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

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

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

*Sergio Maria Carbone*, Professor Emeritus at the University of Genoa, provides an assessment of party autonomy in substantive and private international law in **"Autonomia privata nel diritto sostanziale e nel diritto internazionale privato: diverse tecniche e un'unica funzione"** (Party Autonomy in Substantive and Private International Law: Different Techniques and a Single Function; in Italian).

> *The paper focuses on the techniques through which party autonomy may operate in contractual relationships with the aim of assessing that (i) such techniques are, in practice, more and more difficult to define as to their respective fields of application; (ii) irrespective of which of such different techniques is actually deployed, they all share the common objective and the unified task to accomplish, in the most exhaustive way, the plan that the parties intended to implement by executing their contract. Indeed, party autonomy may operate either as a tool for the regulation of an entire relationship or of parts thereof, or as a conflict of laws rule or, again, as a direct or indirect source of regulation of contractual relationships. Whatever the specific role played by party autonomy with regard to a given contract, party autonomy eventually pursues the aim of executing the parties' underlying programme, provided that the fulfillment thereof is consistent with public policy, overriding mandatory rules and with the mandatory rules of the State with which the contract is exclusively connected. In this view, it is also confirmed the gradual establishment of the so-called material considerations method with regard to private international law solutions and, in particular, to the choice of the*

*national legal system which may come into play in determining the law applicable to contractual relationships.*

*Cristina Campiglio*, Professor at the University of Pavia, examines the history of private international law from the Statutaries to the present day in **"Corsi e ricorsi nel diritto internazionale privato: dagli Statutari ai giorni nostri"** (History Repeating Itself in Private International Law: From the Statutaries to the Present Day; in Italian).

*Private international law ("PIL") aims at pursuing its basic mission, i.e. coordinating the different legal systems and underlying legal cultures, by providing an array of practical solutions. However, no rigid recipe proves to be completely satisfying. As a matter of fact, a growing evidence is accumulating that a merely dogmatic approach is often inconclusive and that PIL implementation cannot be reduced to a mere sum of rigid techniques. Rather, it has turned into an art of its sort, where theories and legal sensibilities may be compounded time to time in different ways. Due to the difficulty (the impossibility, at times) to define a clear-cut hierarchy of values – whether arising from the national legal systems or inherent to individual rights – the legal operator has to come to terms with juridical relativism and, in the absence of any binding guidance, search the most suitable solution to the case in point. Concerning the family law field, which has been known to be the most affected by normocultural differences (i.e., differences in law which are a reflection of cultural differences), it appears that the preferred solution should be the one that assures the continuity of individual status both in time and in space. In the past few years, this need of continuity has led scholars to revaluate old legal theories and to develop a new method (the so-called recognition method), which essentially put aside conflict rules. This method has been used occasionally by the domestic legislator, who has developed a number of "receptive" choice-of-law rules. However, the recognition method is hard to be applied when the foreign legal institution is unknown to the local court and an adaptive transposition is required. In such an event, another aged theory can be resurrected, i.e. the substitutive method. The main goal of this contribution is on the one hand to provide evidence of the persisting relevance of the old legal theories mentioned above (some of which dating back to the seventeenth century), while suggesting on the other hand the need to give methodological rigor up, in favor of a more eclectic and efficient exploitation of the variety of*

*methods that PIL makes available.*

*Carla Gulotta*, Associate Professor at the University of Milano-Bicocca, addresses jurisdiction over employers domiciled abroad namely with reference to the *Mahmadia* case in **"L'estensione della giurisdizione nei confronti dei datori di lavoro domiciliati all'estero: il caso *Mahamdia* e il nuovo regime del regolamento Bruxelles I-*bis*"** (The Extension of Jurisdiction over Employers Domiciled Abroad: The *Mahamdia* Case and the New Regime under the Brussels Ia Regulation; in Italian).

