# 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 12th 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, 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 MARTÍN, Nuria | International Child Abduction and Mediation: Feasibility and Suitability of a Guide of Good Practice |
| TRIMMINGS, Katarina | Embryo transfer in international context |

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|---|---|
| GUZMÁN 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

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| 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, Monika & PFEIFFER, Magdalena | New Act on Private International Law in the Czech Republic: Starting Points and Perspectives within the European Union |
| 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

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|---|---|
| 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 |

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| 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

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|---|---|
| ASON, Agnieszka | The Revised Brussels Regulation: A New Approach To Arbitration in the European Rulemaking |
| HAUBERG WILHEMSEN, Louise | European Perspectives on International Arbitration |
| ZACARIASIEWICZ, 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 |
| Hacibekiroglu, Ekin | Taking evidence in international commercial arbitration |

## 11.30 – 12.00 Coffee Break

## 12.00 – 13.30 Panels

## Group 5 – MARRIAGE & MATRIMONIAL PROPERTY

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|---|---|
| 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. |

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| 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 &SCHULTZ, Tomas | Comity in European PIL |
| SHRIVASTAVA, Vishal | A Case Study on the Need for Strengthening the International Court of Justice |

## Group 7 – RECOGNITION AND ENFORCEMENT IN THE EU

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|---|---|
| TORRALBA, Elisa & RODRÍGUEZ PINEAU, Elena | What's in a Judgment? Reflections on res judicata, jurisdiction and ECJ's activism |
| AZCÁRRAGA MONZONÍS, Carmen | New Developments in the Scope of Free Movements of Public Documents in the European Union |
| SERRANO, Giuseppe | Private enforcement of administrative acts adopted by a foreign competition authority: a PIL perspective |

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|---|---|
| DOWERS, Neil | Underpinning the internal market: the doctrine of mutual trust, the fundamental freedoms, and European private international law |
| GILLIES, Lorna | Assessing the Role of Public Policy and the Utility of Jurisdiction and Choice of Law Rules for the Effective Return of Cultural Property Objects Unlawfully Removed from a Member State |

**Group 8 – COMPANY LAW & FINANCE**

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

**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**

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| Yatsunami, Ren | Characterization of Trust in Consideration of Neighboring Legal Relationships |
| HOLLIDAY, Jayne | Habitual residence: room for improvement? |

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| PERONI, Giulio | From the principle of unity to the principle of divisibility of the patrimony: new tendencies in international private law |
| NAGY, Csongor Itsván | The functions of party autonomy in international family and succession law – an EU perspective |
| WYSOCKA-BAR, Anna | Modification and revocation of professio iuris under the EU Succession Regulation |

## Group 10 – CONTRACTS

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| 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, 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 |
| ÖZGENC, Zeynep | Choice of Law in contract of affreightment: the approach of Turkish private international law. |

## Group 11 – BRUSSELS I RECAST – JURISDICTION

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| CAMPUZANO 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 BALLESTEROS, Mónica | Law applicable to choice of court agreements in Brussels I Recast |
| SÁNCHEZ DÍAZ, Sara | Choice of court agreements: Brussels I Regulation Recast |

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| AÑOVEROS TERRADAS, Beatriz | Collective Redress and Consumer Protection in Europe |

## Group 12 – JURISDICTION & ENFORCEMENT

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| ARZANDEH, Ardavan | Spiliada: An unpredictable doctrine? |
| TARMAN, Zeynep Derya | Jurisdiction Turkish courts |
| KEYES, Mary & MARCHALL, Brooke | *Potestativité* 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

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|---|---|
| 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 *Lex Loci Delicti* |

## Group 14 – INSOLVENCY

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|---|---|
| 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

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|---|---|
| HEIDEMANN, Maren | Choice of law under the proposed Common European Sales Law |
| PORCHERON, 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, Verónica | Designing Ways Forward: Lateral Thinking, Private International Law and the Common European Sales Law' |
| Strecker, Sophie & 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 13th September 2013

## 9.30 -11.00 Plenary session I RECOGNITION & ENFORCEMENT

**Chair: Francisco J. Garcimartín Alférez**

| | |
|---|---|
| GASCÓN INCHAUSTI, 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, Matthias | A System sui generis?Res judicata effect of Member State Judgments in the European Union |
| BEAUMONT, Paul & WALKER, Lara | Recognition and Enforcement of Judgments in Civil and Commercial Matters: Lessons from Brussels for the Hague |
| OPPONG, Richard Frimpong & NIRO, Lisa | Recognition and Enforcement of Judgments of *International* 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**

