First Issue of 2013's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The first issue of 2013 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features two articles and two comments.

In her article *Costanza Honorati*, Professor of European Union Law at the University of Milano-Bicocca, addresses the issue of International Child Abduction and Fundamental Rights ("Sottrazione internazionale dei minori e diritti fondamentali"; in Italian).

> *In several recent decisions on cases concerning the international abduction of minors the European Court of Human Rights set the requirement of an "in-depth examination of the entire family situation" in order to comply with Article 8 ECHR. The present article considers the effects of such principle on the role and on the proceedings of both the court of the State of the child's habitual residence and of the court of the State of his refuge after abduction, especially when acting in the frame of Brussels II Regulation. While the requirement of «in-depth examination» seems overall synergetic to the role of the court of habitual residence, also when such court is judging on the return of the abducted minor pursuant to Article 11(8) Reg. 2201/2003, deeper concerns arise with reference to the role of the court of the State of refuge. When such a court is asked to enforce a decision for the return of the abducted child, the possible violation of the child's fundamental right in the State of origin might raise the question of opposition to recognition and enforcement. The article thus endeavours to find a solution balancing the child's fundamental rights and EU general finality to strengthen the area of freedom, security and justice.*

In their article *Paolo Bertoli* and *Zeno Crespi Reghizzi*, respectively Associate Professor at the University of Insubria and Associate Professor at University of

Milan, provide an assessment of “Regulatory Measures, Standards of Treatment and the Law Applicable to Investment Disputes” (in English).

> *The relationship between State regulatory measures and the international standards of protection for foreign investments has proved to be a critical issue in investor-State arbitration. Normally, two legal systems are involved: the legal order of the State hosting the investment is competent to govern economic activities (including those of foreign investors) carried out on its territory, and the international legal order sets forth the duties of States in respect of foreign investors. After having discussed the basis for, and the law applicable to, investment claims (both in treaty and in contract claims), this article examines the interplay between regulatory measures and the international standards of protection for foreign investments, i.e., indirect expropriation and fair and equitable treatment. The authors also analyse the influence on the arbitrator’s evaluation of the presence of a stabilization clause in the agreement between the State and the investor.*

In addition to the foregoing, the following comments are also featured:

Fabrizio Vismara (Associate Professor at the University of Insubria), “Assistenza amministrativa tra Stati membri dell’Unione europea e titolo esecutivo in materia fiscale” (Administrative Assistance between EU Member States and Enforcement Order in Fiscal Matters; in Italian)

> *The Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, issued under Articles 113 and 115 of the TFEU, was implemented in Italy by Legislative Decree No 149 of 14 August 2012. The Directive introduces a uniform instrument to be used for enforcement measures to recover claims in another Member State, and realizes a system of implementing decisions in tax matters typically excluded from judicial cooperation on civil matters. Directive 2010/24/EU provides that enforcement in other Member States is permitted by means of a uniform instrument which is automatically valid in the requested Member State. The automatic recognition provided for by Directive 2010/24/EU is different from the abolition of exequatur in the field of judicial cooperation in civil matters provided by, respectively, Regulation No 805/2004, Regulation No 1896/2006, Regulation No 861/2007, and Regulation No 1215/2012. Directive*

2010/24/EU sets out a new instrument, named uniform instrument, which is subject to automatic recognition and it is formally distinct from the initial instrument permitting enforcement issued in the applicant Member State.

Lidia Sandrini (Researcher at the University of Milan), "La compatibilità del regolamento (CE) n. 261/2004 con la convenzione di Montreal del 1999 in una recente pronuncia della Corte di giustizia" (Compatibility of Regulation (EC) No 261/2004 with the 1999 Montreal Convention in a Recent Judgment by the Court of Justice of the European Union; in Italian)

This article addresses Regulation (EC) No 261/2004 in so far as it deals with delay in the carriage of passengers by air, as interpreted by the Court of Justice of the European Union in the joined cases Nelson and TUI Travel. It considers whether this recent judgment is consistent with the Montreal Convention of 1999 reaching the overall conclusion that it is not. This unsatisfactory result is due to purpose of ensuring a level of protection for passenger higher than that provided by the international uniform rules. This aim has been achieved affirming the interpretation of the Regulation provided in the Sturgeon case, in which the Court went far beyond the wording of the Regulation, and in the IATA case, in which the Court advanced an untenable and ambiguous construction of the relationship between the Montreal Convention and Regulation No 261/2004. Conversely, in deciding the joined cases, the Court neglected its duty to interpret according to the proper criteria provided by international law the treaties ratified by the EU, and failed to ensure that the EU respect its duty as contracting party.

