International Seminar on Private International Law 2018 (Programme)

The programme of the 2018 edition of the International Seminar on Private International Law organized by Prof. Fernández Rozas and Prof. De Miguel Asensio, has been released and is available **here**. In this occasion, the Seminar is jointly organized with Prof. Moura Vicente and is to be held at the Law Faculty of the University of Lisbonne on 13-14 September 2018. The Seminar, which is closely connected to the legal journal *Anuario Español de Derecho internacional privado*, will be structured in five sections: Family and Successions; International Commercial Arbitration: International Business Law; Private International Law and IT Law; and Codification of PIL with a special focus on Latin America. The Conference will bring together around fifty speakers from more than twelve countries. Additional information about the seminar is available **here**.

The Belgian Government unveils its plan for the Brussels International Business Court (BIBC)

Written by Guillaume Croisant, Université Libre de Bruxelles

In October 2017, as already reported in a previous post, the Belgian Government announced its intention to set up a specialised English-speaking court with jurisdiction over international commercial disputes, the Brussels International Business Court ("BIBC"). An update version of the text has finally been submitted to Parliament on 15 May 2018, after the Government's initial draft faced

criticisms from the High Council of Justice (relating to the BIBC's independence and impartiality, its source of funding and its impact on the ordinary courts) and was subject to the review of the Conseil d'Etat.

In the wake of Brexit, the Belgian Government aims at establishing a specialised business court able to position Brussels as a new hub for international commercial disputes, in line with its international status as *de facto*capital of the EU and seat of many international institutions and companies. Similar projects are ongoing in several jurisdictions throughout the EU, including France, the Netherlands and Germany (see previous post).

The BIBC will have jurisdiction over disputes:

- which are international in nature, i.e. where (i) the parties have their establishment in different jurisdictions, (ii) a substantial part of the commercial relationship must be performed in a third country, or (iii) the applicable law to the dispute is a foreign law. In addition, another language than French, Dutch or German (Belgium's official languages, which are already used before ordinary courts) must have been used frequently by the parties during their commercial relationship;
- among "enterprises" (i.e. every entity pursuing an economic purpose, including public enterprises which provide goods and services on a market basis); and
- provided that the parties have agreed to the BIBC's jurisdiction before or after the crystallisation of their dispute.

Subject to potential amendments in Parliament, the main procedural hallmarks of the BIBC can be summarised as follows:

- the procedure will be conducted in English (notices and submissions, evidence, hearings, judgments, etc.);
- while the BIBC remains a State court, the procedure will be based on the UNCITRAL Model Law on international arbitration, which means that the parties will be offered greater flexibility and room to organise the conduct of the proceedings;
- the cases will be heard by *ad hoc* chambers of three judges, one professional and two lay judges (appointed by the president of the BIBC on the basis of a panel of Belgian and international experts in

international business law), with the assistance of the Registrar of the Brussels Court of Appeal;
- the BIBC will be granted the power to issue provisional and protective measures (including upon request *ex parte* measures);
- no appeal will be open against the BIBC's decision (with the exception of an *opposition*/*tierce opposition* before the BIBC for absent parties/interested third parties, and a *pourvoi en cassation* on points of law before the Supreme Court);
- the BIBC should be self-financing and the court fees are therefore going to be significantly increased (to around € 20,000/case).

The Belgian Government aims to have the BIBC up and running by 1 January 2020.

Proving Chinese Law: Deference to the Submissions from Chinese Government?

Written by Dr. Jie (Jeanne) Huang, Senior Lecturer, University of New South Wales Faculty of Law

The recent U.S. Supreme Court case, Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd, concerns what weight should be given to the Chinese government's submission of Chinese law. On Page 58 of the trial transcript, Justices Kagan and Ginsburg asked how about other countries dealing with formal submissions from the Chinese government. There are two examples.

One is Hong Kong. In TNB Fuel Services SDN BHD v China National Coal Group Corporation ([2017] HKCFI 1016), the issue is whether the defendant, a state-owned enterprise, is protected by Chinese absolute sovereignty immunity under

Chinese law. The court deferred to an official letter provided by the Hong Kong and Macao Affairs Office of the State Department in Mainland China. The Office answers no absolute sovereignty immunity to Chinese state-owned enterprises carrying out commercial activities. The Court adopted this opinion without second inquiry (para 14 of the judgment). After considering a bunch of other factors, the court ruled against the defendant.

