENC, Zeynep | Choice of Law in contract of affreightment: the approach of Turkish private international law. |
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### Group 11 - BRUSSELS I RECAST - JURISDICTION

|                                   |                                                                                                 |
|-----------------------------------|-------------------------------------------------------------------------------------------------|
| CAMPUZANO<br>DÍAZ, Beatriz        | The scope of application of the rules on jurisdiction after the recast of Brussels I Regulation |
| MIGLIO, Alberto                   | The Recast of Brussels I and Jurisdiction Over Third State Defendants                           |
| HERRANZ<br>BALLESTEROS,<br>Mónica | Law applicable to choice of court agreements in Brussels I Recast                               |
| SÁNCHEZ DÍAZ,<br>Sara             | Choice of court agreements: Brussels I Regulation Recast                                        |
| AÑOVEROS<br>TERRADAS, Beatriz     | Collective Redress and Consumer Protection in Europe                                            |

### Group 12 - JURISDICTION & ENFORCEMENT

|                                      |                                                                                                         |
|--------------------------------------|---------------------------------------------------------------------------------------------------------|
| ARZANDEH,<br>Ardavan                 | Spiliada: An unpredictable doctrine?                                                                    |
| TARMAN, Zeynep<br>Derya              | Jurisdiction Turkish courts                                                                             |
| KEYES, Mary &<br>MARCHALL,<br>Brooke | <i>Potestativité</i> and party autonomy                                                                 |
| DARIESCU, Cosmin                     | When Forum non Conveniens objection can be invoked before Romanian Courts?                              |
| Ozcelik, Gulum                       | Public Policy Intervention in the Recognition and Enforcement of Foreign Judgments: Turkish Perspective |

## 16.30 - 17.00 Coffee Break

## 17.00 - 18.30 Panels

### Group 13 - TORTS- APPLICABLE LAW

|                                    |                                                                                                           |
|------------------------------------|-----------------------------------------------------------------------------------------------------------|
| Grusic, Ugljesa                    | Regulating the Environment and Private International Law                                                  |
| ERKAN, Mustafá                     | Product Liability in Turkish Private International Law: Is Turkey Looking Towards the Rome II Regulation? |
| BRIGHT, Clair                      | Civil Liability for Corporate Human Rights Abuse; The issue of extraterritorial jurisdiction              |
| Sousa Gonçalves, Anabela Susana de | The General Rules of the EU Regulation No 864/2007 (Rome II)                                              |
| PITEL, Stephen & HARPER, Jesse     | The Law Governing Tort Claims: Twenty Years of the <i>Lex Loci Delicti</i>                                |

### Group 14 - INSOLVENCY

|                            |                                                                                                              |
|----------------------------|--------------------------------------------------------------------------------------------------------------|
| HEREDIA CERVANTES, Iván    | Arbitral agreements and arbitral procedures in the Insolvency Regulation.                                    |
| PENADÉS FONS, Manuel       | Conflict of laws to solve laws in conflict: Balancing cross-border insolvency and international arbitration. |
| McCORMACK, Gerard          | Reforming the European Insolvency Regulation - changing what is on the menu                                  |
| GUANJIAN Tu, andXiaolin Li | Cross-Border Bankruptcy: A Call and A Suggestion for Cooperation within China                                |

### Group 15 - SALES/CESL

|                  |                                                            |
|------------------|------------------------------------------------------------|
| HEIDEMANN, Maren | Choice of law under the proposed Common European Sales Law |
|------------------|------------------------------------------------------------|

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|--------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------|
| PORCHERON,<br>Delphine               | Unification of substantive rules and private international law: a study of their relationship through the example of the Common European Sales Law |
| RUIZ ABOU NOGM,<br>Verónica          | Designing Ways Forward: Lateral Thinking, Private International Law and the Common European Sales Law'                                             |
| Strecker, Sophie &<br>BERRY, Elspeth | Rome I, Party Autonomy and the Choice of Non-State Law: Difficulty or Opportunity?                                                                 |
| SÜRAL, Ceyda                         | Conflict of laws rules: a barrier before the application of Unidroit principles or not?                                                            |

## **20.30 Conference Dinner in Pabellón de los Jardines de Cecilio Rodríguez (El Retiro)**

### **Friday 13<sup>th</sup> September 2013**

## **9.30 -11.00 Plenary session I RECOGNITION & ENFORCEMENT**

### **Chair: Francisco J. Garcimartín Alférez**

|                                             |                                                                                                                                         |
|---------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------|
| GASCÓN<br>INCHAUSTI,<br>Fernando            | The abolition of exequatur proceedings in the “new” Brussels Regulation                                                                 |
| TUO, Chiara E.                              | The re-evaluation of foreign judgments under EU Regulation 1215/12: between prohibitions and mutual trust                               |
| LEHMANN,<br>Matthias                        | A System sui generis? Res judicata effect of Member State Judgments in the European Union                                               |
| BEAUMONT, Paul<br>& WALKER, Lara            | Recognition and Enforcement of Judgments in Civil and Commercial Matters: Lessons from Brussels for the Hague                           |
| OPPONG, Richard<br>Frimpong & NIRO,<br>Lisa | Recognition and Enforcement of Judgments of <i>International</i> Courts in National Courts: Emerging Jurisprudence and Challenges Ahead |