Indexes and archives of the RDIPP since its establishment (1965) are available on the website of the Department of Italian and Supranational Public Law of the University of Milan.

Liber Amicorum Alegría Borrás

On the occasion of the retirement of Prof. Alegría Borrás a collective book entitled "Entre Bruselas y La Haya. Estudios sobre la unificación internacional y regional del Derecho internacional privado. Liber Amicorum Alegría Borrás" has been published by Marcial Pons . The project, coordinated by Joaquin Forner Delaygua, Cristina González i Beilfuss and Ramon Viñas, gathers more than thirty contributions in English, French and Spanish, by well known and reputed authors of many different nationalities. A huge book, not to miss, that matches the impressive task developed over the years by this Ambassador of Spanish Private International Law in Europe.

(Click here to browse the index and for a glimpse of the first chapter).

5th Conference of the Commission on European Family Law

On 29-31 August 2013, the 5th Conference of the Commission on European Family Law will be held in Bonn, Germany, organized by the Institute for German, European and International Family Law, University of Bonn, and the Käte Hamburger Centre for Advanced Study 'Law as Culture'.

Under the title "Family Law and Culture in Europe: Developments, Challenges and Opportunities", the conference aims to enhance the exchange of ideas and arguments on comparative and international family law in Europe. The conference is open to both academics and practitioners.

Topics include matrimonial property regimes in Europe, non-formalized relationships and parental relations. The CEFL Principles on European Family Law regarding Property Relations between Spouses will be presented and

discussed. Particular attention will also be paid to the conflict of laws in Europe. The recent proposals for EU regulations on matters regarding matrimonial property regimes and property relationships of registered partners will be analyzed. Andrea Bonomi will talk about “The proposed EU PIL Regulation for Spouses”, Milos Hatapka on “The proposed EU PIL Regulation for Registered Partners”.

For further details and registration, visit the website http://www.cefl2013.org/.

French Constitutional Council Upholds Gay Marriage Bill

The French Constitutional Council has rejected the challenge against the bill adopted by the French Parliament opening marriage to same sex couples. It will therefore become law in the coming days.

The bill included French traditional choice of law rules providing for the application of the law of the nationality of each spouse to the substantive validity of marriage (Civil Code, Art. 202-1, para. 1), and the application of the law of the place of celebration to its formal validity (Civil Code, Art. 202-2).

Requirements as to the sex of the spouses being substantive in character, the consequence of these rules would have been that only nationals from one of the 14 jurisdictions allowing gay marriage could have married in France.

This is the reason why the bill also included a more innovative rule providing that two gay people would still be allowed to marry if the national law or the law of the residence of one of them only allowed gay marriage (Civil Code, Art. 202-1, para. 2).

The rule would enable a French national to marry a national from any country in France. This would also apply to French residents, probably to avoid discrimination on the ground of nationality, especially between EU nationals.

Code Civil

Chapitre IV bis Des règles de conflit de lois

Art. 202-1. – Les qualités et conditions requises pour pouvoir contracter mariage sont régies, pour chacun des époux, par sa loi personnelle.

Toutefois, deux personnes de même sexe peuvent contracter mariage lorsque, pour au moins l'une d'elles, soit sa loi personnelle, soit la loi de l'État sur le territoire duquel elle a son domicile ou sa résidence le permet.

Art. 202-2. – Le mariage est valablement célébré s'il l'a été conformément aux formalités prévues par la loi de l'Etat sur le territoire duquel la célébration a eu lieu.

The constitutionality of the provision was challenged on the ground that it violated the principle of equality before the law, as Article 202-1, para. 2, only applies to, and protects, same sex marriage, and that a different rule thus applies to heterosexual marriages.

On May 17th, the Constitutional Council rejected the challenge by ruling that the French Parliament had treated differently people in different situations, and that there was therefore no violation of the equality principle.