The other is Singapore. In Sanum v. Laos ([2016] SGCA 57), the issue is whether the China-Laos Bilateral Investment Treaty (BIT) shall be applied to Macao Special Administrative Region. Chinese embassy in Laos and China Ministry of Foreign Affairs provided diplomatic announcements indicating that the BIT shall not be applied to Macao. However, the Court of Appeal of Singapore held that China's announcements were inadmissible and, even if admitted, they did not change the applicability of the BIT to Macau. This is partly because, before the dispute with Sanum crystalized, no evidence showed that China and Laos had agreed that the BIT should not be applied to Macau. Therefore, the China's diplomatic announcements should not be retroactively applied to a previous dispute. For a more detailed discussion, please see pages 16-20 of my article.

TNB Fuel Services and Sanum share important similarities with Animal Science Products, because the key issues are all about the proving of Chinese law. In the three cases, Chinese government all provided formal submissions to explain the meaning and the applicability of Chinese law. However, TNB Fuel Services and Sanum can also be distinguished from Animal Science Products, because comity plays no role in the former two cases. TNB Fuel Services concerns sovereign immunity, which is an issue that Hong Kong courts must follow China's practices. This is established by Democratic Republic of the Congo v. FG Hemisphere Associates (FACV Nos. 5, 6 & 7 of 2010). Sanum is a case to set aside an investment arbitration award, so the Court of Appeal of Singapore need not consider comity between Singapore and China. In contrast, in Animal Science Products, the U.S. Court of Appeals for the Second Circuit elaborated the importance of comity between the U.S. and China. Therefore, Animal Science Products should not be considered as a technical case of proving foreign laws. The U.S. Supreme Court may consider deferring to the submissions of Chinese government to a certain extent but allows judges to decide whether the Chinese government's submission is temporally consistent with its position on the relevant issue of Chinese law.

Call for Papers: Second German Conference for Young Scholars in PIL

Building on the success of the first German Conference for Young Scholars in PIL, which took place almost exactly one year ago at the University of Bonn, a second conference for young scholars in private international law will be held on 4 and 5 April 2019 at the University of Würzburg. Young scholars are invited to submit proposals for presentations in German or English that engage with the conference theme 'IPR zwischen Tradition und Innovation – Private International Law between Tradition and Innovation'.

Further information on possible approaches to the conference theme can be found in the official Call for Papers; contributions may discuss any aspect of private international law relating to the theme, including questions of international jurisdiction, choice of law, recognition and enforcement, international arbitration, and *loi uniforme*. Submissions describing the proposed 30-minute talk in no more than 800 words can be made until 1 July 2018. While the conference language will be German, individual submissions may be made (and presented) in German or English.

All accepted contributions will be published in a conference volume.

Constitutional and Treaty-based Review of Foreign Law – Studies in Private International Law

A new book co-edited by Gustavo Cerqueira and Nicolas Nord has been published:

Contrôle de constitutionnalité et de conventionnalité du droit étranger – Études de droit international privé (Amérique Latine – États-Unis – Europe), Société de législation comparée, Paris, 2017, 285 p.

The application of foreign law is increasingly frequent in the settlement of international disputes, both before the judge and the arbitrator. At the same time, the impact of constitutional and treaty standards on private law is a widespread phenomenon. The question of a dual constitutional and treaty-based review of foreing law by the forum seized inevitably arises. It could be carried out in the light of the hierarchy of the standards of the system of the lex causae, the hierarchy of the forum or even the hierarchy of the State in which the judgment given is intended to be enforced. The operation of the classic mechanisms of private international law and arbitration law is put to the test, both in terms of applicable law and the international effectiveness of decisions.

Because of its innovative nature, this book updates the essential issues of the subject. The national reports show the different approaches to the question of double-checking in Europe (Germany, France, Italy and Switzerland), North America (United States) and Latin America (Argentina, Brazil and Uruguay). More generally, prolegomena contextualize the places and forms of application of foreign law subject to a constitutional and treaty-based review, and explore the figure of otherness in these contextes.

The debates raised during the round tables of the colloquium that gave rise to this book, which was held at the Grand Chamber of the Court of Cassation on 23 September 2016, revealed not only differences of assessment, but also certain convergences worthy of an overall vision of the problem. More than a juxtaposition of systems, the debates provided an opportunity to explore new avenues for resolution. Some of them seek to establish an international cooperation in this area. At a time when we are discussing the adoption of a

supranational instrument aimed at strengthening the system for determining and applying foreign law and judicial cooperation in the field of information on the law applicable within the European Union, this book is intended to be the starting point for new reflections.

