Katia Fach on Arbitration

Dr. Katia Fach (Universidad of Zaragoza) is author of “Rethinking the Role of Amicus Curiae in International Investment Arbitration”, to be found in 35 *Fordham International Law Journal 510,* and also here (SSRN)

> The intervention of amicus curiae in investment arbitration is a matter of great interest and it will continue generate a legal debate in the future. In the wake of multiple courts and some tribunals, several rules on investment arbitration have increasingly recognized the possibility that the general interest is protected through amicus submissions. The fact that a party of the investment arbitration is a state and problems transcend the interests of the specific parties involved in the arbitration justify the progressive implementation of the principle of transparency, which has been traditionally rejected in commercial arbitration, in the field of investment arbitration.The acceptance of the institution of amicus curiae in BITs and arbitration rules has resulted recently in various NGOs submitting amicus briefs in relevant international arbitrations. Additionally, UNCITRAL and ICC are currently developing two projects in the field of investment arbitration that are going to address the issue of amicus briefs. Taking all of this data as reference, this Note reflects on the most appropriate regulation of the institution of amicus curiae. This means taking into account a multiplicity of factors, both internal -concerning the content and the submission process- and external -referring to the relationship of these non-parties with other participants in investment arbitration-. The approach taken regarding this regulation is multiple, since the institution of amicus curiae is controversial. Against the multiple benefits preached mainly by NGOs, investors believe that the acceptance of amicus curiae brings various injustices. The proposal advocated by this Note is twofold. On the one hand, the acceptance of unsolicited amicus briefs should be governed by a set of criteria able to block any submission that do not benefit the outcome of arbitration and are excessively detrimental to the parties and arbitrators of the investment dispute. On the other hand, institutions managing investment arbitrations could establish a new institution exclusively and permanently dedicated to defending the collective interest. This proposal, although suggestive, would imply a major change in the system and therefore their perspectives of success would possibly materialize in the

medium to long term.

Also from Katia Fach, see "Ecuator's Atteinment of the Sumak Kawsay and the Role Assigned to International Arbitration", the *Yearbook of International Investment Law and Policy*, 2010-2011, pp. 451-487:

> Article 422 of the 2008 Ecuadorian Constitution prevents the Ecuadorian State from ceding its sovereign jurisdiction to international arbitration entities through entering into Treaties or international instruments. This provision is a clear manifestation of the rejection generated in Ecuador by an *ex ante* and general submission to international tribunals. This chapter discusses in detail the wording of Article 422, highlighting the doubts and difficulties of interpretation posed by this constitutional provision. It also reflects on two events derived from the approval of Article 422: the denunciation of the ICSID Convention and the denunciation of a number of Bilateral Treaties on the Promotion and Guarantee of Investments signed by Ecuador. The chapter also studies some recent judgments of the Ecuadorian Constitutional Court, which have declared many BITs as unconstitutional. A detailed review of these decisions will lead us to make a critical assessment. Finally, it analyzes the most recent manifestations of the Ecuadorian government regarding international investments. These latest contractual and legislative developments force us to reconsider the real impact that Article 422 of the Constitution is having on Ecuadorian economic life.

Cuniberti on the Efficiency of Exequatur

I have posted Some Remarks on the Efficiency of Exequatur on SSRN. The abstract reads:

> *After the European Council announced that it wanted to suppress intermediate measures in the enforcement of foreign judgments within the European Union, the European Commission has proposed to abolish the procedure whereby*

courts of the Member states may verify whether foreign judgments meet some basic requirements of the forum (exequatur).

The project of abolishing exequatur has attracted strong criticism among European scholars. It has been pointed out that the most important function of exequatur is to verify whether the foreign court did not violate human rights, and that suppressing it would entail dramatically reducing human rights protection in the European Union.

Most of these scholars have dismissed the economic argument made by the European lawmaker to justify its project that the existing procedure, which delays and increases the costs of cross-border debt recovery, is simply too costly. This short paper offers some preliminary thoughts on the efficiency of the exequatur procedure. It argues that as human rights violations are, in practice, almost exclusively violations of procedural rights, the impact of human rights violations is essentially to decrease the chances to win on the merits in cases where the symbolic dimension of the right to a fair trial is negligible. The paper thus distinguishes between two categories of cases and argues that, in commercial and consumer cases, exequatur is clearly too costly and should be abolished, while the situation might be different in tort and labor cases.