## **11.15 -11.45 Coffee break**

## **11.45 - 13.15 Plenary session II CONTRACTS & TORTS**

**Chair: Pedro A. De Miguel Asensio**

|                                             |                                                                                |
|---------------------------------------------|--------------------------------------------------------------------------------|
| LEIN, Eva                                   | Extending Jurisdiction under Art 5(3) Brussels I Regulation to Accomplices?    |
| DANOV, Mihail                               | Private Antitrust Litigation and Private International Law in a Global Context |
| TERAMOTO, Shinto<br>& Jur?ys Paulius        | IP Intermediaries In Conflict Of Laws: A Social Network Perspective            |
| ALBORNOZ, M <sup>a</sup><br>Mercedes        | The internet and private international law of contracts                        |
| OREJUDO PRIETO<br>DE LOS MOZOS,<br>Patricia | PIL matters relating to crowdfunding                                           |
| MÄSCH                                       | Agency and conflict of laws                                                    |

## **13.30 - 15.00 Lunch**

## **15.00 -16.30 Plenary session III GLOBAL LITIGATION**

**Chair: Paul Beaumont**

|                                  |                                                                                                                                                   |
|----------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------|
| PERTEGÁS, Marta<br>& Teitz, L.E. | The benefits of regional and global litigation instruments for foreign trade and investment                                                       |
| CHILDRESS,<br>Donald Earl        | Transnational litigation and PIL                                                                                                                  |
| GROSSE RUSE-<br>KHAN, Henning    | A conflict of laws approach to competing rationalities in international law. The Case of Plain Packaging between IP, Trade, Investment and Health |
| UBERTAZZI,<br>Benedetta          | Private International Law before the International Court of Justice                                                                               |

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|----------------------------------|-------------------------------------------------------------------------------------------|
| MAHER, Gerard &<br>RODGER, Barry | Countries, States, and Legal Systems: An International<br>Private Law Perspective         |
| TANG, Zheng<br>Sophia            | Corruption in International Commercial<br>Arbitration—Special Conflict of Laws Challenges |

**16.30 -17.00 Coffee Break**

**17.00 -18.00 Conference by A.G. Pedro Cruz Villalón**

**18.00 - 18.30 Concluding remarks and closing words by P. Beaumont**

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## Michaels on Globalisation and Law

Ralf Michaels (Duke Law School) has posted Globalization and Law: Law Beyond the State on SSRN.

*The chapter provides an introduction into law and globalization for sociolegal studies. Instead of treating globalization as an external factor that impacts the law, globalization and law are here viewed as intertwined. I suggest that three types of globalization should be distinguished — globalization as empirical phenomenon, globalization as theory, and globalization as ideology. I go on to discuss one central theme of globalization, namely in what way society, and therefore law, move beyond the state. This is done along the three classical elements of the state — territory, population/citizenship, and government. The role of all of these elements is shifting, suggesting we need to move away from the traditional paradigm of both social and legal studies: methodological nationalism. I do not answer here how this paradigm should be replaced, but I discuss one prominent candidate of a meta-theory: transnational law. Transnational law, I suggest, helps transcend dichotomies of methodological nationalism that have become unhelpful: between domestic and international, between public and private, and between law and society*

The paper is forthcoming in *Law and Social Theory* (Bannaker & Travers eds., Oxford, Hart Publishing, 2013).

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# French Supreme Court Upholds Argentina's Immunity despite Waiver

Last week, the French Supreme Court for private and criminal matters (*Cour de cassation*) set aside three series of enforcement measures carried out by NML Capital Ltd against the Republic of Argentina in three judgments dated 28 March 2013 (see [here](#), [here](#) and [here](#)).

Readers will recall that NML Capital Ltd was the beneficial owner of bonds issued by Argentina in year 2000. As the relevant financial contracts contained a clause granting jurisdiction to New York courts, the creditor sued Argentina before a U.S. federal court, and obtained in 2006 a judgment for USD 284 million. In the summer 2009, NML Capital initiated enforcement proceedings in Europe.

The contracts also contained a waiver of immunity from enforcement. NML Capital first attached assets covered by diplomatic immunity. In a judgment of 28 September 2011, the *Cour de cassation* ruled that the waiver did not cover diplomatic assets. This was because, the Court explained, diplomatic immunity is governed by special rules which require a waiver to be both express and specific, i.e. provide specifically that it covers diplomatic assets. As the Court was aware that the 1961 Vienna Convention only provides that waiver of diplomatic immunity should be express, the Court ruled that the special rules governing diplomatic immunity were to be found in customary international law.

This time, NML Capital focused on non diplomatic assets. It attached monies owed by French companies to Argentina through their local branches (and could thus be attached from France). The assets were public, however: they were tax and social security claims. But, at first sight, they fell within the scope of the

waiver. Indeed, I understand that the Republic of Argentina had waived immunity “for the Republic, or any of its revenues, assets or property”.