29. Considérant, en premier lieu, que, par les dispositions du second alinéa de l'article 202-1 du code civil dans sa rédaction résultant du paragraphe II de l'article 1er de la loi déférée, le législateur a entendu introduire un dispositif spécifique selon lequel « deux personnes de même sexe peuvent contracter mariage lorsque, pour au moins l'une d'elles, soit sa loi personnelle, soit la loi de l'État sur le territoire duquel elle a son domicile ou sa résidence le permet » ; qu'il était loisible au législateur de permettre à deux personnes de même sexe de nationalité étrangère, dont la loi personnelle prohibe le mariage entre personnes de même sexe, de se marier en France dès lors que les autres conditions du mariage et notamment la condition de résidence sont remplies ; que le législateur, qui n'était pas tenu de retenir les mêmes règles pour les mariages contractés entre personnes de sexe différent, n'a pas traité différemment des personnes se trouvant dans des situations semblables ; que, par suite, le grief tiré de l'atteinte au principe d'égalité devant la loi doit être écarté ;

I thought that the rationale for allowing same sex marriage was to give the same rights to everybody, because there should be no difference between gay and heterosexual couples, but maybe I have missed something.

Transnational Dispute Management 3 (2013) – Corruption and Arbitration

The latest issue of TDM is now available. This special issue on Corruption and Arbitration analyzes new trends and challenges regarding the intersection between allegations of corruption and decisions by arbitral tribunals regarding jurisdiction, admissibility and the merits of commercial and investment disputes. As any transnational practitioners will know, allegations of corruption abroad pervade both arbitral and litigation practices–whether its affirmative claims of corruption before investor-state tribunals, or the enforcement of foreign judgments before national courts. This issue is an important contribution to the field.

The articles included in this issue are:

* *Nailing Corruption: Thoughts for a Gardener – A Comment on World Duty Free Company Ltd v The Republic of Kenya* by S. Nappert, 3 Verulam Buildings

* *Proving Corruption in International Arbitration: A Balanced Standard for the Real World* by C. Partasides, Freshfields

* *Corruption in International Arbitration and Problems with Standard of Proof: Baseless Allegations or Prima Facie Evidence?* by S. Wilske, Gleiss Lutz Rechtsanw?lte T.J. Fox, Gleiss Lutz Rechtsanw?lte

* *Random Reflections on the Bar, Corruption and the Practice of Law* by F.P. Feliciano, SyCip Salazar Hernandez & Gatmaitan (SyCipLaw)

* *Fraud and Corruption in International Arbitration* by C.B. Lamm, White & Case LLP H.T. Pham, White & Case LLP R. Moloo, Freshfields Bruckhaus Deringer LLP

* *Unlawful or Bad Faith Conduct as a Bar to Claims in Investment Arbitration* by A. Cohen Smutny, White & Case LLP P. Polášek, White & Case LLP

* *Suspicion of Corruption in Arbitration: A German Perspective* by M.S. Rieder, Shearman & Sterling A. Schoenemann, Shearman & Sterling

* *The Potential for Arbitrators to Refer Suspicions of Corruption to Domestic Authorities* by K.S. Gans, DLA Piper LLP D.M. Bigge, US Department of State, Office of the Legal Advisor

* *The Courses of Action Available to International Arbitrators to Address Issues of Bribery and Corruption* by A. Crivellaro, Bonelli Erede Pappalardo

* *Enforcing Anti-Corruption Measures Through International Investment Arbitration* by S. Kulkarni

* *State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration* by A.P. Llamzon, Permanent Court of Arbitration

* *The Legal Consequences of Investor Corruption in Investor-State Disputes: How Should the System Proceed?* by T. Sinlapapiromsuk, Faculty of Law, Chulalongkorn University

* *The Judicial Scrutiny of Arbitral Awards in Setting Aside and Enforcement Proceedings Involving Issues of Corruption* by M. Hwang, Michael Hwang S.C. K. Lim, Michael Hwang Chambers

* *West Africa: The Actions of the OHADA Arbitral Tribunal in the Face of Corruption* by C.N. Nana, London Metropolitan University

* *Host-State Counterclaims: A Remedy for Fraud or Corruption in Investment-Treaty Arbitration?* by S. Dudas, Leaua & Asociatii N. Tsolakidis, Johann Wolfgang Goethe-University