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|---|---|
| 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 & Jur?ys Paulius | IP Intermediaries In Conflict Of Laws: A Social Network Perspective |
| ALBORNOZ, Mª Mercedes | The internet and private international law of contracts |
| OREJUDO PRIETO DE LOS MOZOS, 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**

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|---|---|
| PERTEGÁS, Marta & Teitz, L.E. | The benefits of regional and global litigation instruments for foreign trade and investment |
| CHILDRESS, Donald Earl | Transnational litigation and PIL |
| GROSSE RUSE-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, Benedetta | Private International Law before the International Court of Justice |
| MAHER, Gerard & RODGER, Barry | Countries, States, and Legal Systems: An International Private Law Perspective |
| TANG, Zheng Sophia | Corruption in International Commercial 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*?

# 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**

# Special Issue of JIPITEC on PIL and Intellectual Property

This special issue of the Journal of Intellectual Property, Information Technology and E-Commerce Law (JIPITEC) presents a collection of papers given at the inaugural meeting of the International Law Association's Committee on Intellectual Property and Private International Law held at the University of Lisbon on March 15-17, 2012.

- International Jurisdiction in Intellectual Property Disputes (Paulius Jurcys)
- Infringement and Exclusive Jurisdiction in Intellectual Property: a Comparison for the International Law Association (Benedetta Ubertazzi)
- IP and Applicable Law in Recent International Proposals: Report for the International Law Association (Matulionyte Rita)
- Recognition and Enforcement of Foreign Judgments in Intellectual Property: a Comparison for the International Law Association (Benedetta Ubertazzi)
- Internet Intermediaries and the Law Applicable to Intellectual Property Infringements (Pedro De Miguel Asensio)
- Transnational Law for Transnational Communities The Emergence of a Lex Mercatoria (or Lex Informatica) for International Creative Communities (Axel Metzger)

*H/T: Bernd Justin Jütte.*

# Borchers on Conflict of Laws in Human Rights Actions

Patrick J. Borchers, who is the Dean of Creighton University School of Law, has posted Conflict-of-Laws Considerations in State Court Human Rights Actions on SSRN.

> *As U.S. Supreme Court decisions have curtailed the availability of civil redress for human rights violations under the Alien Tort Statute, victims of human rights abuses are beginning to consider U.S. state courts as a possible forum. In some cases, state courts may prove to be a superior forum, however in many cases they will offer little — if any — hope of meaningful redress. In the paradigmatic case of a civil plaintiff seeking redress for torture, forced labor or other atrocities — usually as the result of an alleged conspiracy between foreign governments and private corporations or individual operating abroad — state choice-of-law doctrines will often require the application of the tort law of the foreign country, as well as the law relative to damages available. In many cases, the law choice will prove to have a crippling effect on the viability of U.S. litigation. Moreover, recent U.S. Supreme Court decisions limiting the personal jurisdictional reach of state courts over foreign corporations may make state courts unavailable for jurisdictional reasons. Finally, the common law doctrine of forum non conveniens may make state courts unavailable to victims of human rights abuses even if the state court has jurisdiction. In some cases, state courts will prove to be a preferable forum to federal court. However, prospective litigants and their counsel will need to carefully consider the potential pitfalls of filing in state court.*

The article was recently published in the *U.C. Irvine Law Review* as part of a symposium on Human Rights Litigation in State Courts and Under State Law.

# Italian Society of International Law Launches SIDIBlog

The Italian Society of International Law (SIDI-ISIL) has launched a new blog devoted to International Law and EU Law: SIDIBlog. As explained in its presentation,

*SIDIblog is a space for discussion and debate over current issues of Private International Law, Public International Law and European Union Law. All scholars and practicing lawyers having an interest in these topics are invited to participate through posts and comments. Posts are brief pieces (maximum 1500 words) that may discuss a relevant topic, present an innovative idea, or comment upon recent developments. They may be sent to the following e-mail address: sidiblog2013 [at] gmail.com.*

The first post, authored by *Annalisa Ciampi* (Univ. of Verona), analyses the legal and diplomatic saga of the Italian marines that were arrested in India in February 2012, accused of shooting two Indian fishermen off the coast of the Kerala region, mistaking them for pirates, as they were guarding an Italian oil tankers (the Enrica Lexie). In addition, another post by *Cesare Pitea* (Univ. of Parma) provides links to relevant documents of the case, and to comments and analysis by Italian and international scholars.

*Conflictoflaws.net* wishes all the best to the new blog.