Informations:
http://legiscompare.fr/ecommerce/fr/colloques/408-livre-controle-de-constitutionnalite-et-de-conventionnalite-du-droit-etranger.html

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The Pitfalls of International Insolvency and State Interventionism in Slovenia

Written by Dr. Jorg Sladic, Attorney in Ljubljana and Assistant Professor in Maribor (Slovenia)

The most interesting development in European private international law and European insolvency law seems the Croatian AGROKOR case. Rulings of English courts have been reported (see e.g. Prof. Van Calster's blog, Agrokor DD – Recognition of Croatian proceedings shows the impact of Insolvency Regulation's Annex A.)[1] However, a new and contrary development seems to be an order by the Slovenian Supreme Court in case Cpg 2/2018 of 14 March 2018.[2]

The Slovenian forum refused to grant exequatur to Croatian extraordinary administration as a way of divestiture of insolvent debtor. Large parts of the order do read as a manual of non-contentious proceedings and deal in assessment of interest in bringing an appeal. However, the part dealing with private international law and European civil procedure has to presented. It will have a wider international effect. It is also interesting that the Slovenian forum refused to contemplate any assessment done by the High Court of Justice of England & Wales in case In the matter of Agrokor dd and in the matter of the Cross-border insolvency regulations 2006 ([2017] Ewhc 2791 (Ch)).

Facts:

AGROKOR is a huge agro-industrial enterprises in South-Eastern Europe (Croatia, Slovenia, Romania, Serbia and also perhaps some other European jurisdictions) employing more than 50 000 employees. It is also the biggest owner of agricultural lands in that part of Europe. The impacts of Agrokor were discussed by Hogan & Lovell on their website.[3] Agrokor was owned and operated by a local oligarch and is apparently implied in not all to transparent business operations. As a consequence it became insolvent.

Due to huge debts that would actually require a collective insolvency proceedings Croatia adopted the Law on Extraordinary Administration Proceeding in

Commercial Companies of Systemic Importance for the Republic of Croatia.[4] The essence of that legislation is summarized in English by the High Court of Justice of England & Wales in case In the matter of Agrokor dd and in the matter of the Cross-border insolvency regulations 2006 ([2017] Ewhc 2791 (Ch)). The essence of Croatian legislation is the (temporary) suspension of *par condicio creditorum* in and *pari passu* clauses in insolvency law. AGROKOR was passed under extraordinary administration suspending the rights of owners and of the board of directors.

The Croatian extraordinary administrator requested the recognition of extraordinary administration under Croatian law also for the assets and subsidiaries in Slovenia in 2017. Upon opposition of creditors (banks as creditors *ex iure crediti*) the recognition order was vacated. After remedies the case came before the Supreme Court and ended with an unanimous refusal of recognition.

Reasoning:

In this report only points of private international law will be reported. Questions of standing and of interest in bringing proceedings will not be discussed.

Inapplicability of EU private international law

Even though Slovenia and Croatia are nowadays Member States of the EU, the Regulations 1346/200 and 848/2015 are not to be applied, as the Croatian proceedings are not mentioned in the Annex A. Slovenian national international collective insolvency law (Art. 445 – 488 Financial Operations, Insolvency Proceedings and Compulsory Winding-up Act) and the Bilateral Legal Assistance Treaty Between Slovenia and Croatia of 1994 are to be applied (par. 6).

The lis pendens plea

Agrokor argued that an arbitration case is pending in London and that some of the parties in the Slovenian case declared their claims in Croatian proceedings for extraordinary administration. The Slovenian Supreme court dismissed such a plea. The effects of lis pendens on the arbitration in the UK are a matter for UK courts (par. 23). As a consequence the recognition of Croatian extraordinary administration in the UK by the judgement of the High Court of Justice Nr. CR-2017-005571 of 9 November 2017 is of no importance for Slovenian proceedings. However, even if UK law incorporated the UNCITRAL guidelines the

High court (judge Paul Matthews) based its argumentation on common law and precedents based on that law. The Slovenian forum completely cut the discussion by a laconic statement according to which understanding and application of devices of insolvency law under [*English*] common law is quite different from Slovenian civil law legal order (par. 24).