## **Requirements for Waiving Sovereign Immunity**

International law is changing really fast in Paris, however. The *Cour de cassation* decided to extend its new doctrine that waiver of immunity of enforcement should be both express and specific to public assets. The new rule is that waivers should specifically mention the assets or categories of assets to which they apply. As a consequence, as the waiver did not specifically mention, the Court found, tax and social revenues, it did not apply to them.

The judgments also explain that the new rule originates from customary public international law, as reflected in the 2004 UN Convention on Jurisdictional Immunities of States and Their Property. This is clearly the most creative part of the judgments.

Article 19 of the 2004 Convention reads:

### *Article 19*

#### *State immunity from post-judgment measures of constraint*

*No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:*

*(a) the State has expressly consented to the taking of such measures as indicated:*

*(i) by international agreement;*

*(ii) by an arbitration agreement or in a written contract; or*

I am not sure where the requirement that the waiver be asset specific appears.

Furthermore, when Germany argued that Article 19 reflected customary international law in the *Jurisdictional Immunities of the State* case, the International Court of Justice responded:

*117. When the United Nations Convention was being drafted, these provisions gave rise to long and difficult discussions. The Court considers that it is unnecessary for purposes of the present case for it to decide whether all aspects of Article 19 reflect current customary international law.*

## Human Rights

Interestingly enough, the *Cour de cassation* also refers to several judgments of the European Court of Human Rights which held that rules on sovereign immunities necessarily comply with the ECHR as long as they reflect international law.

In other words, the French court recognizes that should it grant a wider immunity to foreign states than the one recognized by international law, it might infringe the European Convention. The ECHR also considers that the 2004 UN Convention reflects customary international law, but would it read Article 19 as liberally as the *Cour de cassation*?

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# MPI Hamburg: International Private Law in China and Europe

On June 7 and 8, 2013 the Max Planck Institute for Comparative and International Private Law Hamburg will host a symposium on “**International Private Law in China and Europe**”. The registration form is available [here](#).

The programme reads as follows:

FRIDAY, 7 JUNE 2013

- 9.00 **Registration**
- 9.15 – 9.30 Welcome
- 9.30 – 11.10 **Jurisdiction, Choice of Law, and the Recognition of Foreign Judgments in Recent Legislation**
  - 9.30 – 9.50 *Jin Huang*
  - 9.50 – 10.10 *Herbert H.P. Ma*
  - 10.10 – 10.30 *Stefania Bariatti*
  - 10.30 – 11.10 Discussion
- 11.10 – 11.30 Coffee break

- 11.30 – 13.10 **Selected Problems of General Provisions**

- 11.30 – 11.50 *Weizuo Chen*
- 11.50 – 12.10 *Rong-Chwan Chen*
- 12.10 – 12.30 *Jürgen Basedow*
- 12.30 – 13.10 Discussion

- 13.10 – 14.15 Lunch

- 14.15 – 16.00 **Property Law**

- 14.15 – 14.35 *Huanfang Du*
- 14.35 – 14.55 *Yao-Ming Hsu*
- 14.55 – 15.15 *Louis d'Avout*
- 15.15 – 16.00 Discussion

- 16.00 – 16.15 Coffee break

- 16.15 – 18.00 **Contractual Obligations**

- 16.15 – 16.35 *Qisheng He*
- 16.35 – 16.55 *Jyh-Wen Wang*
- 16.55 – 17.15 *Pedro de Miguel Asensio*
- 17.15 – 18.00 Discussion

SATURDAY, 8 JUNE 2013

- 9.00 – 10.40 **Non-Contractual Obligations**

- 9.00 – 9.20 *Guoyong Zou*
- 9.20 – 9.40 *En-Wei Lin*
- 9.40 – 10.00 *Peter Arnt Nielsen*
- 10.00 – 10.40 Discussion

- 10.40 – 11.00 Coffee break

- 11.00 – 12.40 **Personal Status (Family Law/Succession Law)**

- 11.00 – 11.20 *Yujun Guo*
- 11.20 – 11.40 *Hua-Kai Tsai*
- 11.40 – 12.00 *Katharina Boele-Woelki*
- 12.00 – 12.40 Discussion

- 12.40 – 13.45 Lunch

- 13.45 – 15.30 **Company Law**

- 13.45 – 14.05 *Tao Du*
- 14.05 – 14.25 *Wang-Ruu Tseng*
- 14.25 – 14.45 *Marc Philippe Weller*
- 14.45 – 15.30 Discussion
- 15.30 – 15.45 Coffee break
- 15.45 – 17.30 **International Arbitration**
  - 15.45 – 16.05 *Song Lu*
  - 16.05 – 16.25 *Ful-Dien Li*
  - 16.25 – 16.45 *Carlos Esplugues Mota*
  - 16.45 – 17.30 Discussion
- 17.30 – 18.00 **Conclusions**
- 18.00 End of Conference
- 19.00 **Reception by the Free and Hanseatic City of Hamburg**