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# Denmark to Apply Brussels I Recast

Denmark has notified the Commission of its decision to implement the contents of Regulation (EU) No 1215/2012 by letter of 20 December 2012. The decision was

made under the 2005 Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

*H/T: Rafaël Jafferali*

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# ECJ Rules on Jurisdiction for Claims based on Promissory Notes

On March 14th, 2013, the Court of Justice of the European Union delivered its judgment in Ceská spontelna, a.s. v. Gerald Feichter (Case C 419/11).

The case was concerned with a blank promissory note issued by a Czech company (Feichter) in favour of another Czech company (Ceská spontelna) in order to guarantee the first company's obligations under an overdraft agreement. Mr Feichter, having his domicile in Austria, also signed, as an individual, the promissory note on its face, marking it 'per aval' and thus undertaking to guarantee its payment. The beneficiary of the note eventually sued the avaliste (guarantor) in the Czech Republic.

Mr Feichter first argued that he was a consumer and should benefit from Article 16 of the Brussels I Regulation. The Czech court also wondered whether the action under the promissory note ought to be characterized as contractual in character for the purpose of Article 5(1) of the Regulation.

**Consumer Protection**

The ECJ held

> *36 It is common ground that the giver of the aval in the case in the main proceedings became the guarantor of the obligations of the company of which he is the managing director and in which he has a majority shareholding.*
>
> *37 Accordingly, even if the obligation on the giver of the aval is of an*

*abstract nature and is thus independent of the obligation on the maker of the note for which the giver of the aval became guarantor, the fact remains, as the Advocate General observed in point 33 of her Opinion, that the aval of a natural person, given on a promissory note issued in order to guarantee the obligations of a commercial company, cannot be regarded as having been given outside and independently of any trade or professional activity or purpose while that individual has close professional links with that company, such as being its managing director or majority shareholder.*

## Contractual Claim

The ECJ held

*48 As regards whether such an obligation exists in circumstances such as those at issue in the main proceedings, it must be noted, as it was by the Advocate General at point 45 of her Opinion, that, in the present case, the giver of the aval, by signing the promissory note on its face under the indication 'per aval', voluntarily consented to act as the guarantor of the obligations of the maker of that promissory note. His obligation to guarantee those obligations was thus, by his signature, freely accepted, for the purposes of that provision.*

*49 The fact that that signature was made on a blank promissory note is not such as to cast doubt on that finding. Account must be taken of the fact that the giver of the aval, by also signing the agreement on the right to complete the note, freely accepted the conditions concerning the manner in which that promissory note would be completed by the payee filling in the missing information, even though signature of that agreement did not, in itself, result in the aval coming into being.*

## Final Ruling

*1. Article 15(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that a natural person with close professional links to a company, such as its managing director or majority shareholder, cannot be considered to be a consumer within the meaning of that provision when he gives an aval on a promissory note issued in order to*

*guarantee the obligations of that company under a contract for the grant of credit.*

*Therefore, that provision does not apply for the purposes of determining the court having jurisdiction over judicial proceedings by which the payee of a promissory note, established in one Member State, brings claims under that note, which was incomplete at the date of its signature and was subsequently completed by the payee, against the giver of the aval, domiciled in another Member State.*

*2. Article 5(1)(a) of Regulation No 44/2001 applies for the purposes of determining the court having jurisdiction over judicial proceedings by which the payee of a promissory note, established in one Member State, brings claims under that note, which was incomplete at the date of its signature and was subsequently completed by the payee, against the giver of the aval, domiciled in another Member State.*

*H/T: Severine Menetrey*

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# Recast of the Rules of Procedure of the ECJ

*Georgia Koutsoukou is a researcher fellow of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law. This contribution summarizes the most relevant features of the Recast Rules of Procedure of the ECJ, which were the object of a thorough presentation at one of the Institute's weekly seminars. A table of correspondence of the new and old rules was published in the Official Journal C 337, 6.11.2012.*

The Rules of Procedure of the ECJ have been recently amended and, as provided in Article 210 of the Rules, the new provisions entered into force on November 1st, 2012 (OJ L 265/I, 29.9.2012). The preamble of the new Rules of Procedure sheds

light on the reasons which led to their amendment. Above all, the preponderance of preliminary proceedings in the Court´s practice necessitated the adaption of the rules, which were originally primarily tailored to direct actions, to its caseload. It is further noteworthy that the new rules take account of procedural economy considerations and, additionally, purport to simplify complex procedures and ease certain procedural arrangements.

The first Title (Articles 3-42) concerns the internal organization of the Court. Firstly, Article 10 provides for the creation of the function of the **Vice President** of the Court in order to reduce the task burden of the President. Article 27 has altered the composition of the Grand Chamber. It is also noteworthy that Article 22 (1) extends the **right to consult the register** of the Registry to "anyone" in order to increase transparency in the function of the Court.