However, *lis pendens* could be given effect due to parallel pending proceedings in Slovenia and Croatia. The Slovenian Court did not apply the Regulation Brussels Ia (1215/2012) but referred to national Slovenian law. The Slovenian forum explained that the Regulation Brussels Ia is not t be applied by virtue of its exception for bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings (Art. 1(b) Regulation 1215/2012). National Slovenian private international law deals with the exception of *lis pendens* in Art. 88 Private International Law and Proceedings Act of 1999.[5] The essence of Slovenian international *lis pendens* is the request to suspend proceedings before a Slovenian forum. Where Slovenian private international law applies, a Slovenian forum will not suspend the proceedings ox officio. *In concreto*, however, none of the parties in Slovenian set of proceedings requested suspension.

Cross-border effects of substantive consolidation

One of the pleas in appeal was the erroneous application of substantive consolidation under the UNCITRAL model law. Lower courts considered that the substantive consolidation violated the *par condicio creditorum principle*, i.e. a basic principle of Slovenian insolvency law. Lower courts assessed the Croatian extraordinary administration and concluded that in essence such an administration is to be considered as a substantive consolidation. Substantive consolidation is a treatment of the assets and liabilities of two or more enterprise group members as if they were part of a single insolvency estate.[6] Slovenian insolvency legislation followed the UNCITRAL model law. The Supreme Court did not have any problem incorporating via its own case-law the UNCITRAL Legislative Guide on Insolvency Law. According to the Slovenian forum the Croatian Law on Extraordinary Administration Proceeding in Commercial Companies of Systemic Importance for the Republic of Croatia indeed incorporated the substantive consolidation in Croatian law. Art. 43 of the said Croatian law namely provides for a systemic measure of substantive consolidation (paras. 29 – 40, especially par. 36). Substantive cross-border consolidation is

contrary so Slovenian international *ordre public*.

The defence of ordre public (paras 41 – 53)

The essence of Slovenian Supreme Court's reasoning consists of assessment of the compliance with ordre public condition for granting recognition (see on Slovenian legislation in Italian e.g. in Sladi? La Corte suprema slovena si confronta con i danni punitivi, Danno e responsabilità 1/2014, p. 18 et seq.). The national Slovenian law applies the prerequisite of international ordre public, i.e. only foreign decision that could endanger the legal and moral integrity of Slovenian legal order are not recognised. The *ordre public* defence is the ultimate refuge. However, recognition of foreign proceedings for divestiture of over-indebted debtors where the condition of equal treatment of creditors (*par condicio creditorum*) is not complied with would not comply with the requirements of Slovenian international *ordre public*. Slovenia namely protects on the one hand in national insolvency proceedings the equal treatment of creditors. On the other hand it only grants recognition in international insolvency legislation the powers of foreign administrator to conduct the case for the common representation of all creditors (par. 45). The Croatian Law on Extraordinary Administration Proceeding in Commercial Companies of Systemic Importance for the Republic of Croatia is a form of State's economic intervention or economic protectionism having the aim of protection of commercial companies of systemic importance. The Croatian law interferes in the fundamental principles of collective insolvency law and gives certain creditors privileges to be paid by priority by an administrator's discretionary decision without any consent of the board of creditors (par. 47). The extraordinary administration is conditioned by the State's interest and certainly not by the interest of creditors. Creditors do not get nor the benefit of the *par condicio creditorum* (no equal treatment of creditors in having the same condition vis-a-vis the debtor) and are not paid in equal shares (no *pari passu* clause) (par. 48).

The Slovenian Supreme Court refused to engage in any assessment of compatibility of Croatian law with the Croatian ordre public (par. 49). However, it remarked that Courts in successor States of Yugoslavia refused to recognise the effects of judicial decisions based on the Law on Extraordinary Administration Proceeding in Commercial Companies of Systemic Importance for the Republic of Croatia. Courts in Montenegro (Supreme Court of Montenegro), Serbia (Commercial court of Appeal), Bosnia (Supreme Court of Bosnia) all concluded

that the Croatian Law on Extraordinary Administration Proceeding in Commercial Companies of Systemic Importance for the Republic of Croatia does not deal in insolvency, it is aimed at the protection of State's interests. The Croatian law is contrary to ordre public of any of those States. Perhaps the said decisions can also be seen as introducing the government interest analysis in South-Eastern Europe?