The paper is forthcoming in the *Festschrift für Bernd von Hoffmann.*

Stephan on Germany v. Italy

Paul Stephan, who is the John C. Jeffries, Jr. Distinguished Professor of Law at the University of Virginia, comments on the recent judgment of the International Court of Justice in *Jurisdictional Immunities of the State* over at the lawfareblog.

Prize in International Insolvency Studies, 2012

The International Insolvency Institute has announced its 2012 Prize in International Insolvency Studies. The Prize in International Insolvency Studies comprises a Gold Medal Prize for the winning submission as well as a Silver Medal Prize, a Bronze Medal Prize, and several Finalist Prizes. The Prizes are accompanied by an honorarium for the Medal winners.

PRIZE DETAILS: The III Prize is awarded for original legal research, commentary or analysis on topics of international insolvency and restructuring significance and on comparative international analysis of domestic insolvency and restructuring issues and developments. The Prize Competition is open to full and part-time undergraduate and graduate students and to practitioners in practice for less than eight years. Entries must not have been published prior to October 2011 and must be available to be posted on the International Insolvency Institute website. Medal-winning entries will be considered for publication in the Norton Journal of Bankruptcy Law and Practice (West), the Norton Annual Review of International Insolvency (West) and for inclusion in the Westlaw electronic database.

JURY: Entries will be judged by a distinguished panel of leading international insolvency academics and practitioners. The Jury will consist of Co-Chairs Professor Christoph Paulus, Humboldt University, Berlin and Professor Jay L. Westbrook, University of Texas, Austin and Hon. Samuel L. Bufford, Pennsylvania State University, University Park, Pennsylvania; Professor Junichi Matsushita, University of Tokyo, Tokyo; Hon. Adolfo Rouillon, Senior Counsel, Legal Department, World Bank, Washington, D.C., Professor John A.E. Pottow, University of Michigan, Ann Arbour, Professor Jingxia (Josie) Shi, China University of International Business & Economics, Beijing and Professor Ulrik Rammeskow Bang-Pedersen, University of Copenhagen, Denmark.

SUBMISSIONS/FURTHER INFORMATION: Entries may be of any length but a limit of 20,000 – 30,000 words is preferred. Entries must be received by March 31, 2012. The Gold Medal winner will be honoured at the III's Twelfth Annual International Insolvency Conference in Paris on June 21-22, 2012 and will have all

Conference registration fees waived. All Medal Winners and Finalists will be invited to attend the Conference and will be provided with complementary Conference registration. For further details and the terms of the III Prize in International Insolvency Studies, please contact the Executive Director of the International Insolvency Institute, Shari Bedker, at the III's offices in Washington, D.C. at (telephone) (703) 273-6165, (fax) (703) 830-0610 or (email) info@iiiglobal.org

SUMMARY OF TERMS AND CONDITIONS: The International Insolvency Institute will award its 2012 Prize in International Insolvency Studies, for outstanding writing, research or analysis in the insolvency field. The terms of the 2012 Prize Competition are as follows:

1. Candidates must be full or part-time undergraduate or graduate students, researchers or practitioners in practice for less than seven years.
2. The article or research must be on an international or comparative insolvency topic and must be submitted in English.
3. Articles or research in preparation for publication or already published are eligible, provided they were not published before October, 2011.
4. Candidates may submit only one contribution.
5. The Jury may decide not to award the Prize if, in its opinion, no contribution of sufficient quality has been submitted.
6. Entries must be eligible and available to be posted on the III website and published in the Journal of Bankruptcy Law and Practice or the Annual Review of International Insolvency (West and Westlaw).
7. Articles must be submitted before March 31, 2012.
8. Candidates will be informed of the final decision of the jury on or before April 30, 2012.
9. All contributions should be sent to the III c/o Shari Bedker at: info@iiiglobal.org and must be marked as submissions for the III Prize in International Insolvency Studies, 2012.
10. The Gold Medal Prize will be US $3,000; the Silver Medal Prize will be US $2,000; the Bronze Medal Prize will be US $1,000; and up to 6 Finalist Prizes of US $500 may be awarded.
11. The Gold Medal Winner will be invited to attend the III's Twelfth Annual Conference in Paris in June, 2012 to present their work and the III will cover his/her reasonable travel expenses. All Medal Winners and Finalist Prize recipients may attend the 2012 Annual Conference and their Conference

registration fees will be waived.