* *Commercial Arbitration and Corrupt Practices: Should Arbitrators Be Bound By A Duty to Report Corrupt Practices?* by S. Nadeau-Séguin, Baker Botts LLP

* *On the Divide Between Investor-State Arbitration and the Global Fight Against*

Corruption by D. Litwin, McGill University, Faculty of Law

* *International Commercial Arbitration and Corruption: The Role and Duties of the Arbitrator* by C.A.S. Nasarre, McGill University, Faculty of Law

* *Legal Consequences of Corruption in International Investment Arbitration: An Old Challenge With New Answers* by R.H. Kreindler, Shearman & Sterling LLP

New Czech Act on Private International Law

See this post over at *Transnational Notes*.

New U.S. Casebook on Conflict of Laws

Professor Laura Little (Temple University's Beasley School of Law) is the author of a new U.S. casebook on the Conflict of Laws published in the Aspen Casebook Series.

Though relying essentially on U.S. sources, the casebook contains a number of comparative developments, in particular with European regulations.

> ***About the Book***
>
> *This progressive new casebook offers a contemporary, practical approach to a subject in which there are few right answers and plenty of opportunity for creativity, by connecting course content to law practice and offering modern*

cases and a problem pedagogy.

***This title features**:*

- ***Well-balanced** casebook presents the deep jurisprudential lessons imbedded in the conflict of laws subject matter while maintaining a clear presentation of doctrines relevant to current law practice*
- ***Thematic approach** puts conflicts of law in the context of actual issues confronted in law practice*
- ***Problem pedagogy** helps students apply various approaches and concepts. Extensive teaching manual outlines detailed answer to each problem.*
- ***Clear, accessible writing** without the "hide the ball" approach of many other books provides accessibility for a difficult course*
- ***Innovative organization**, beginning with personal jurisdiction, follows the way issues arise in litigation and highlights the importance of forum selection. Modular presentation allows professors to adapt book took their own organization*
- ***Contemporary cases** and hypotheticals allow students to apply rules to current situations. Traditional cases are also included so as to maintain continuity with the venerable parts of the discipline*
- ***Full coverage of current topics** such as internet issues, same sex marriage, choice of law clauses, and class actions*
- ***International and comparative materials** cover global aspects of conflicts*
- ***PowerPoint slides, charts, and diagrams** available on line and in teaching manual provide appealing visual tools and add to the books' teachability*
- ***Emphasis on the Restatement (Second) of Conflicts**, which is now the predominant United States approach but is insufficiently covered in most other texts*
- ***Author Laura Little** brings her considerable expertise to the book—as a Professor of Law at Temple University School of Law, she specializes in federal courts, conflict of laws, and constitutional law and teaches, lectures, and consults internationally on these subjects. She is the author of numerous books and articles, including the successful Federal Courts: Examples & Explanations (Aspen), and Has received numerous*

awards for innovative and effective teaching

- ***Comprehensive Teachers Manual*** *includes answers to every problem, teaching suggestions, sample syllabi, and a graphical depiction of each main case as well as unique insights and case backgrounds*

More information is available here. Extracts can be downloaded here.

AJIL Agora on Kiobel

The American Journal of International Law has issued a call for submissions for an agora on "Transnational Human Rights Litigation After *Kiobel*." Here's the call:

> *The American Journal of International Law is calling for short submissions (maximum 3000 words, including footnotes) for a forthcoming agora on "Transnational Human Rights Litigation After Kiobel." Contributions must not have been previously published in whole or in substantial part (on the web or elsewhere). Some of the chosen contributions will be published in the October 2013 issue of the Journal. Other selected contributions may be published electronically in a special ASIL online publication. All contributions must be submitted no later than June 15 in order to be considered. Contributions on U.S. law issues, and on comparative and non-U.S. dimensions, are welcome. The editors aim to publish a set of distinctive contributions, rather than many making similar points. All selections for publication in AJIL or in the ASIL online publication will be peer reviewed by a committee of the AJIL editorial board consisting of Carlos Vázquez (chair), Curtis Bradley, and Ingrid Wuerth, in consultation with Co-Editors in Chief José Alvarez and Benedict Kingsbury. Decisions on publication (including requests for revisions) will be made on a rolling basis, but in any case no later than June 30. Submit contributions toajil@asil.org with "Kiobel Agora" in the subject line.*

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.