In the end the Slovenian Supreme Court stressed the importance of the European *ordre public*. "In the framework of national *ordre public* also the European *ordre public* is to be acknowledged next to regional *ordre public*. [*Comment: The order does not clarify what the difference between the European and regional ordre public is*]. A Slovenian forum is not empowered to refuse the recognition of foreign insolvency proceedings even though they might be contrary to national *ordre public* if such a refusal would not be justified or proportional from a European point of view. Slovenia and Croatia are namely both members of European legal area, i.e. members of the EU. However, each State is empowered to set types and conditions of collective insolvency proceedings on their territories. The effects and closing can then be a subject-matter of recognition (both automatic and according to the rules) in other States and also to set interest to be affected by legal consequences of recognition of foreign insolvency proceedings." Slovenia decided to protect the creditors' interests, for their equal treatment, as a consequence the refusal of recognition of the extraordinary administration complies with the Slovenian ordre public.

[1]https://gavclaw.com/2018/03/26/agrokor-dd-recognition-of-croatian-proceedings-shows-the-impact-of-insolvency-regulations-annex-a/#comment-69405

[2]Available in Slovenian at http://www.sodisce.si/sodni_postopki/objave/2018031912582798/

[3]https://www.hlbriworkoutblog.com/2017/12/english-recognition-agrokor-insolvency-not-tick-box-exercise/#page=1

[4]The Croatian version available on the webise of the Croatian Official Journal https://narodne-novine.nn.hr/clanci/sluzbeni/2017_04_32_707.html

[5]The translation in Encyclopedia of Private International Law (Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro de Miguel Asensio), 2017, p. 3784–3804 reads as: »A court of the Republic of Slovenia will stay the proceedings at **the**

request of a party if other proceedings on the same matter have been initiated before a foreign court between the same parties:

- if the suit in the proceedings conducted abroad was served on the defendant before the service of the suit in the proceedings conducted in the Republic of Slovenia; or if a non-contentious procedure abroad started earlier than in the Republic of Slovenia;
- if it is probable that the foreign decision will be recognized in the Republic of Slovenia, and;
- if reciprocity exists between the two states.«

[6]http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html.

Business and Human Rights (Empresas y Derechos Humanos)

A new book co-edited by Prof. F.J. Zamora Cabot and M.C. Marullo has just been published in the field of human rights and business by the Italian publisher house Editoriale Scientifica, as part of the collection "La ricerca del diritto nella comunità internazionale". The diversity of the approaches of the contributions – constitutional law, International Public Law, investment arbitration, Procedural Law, Private International Law-, makes it worth for specialists in the different areas. The index and Foreword can be looked up here.

Update on ‘This one is next: the Netherlands Commercial Court!’

A brief update on our previous post regarding the approval of the establishment of the Netherlands Commercial Court by the House of Representatives (*Tweede Kamer*). The bill is now scheduled for rubber-stamping by the Senate (*Eerste Kamer*) on 27 March 2018. This makes the kick-off date of 1 July 2018 realistic.

We believe that this court will strengthen international commercial complex litigation in the Netherlands, and it offers business litigants an alternative to arbitration and high quality commercial courts in other countries. See also (for Dutch readers) Eddy Bauw and Xandra Kramer, ‘Commercial Court’ is uitkomst voor complexe internationale handelszaken, Het Financieele Dagblad, 11 October 2017.

More news will follow soon.

Our previous post:

This one is next: the Netherlands Commercial Court!

By Georgia Antonopoulou, Erlis Themeli, and Xandra Kramer, Erasmus University Rotterdam
(PhD candidate, postdoc researcher and PI ERC project Building EU Civil Justice)

Following up on our previous post, asking which international commercial court would be established next, the adoption of the proposal for the Netherlands Commercial Court by the House of Representatives (*Tweede Kamer*) today answers the question. It will still have to pass the Senate (*Eerste Kamer*), but this should only be a matter of time. The Netherlands Commercial Court (NCC) is

expected to open its doors on 1 July 2018 or shortly after.

The NCC is a specialized court established to meet the growing need for efficient dispute resolution in cross-border civil and commercial cases. This court is established as a special chamber of the Amsterdam District Court and of the Amsterdam Court of Appeal. Key features are that proceedings will take place in the English language, and before a panel of judges selected for their wide expertise in international commercial litigation and their English language skills.