Seminar on Private International Law: Programme

As already announced, the Facultad de Derecho of the Complutense University of Madrid is hosting a new edition of the International Seminar on Private International Law, organised bu Prof. Fernández Rozas and Prof. De Miguel Asensio, on March 2012, the 22 and 23. Prof. Fausto Pocar, Sabine Corneloup, Juan José Álvarez Rubio, Mark D. Rosen, Justyna Balcarczyk, Eva Inés Obergfell, Santiago Álvarez González, Bertrand Ancel, Constanza Honorati, Michael Wilderspin, Janeen M. Carruthers and Darío Moura Vicente, will be main speakers; each lecture will be followed by the presentation of papers on the same subject.

The full schedule is here. Registration is free; just send an email to seminariodiprucm@gmail.com before March, the 15.

Jurisdictional Immunities of the State: the ICJ to Deliver its

Judgment in the Germany v. Italy Case

According to a press release, **on 3 February 2012 the International Court of Justice will deliver its judgment in the case concerning *Jurisdictional Immunities of the State*** (Germany v. Italy: Greece intervening) (see our previous post here).

A public sitting will take place at the Peace Palace in The Hague, during which the President of the Court, *Judge Hisashi Owada*, will read the judgment. The public sitting will be broadcast live and in full on the Court's website (see Multimedia, in the Press Room section), **from 10 a.m. local time**.

At the end of the sitting, a press release, the full text of the judgment and a summary of it will be distributed. All of these documents will be made available at the same time on the Court's website, where all the documentation relating to the proceedings is accessible.

Joint Conference European Commission- Hague Conference

At the meeting of the Council on General Affairs and Policy of the Hague Conference, 5-7 April 2011, the EU managed to keep on the agenda the project on accessing the content of foreign law; a joint conference with the Hague Conference was foreseen in February 2012. Latest news are that it will indeed be held in Brussels in two weeks (Wednesday 15-Friday 17, Borschette Conference Centre). The programme is not yet available on the official websites, but a draft has already been published by Prof. Garau here.

Anton’s Private International Law – 3rd ed. by P. Beaumont and P. McEleavy

Recently, the 3rd edition of Professor Anton’s standard text on the Scottish rules of private international law has been published. The book has been completely revised by Professor Paul Beaumont (University of Aberdeen) and Professor Peter McEleavy (University of Dundee) paying regard to the fact that the subject area has been comprehensively restructured in recent years due to the process of Europeanisation. The Brussels I, Brussels IIa, Rome I, Rome II and Maintenance Regulations, as well as associated case law, are considered in detail with regard paid to their particular impact on Scots law. Further, the recent work of the Hague Conference on Private International Law is included, in particular the Conventions on Maintenance, Choice of Court, Protection of Adults, Protection of Children and Inter-country Adoption. In analysing European and global instruments the authors have drawn on their experience in participating in the negotiation processes in Brussels as well as from their work for the Hague Conference.

Here is the contents:

Introduction
Theories and methods
International and regional instruments: Implementation, integration and interpretation
Identification of the applicable law
Application of statutes and limits to the application of foreign law
State immunity
Connecting factors
Jurisdiction

External decrees: Recognition and enforcement
Choice of law in contractual obligations – Rome I regulation
Arbitration
Foreign money liabilities
Bills of exchange and letters of credit
Choice of law in noncontractual obligations
Marriage, civil partnership and cohabitation
Divorce and dissolution
Effects of marriage and divorce on property
Children
Maintenance
Adults with incapacity
Property
Trusts
Administration of estates of persons deceased
Succession
Companies, firms and associations
Bankruptcy
Procedure and evidence

More information can be found at the publisher's website.