The second Title (Articles 43-92) refers to the procedural provisions common to all types of procedure and has brought about significant changes. As for the written part of the procedure, according to Article 58 of the Rules the Court can determine the **maximum length of written pleadings and observations** through decision published in the Official Journal of the European Union. With regard to the oral part of the procedure, the Court can by virtue of Article 76 (2) on proposal of the Judge Rapporteur and after hearing the Advocate General **abstain from holding a hearing in case** the written pleadings or observations are sufficient for the ruling to be delivered. Moreover, Article 77 introduces the possibility for **similar cases to be heard jointly**. Article 83 has restricted the Court´s discretion in relation to the **reopening of oral procedure** through determination of the conditions under which the court may issue such an order. Finally, we should point out that, unlike the old rules, the new provisions do not provide for common rules on **legal aid**. There are rules on legal aid only for references for a preliminary ruling and appeals in other titles of the Rules. This can be attributed to the minor, if any, importance of legal aid for direct actions.

The new Rules introduce a separate, third Title on references for a preliminary ruling (Articles 93-118) due to their obvious preponderance in the court practice. For the first time Article 94 determines the minimum essential content of any request for preliminary ruling and Article 97 clarifies the term "parties to the proceedings". Besides, the Court considered it necessary to introduce a rule on anonymity in Article 95. Article 100 adopts the Court's case law by providing that it remains seized as long as the request for a preliminary ruling is not withdrawn

by the referring Court. To enhance the procedural efficiency, Article 99 **simplifies and harmonizes the procedural requirements for a decision by reasoned or**der. As for the goal of proceedings acceleration, it must be noted that the **expedited procedure** does not take place only at the request of the referring court but also on motion of the President of the Court according to Article 105 (1). Further, there are some changes with regard to the **urgent preliminary ruling** procedure. Firstly, a case connected to another pending case assigned to a Judge Rapporteur can be assigned pursuant to Article 108 (2) to the same Judge Rapporteur, even if he is not a member of the designated Chamber. Secondly, another Member State can be invited according to Article 109 (3) to participate in the proceedings, in case the request for a preliminary ruling refers to an administrative procedure or to judicial proceedings in its territory.

The fourth Title (Articles 119-166) deals with direct actions. Article 124 (1) extends the **time-limit for lodging a defense** from one to two months and Article 124 (3) allows the extension of the time-limit only in exceptional cases. According to Articles 126 (2) and 133, respectively, the President of the Court is entitled to **specify the issues to which the reply and the rejoinder should relat**e and to initiate an expedited procedure. The provisions on the intervention of the Member States and other EU-Institutions have been also simplified. Besides, pursuant to Article 145, disputes concerning the costs are assigned to the Chamber of three or five judges, whose member is the Judge Rapporteur responsible for the case.

The fifth Title (Articles 167-190) concerns the appeals against the decisions of the General Court. First of all, Article 176 et seq. draws a clearer distinction between response to the appeal and cross-appeal. The latter has to be submitted according to Article 176 (2) by **document separate from the response**. Additionally, Article 183 clarifies that the manifest inadmissibility or the discontinuance of an appeal deprives the cross-appeal of its purpose. Moreover, Article 182 provides for **decisions by reasoned or**der with reference to the relevant case law in case the Court has already ruled on one or more questions of law identical to the ones raised by the pleas in law of the appeal or cross appeal.

The Review of the decisions of the General Court is regulated in the sixth Title (Articles 191-195). Article 191 foresees the **designation of reviewing Chamber** consisting of five Judges for an one-year period. The proposal to review may be made by the First Advocate General and the decision of the Court refers both to

the proposal of the Advocate General and the substance of the Case, as stipulated in Article 192 and 195 respectively.

The seventh title (Articles 196-200) amends the relevant procedural arrangements with regard to the Opinions in context of Article 218 TFEU on the agreements between the EU and third countries or international organizations. Article 197 states that **only one Advocate General** instead of all (eight) will be participating at the proceedings. The opinions must further on be delivered **in open court** by virtue of Article 200.

Last but not least, Article 206, which forms part of the eighth and last Title (Articles 201-206) on particular forms of procedure, introduces a new procedure for requests of the Member States according to **Article 269 TFEU**, i.e. **requests for the review of the legality of observations and recommendations** made by the Council or European Council in case of clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU.

To conclude, by adopting these new Rules of Procedure, the Court seeks to adapt to the changes in its caseload and dispose within a reasonable period of time of the cases brought before it by fostering the acceleration of the proceedings. It will be interesting to see in the future whether and how these quite significant amendments successfully achieve the desired outcome.