To accommodate the demand for efficient court proceedings in these cases a special set of rules of procedure has been developed. The draft Rules of Procedure NCC can be consulted here in English and in Dutch. It goes without saying that the court is equipped with the necessary court technology.

The Netherlands prides itself on having one of the most efficient court systems in the world, as is also indicated in the Rule of Law Index – in the 2017-2018 Report it was ranked first in Civil Justice, and 5th in overall performance. The establishment of the NCC should also be understood from this perspective. According to the website of the Dutch judiciary, the NCC distinguishes itself by its pragmatic approach and active case management, allowing it to handle complex cases within short timeframes, and on the basis of fixed fees.

Workshop on Private International Law of IP Rights

This call for papers is provided for by Jeanne Huang.

The issue of cross border protection of intellectual property (IP) was very important and explained the use of bilateral and multilateral treaties such as the Berne Convention and the Paris Convention. One of the fundamental principles underlying these treaties was territoriality and the national treatment principle. However, the advent of the 21st century brought digitisation and globalisation, which have significantly impacted upon the territoriality protection. Finding the

best way to protect IP within the context of globalisation and digitisation was the most fundamental question that the workshop sought to answer. We invite colleagues working on private international law and IP to submit expressions of interest to present at the workshop, which will be held at the Faculty of Law, University of New South Wales on Saturday, 18 August 2018, from 9:30 am -5:00 pm. The workshop is designed to allow researchers working in the field of private international law and IP to deliver work-in-progress papers to their peers. We particularly welcome submissions to discuss and debate the draft International Law Association Guidelines of Intellectual Property and Private International Law, available here.

We are keen to receive proposals that focus on private-international-law issues in cross-border IP disputes, such as:

- Jurisdiction,
- Applicable Law,
- Recognition and Enforcement of Judgments,
- Arbitration or
- Private international law issues in smart contracts, blockchain transactions and other digitalized transactions.

For paper proposals, speakers are to submit a title and 150-200 word abstract, along with a one-page CV for potential inclusion in the workshop. Please send your proposal to Jeanne.Huang@unsw.edu.au by 15 April 2018.

A European Law Reading of Achmea

Written by Prof. Burkhard Hess, Max Planck Institute Luxembourg.

An interesting perspective concerning the *Achmea* judgment of the ECJ[1] relates to the way how the Court addresses investment arbitration from the perspective of European Union law. This paper takes up the judgment from this perspective.

There is no doubt that *Achmea* will disappoint many in the arbitration world who might read it paragraph by paragraph while looking for a comprehensive line of arguments. Obviously, some paragraphs of the judgment are short (maybe because they were shortened during the deliberations) and it is much more the outcome than the line of arguments that counts. However, as many judgments of the ECJ, it is important to read the decision in context. In this respect, there are several issues to be highlighted here:

First, the judgment clearly does not correspond to the arguments of the German Federal Court (BGH) which referred the case to Luxembourg. Obviously, the BGH expected that the ECJ would state that intra EU-investment arbitration was compatible with Union law. The BGH's reference to the ECJ argued in favor of the compatibility of intra EU BIT with Union law.[2] In this respect, the *Achmea* judgment is unusual, as the ECJ normally takes up positively at least some parts of the questions referred to it and the arguments supporting them. In contrast, the conclusion of AG Wathelet were much closer to the questions asked in the preliminary reference.

Second, the Court did not follow the conclusions of Advocate General Wathelet.[3] As the AG had pushed his arguments very much unilaterally in a (pro-arbitration) direction, he obviously provoked a firm resistance on the side of the Court. In the *Achmea* judgment, there is no single reference to the conclusions of the AG[4] – this is unusual and telling, too.

Third, the basic line of arguments developed by the ECJ is mainly found in paras 31 – 37 of the judgment. Here, the Court sets the tone at a foundational level: the Grand Chamber refers to basic constitutional principles of the Union (primacy of Union law, effective implementation of EU law by the courts of the Member States, mutual trust and shared values). In this respect, it is telling that each paragraph quotes Opinion 2/13[5] which is one of the most important (and politically strongest) decisions of the Court on the autonomy of the EU legal order and the role of the Court itself being the last and sole instance for the interpretation of EU law.[6] *Achmea* is primarily about the primacy of Union law in international dispute settlement and only in the second place about investment arbitration. *Mox Plant*[7] has been reinforced and a red line (regarding concurrent dispute settlement mechanisms) has been drawn.