Schooling in Cuba, Payment from Spain and the Helms Burton Act

The schooling of two children in the *École Française* of La Habana, Cuba, costs $ 1054 every three months; an amount that the father of the kids was willing to pay. However, the amount never reached destination. In September 2011, a Spanish national ordered payment by means of bank transfer from Novagalicia Banco in La Coruña (Spain), to an office in Paris, Crédit Mutuel-CIC. Unfortunately the operation was performed in dollars rather than euros: this caused the intervention of the Novagalicia Banco correspondent bank in the U.S., JPMorgan

Chase Bank; and thereafter, of the US Treasury Department through the Office of Foreign Assets Control (OFAC). The OFAC is responsible for enforcing economic and trade sanctions of U.S. foreign policy, such as those prescribed by the Helms Burton Act of 1996.

The short term solution for the kids to remain enrolled was … paying again. This time in euros.

No Power to Issue Anti-Enforcement Injunctions in New York

On 26 January 2012, the U.S. Court of Appeals for the Second Circuit has issued its long-awaited opinion in the *Chevron* case on the power to issue anti-enforcement injunctions.

The judgment offers an interesting analysis of the power of U.S. Courts to issue such novel and radical injunctions. The Court finds that the issue is controlled by its (New York) *Uniform Foreign Country Money-Judgments Recognition Act*, and not by its precedents on anti-suit injunctions. The Court also discusses briefly comity, and declines Chevron's invitation to be "*a transnational arbiter to dictate to the entire world which judgments are entitled to respect and which countries' courts are to be treated as international pariahs*".

Recognition Act

> *Whatever the merits of Chevron's complaints about the Ecuadorian courts, however, the procedural device it has chosen to present those claims is simply unavailable: The Recognition Act nowhere authorizes a court to declare a foreign judgment unenforceable on the preemptive suit of a putative judgment-debtor. The structure of the Act is clear. The sections on which Chevron relies provide exceptions from the circumstances in which a holder of a foreign*

judgment can obtain enforcement of that judgment in New York; they do not create an affirmative cause of action to declare foreign judgments void and enjoin their enforcement. (…)

These procedural requirements exist for good reason. The Recognition Act and the common-law principles it encapsulates are motivated by an interest to provide for the enforcement of foreign judgments, not to prevent them. The Act "was designed to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement" in New York. The exceptions to that rule – such as the mandatory nonrecognition of judgments procured without due process or personal jurisdiction – serve the same purpose: to facilitate trust among nations and their judicial systems by preventing one jurisdiction from using the trappings of sovereignty to engage in a sort of seignorage by which easy judgments are minted and sold to any plaintiff willing to pay for them. Accordingly, a jurisdiction such as New York that requires foreign judgments to comport with certain basic requirements of fairness and legitimacy instills trust in the overall enforcement-facilitation framework.

Chevron would turn that framework on its head and render a law designed to facilitate "generous" judgment enforcement into a regime by which such enforcement could be preemptively avoided.

Comity

Considerations of international comity provide additional reasons to conclude that the Recognition Act cannot support the broad injunctive remedy granted by the district court. As noted above, the New York legislature, in enacting the Recognition Act, sought to provide a ready means for foreign judgment-creditors to secure routine enforcement of their rights in the New York courts, while reserving New York's right to decline to participate in the enforcement of fraudulent "judgments" obtained in corrupt legal systems whose courts failed to provide the basic rudiments of fair adjudication. In doing so, New York undertook to act as a responsible participant in an international system of justice – not to set up its courts as a transnational arbiter to dictate to the entire world which judgments are entitled to respect and which countries' courts are to be treated as international pariahs. The exceptions to New York's

general policy of enforcing foreign judgments are exactly that: exceptions that permit New York courts, under specified
circumstances, to decline efforts to take advantage of New York's policy of liberally enforcing such judgments. Nothing in the language, history, or purposes of the Act suggests that it creates causes of action by which disappointed litigants in foreign cases can ask a New York court to restrain efforts to enforce those foreign judgments against them, or to preempt the courts of other countries from making their own decisions about the enforceability of such judgments. (…)

We need not address here whether and how international comity concerns would affect a hypothetical effort by a state to vest its courts with the authority to issue so radical an injunction. There is no such statutory authorization, for New York has authorized no such relief. To resolve the dispute before us, we need only address whether the statutory scheme announced by New York's Recognition Act allows the district court to declare the Ecuadorian judgment non-recognizable, or to enjoin plaintiffs from seeking to enforce that judgment. Because we find that it does not, the injunction collapses before we reach issues of international comity.