Although I don't repeat here the line of arguments developed by the Grand

Chamber, I would like to invite every reader to compare the judgment with the Conclusions of AG Wathelet. In order to understand a judgment of the ECJ, one has to compare it with the Conclusions of the AG – also in cases where the Court does (exceptionally) not follow the AG. In his Conclusions, AG Wathelet had tried to integrate investment arbitration into Union law and (at the same time) to preserve the supremacy of investment arbitration over EU law even in cases where only intra EU relationships were at stake. Or – to put it the other way around: For the ECJ, the option of investors to become quasi-international law subjects and to deviate of mandatory EU law by resorting to investment arbitration could not be a valuable option – especially as their home states (being EU Member States) are not permitted to escape from mandatory Union law by resorting to public international law and affiliated dispute resolution mechanisms. Therefore, from a perspective of EU law the judgment does not come as a surprise.

Finally, this judgment is not only about investment arbitration, its ambition goes obviously further: If one looks at para 57 the perspective obviously includes future dispute settlement regimes under public international law and their relationship to the adjudicative function of the Court. One has to be aware that Brexit and the future dispute resolution regime regarding the Withdrawal Treaty is in the mindset of the Court. In this respect the wording of paragraph 57 seems to me to be telling. It states:

"It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, *provided that the autonomy of the EU and its legal order is respected*[8]."

Against this background of European Union law, the *Achmea* judgment appears less surprising than the first reactions of the "arbitration world" might have implied. Furthermore, the (contradictory[9]) statement in paras 54 and 55 should be read as a sign that the far reaching consequences with regard to investment arbitration do not apply to commercial arbitration (*Eco Swiss*[10] and *Mostaza*

Claro[11] are explicitely maintained).[12] Finally, it is time to start a discussion about the procedural and the substantive position of individuals in investment arbitration in the framework of Union law. As a matter of principle, EU investors should not expect to get a better legal position as their respective home State would get in the context of EU law. Investment arbitration does not change their status within the Union. In this respect, *Achmea* is simply clarifying a truism. And, as a side effect, the disturbing *Micula* story should now come to an end, too.[13]

Footnotes

[1] ECJ, 3/6/2018, case C-284/16, *Slovak Republic v. Achmea BV*, EU:C:2018:158.

[2] BGH, 3/3/2016, ECLI:DE:BGH:2016:030316BIZB2.15.0

[3] Conclusions of 9/19/2017, EU:C:2017:699. The same outcome had occured in case C-536/13, *Gazprom*, EU:C:2015:316, which was also related to investment arbitration.

[4] The Court only addresses the issue whether the hearing should be reopened because some Member States had officially expressed their discomfort with the AG's Conclusions, ECJ, 3/6/2018, case C-284/16, *Amchea*, EU:C:2018:158, paras 24-30.

[5] ECJ, 12/18/2014, Opinion 2/13 (*Accession of the EU to the ECHR*), EU:C:2014:2454.

[6] For the political connotations of Opinion 2/13, cf. *Halberstam*, "'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward." German L.J. 16, no. 1 (2015): 105 ff.

[7] ECJ, 5/30/2015, case C-459/03 *Commission v Ireland,* EU:C:2006:345.

[8] Highlighted by B.Hess.

[9] Both, commercial and investment arbitration are primarily based on the consent of the litigants, see *Hess*, The Private Public Divide in International Dispute Settlement, RdC 388 (2018), para 121 – in print

[10] ECJ, 6/1/1999, case C?126/97, *Eco Swiss*, EU:C:1999:269.

[11] ECJ, 10/26/2006, case C?168/05, *Mostaza Claro*, EU:C:2006:675.

[12] It is interesting to note that the concerns of the ECJ (paras 50 ss) regarding the intervention of investment arbitration by courts of EU Member States did not apply to the case at hand as German arbitration law permits a review of the award (section 1059 ZPO). The concerns expressed relate to investment arbitration which operates outside of the NYC without any review of the award by state court, especially in the context of articles 54 and 55 ICSID Convention.

[13] According to the ECJ's decision in *Achmea*, the arbitration agreement in the *Micula* case must be considered as void under EU law. However, Micula was given by an ICSID arbitral tribunal and, therefore, there is no recognition procedure open up a review by state courts of the arbitral award, see articles 54 and 55 ICSID Convention.