*After years of doctrinal debate, public consultations and normative efforts, the Recast of the Brussels I Regulation was finally adopted on 12 December 2012. Among the most innovative features of the new Regulation is the extension of the jurisdiction of EU Member States' courts towards employers not domiciled in the Union. According to the author the new rules cannot be labeled as giving raise to "exorbitant grounds of jurisdiction", nor can they be entirely understood unless they are read as the outcome of the efforts of the EU's Legislator and judges to guarantee the enforcement of European rules aimed at employees' protection in international employment cases. The article also argues that while waiting for the new Regulation to become effective, the European Court of Justice is anticipating its effects through an unprecedented wide construction of the expression "branch, agency or establishment" ex Art. 18(2) of Regulation No 44/2001. Lastly, the author suggests that the difficulties envisaged as for the recognition and the enforceability of the judgments given on the new grounds of jurisdiction might be overcome in respect of those Countries knowing similarly extensive rules of protective jurisdiction, or otherwise recurring to a principle of comity.*

*Rosario Espinosa Calabuig*, Profesora Titular at the University of Valencia, examines the interface between the 1999 Geneva Convention on the Arrest of Ships and Regulations Brussels I and Brussels Ia in **"¿La desarmonización de la armonización europea? A propósito del Convenio de Ginebra de 12 de marzo de 1999 sobre embargo preventivo de buques y su relación con los reglamentos Bruselas I y Bruselas I *bis*"** (The Disharmonization of the European Harmonization? Remarks on the Geneva Convention of 12 March 1999 on the Arrest of Ships and Its Interface with Regulations Brussels I and Brussels

Ia; in Spanish).

> *The International Convention on Arrest of Ships of 1999 came into force on September 14, 2011, and so far it has been ratified by only four EU Member States, including Spain. As the precedent Convention of 1952 – which is still in force in most of the EU Member States – the 1999 Convention prescribes rules on both international jurisdiction, and recognition and enforcement of decisions. Accordingly, the European Union seems to be the one entity having standing to ratify the 1999 Convention, at least with regard to those rules. To this effect, doubts arise about the legality of the aforementioned accession of EU Member States to the Convention but, in particular, about the EU interest in the ratification of the Convention of 1999. Such ratification ought to be encouraged by other Member States, but this is not granted at all. Still, the EU might authorize Member States to ratify the 1999 Convention as previously occurred with reference to other maritime Conventions, such as the 2001 Bunkers or the 1996 HNS. Meanwhile, the 1999 Convention is already operating in countries like Spain. Hence, conflicts arising from the non-coordination between its provisions and those of the Brussels I Regulation ought to be addressed. Among such conflicts are, for example, those arising from a provisional measure being adopted inaudita parte by different courts within the European area of justice. Furthermore, the Brussels I Regulation was recast by Regulation No 1215/2012 which will be in force as of 2015, and among other innovations abolishes exequatur. This paper aims at unfolding those conflicts which might be solved by resorting to the ECJ case-law, in particular Tatry and TNT Express.*

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

*Lidia Sandrini*, Researcher at the University of Milan, **"Risarcimento del danno da sinistri stradali: è già tempo di riforma per il regolamento Roma II?"** (Compensation for Traffic Accidents: Has the Time Come to Amend the Rome II Regulation?; in Italian).

> *This article addresses Regulation EC No 864/2007 in so far as it deals with traffic accidents, at the aim of investigating whether there is an actual need for amendments to the rules applicable in this field. It is submitted that the coordination between the Regulation and the Motor Insurance Directives can*

*be achieved through the interpretation of the different legal texts in the light of their respective scopes and objects. On the contrary, the impact of the application of the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents definitely needs to be addressed by the EU legislator, in order to ensure the consistency of the solutions in the European judicial area. Finally, with regard to the interpretation of specific connecting factors provided for by the Regulation, it appears that most of the difficulties highlighted by Scholars and faced by judges are due, on one hand, to an inaccurate drafting, and, on the other hand, to the lack of explicit and detailed solutions with regard to general problems, such as the treatment of foreign law, the law applicable to the preliminary questions, and characterization.*

*Luigi Pintaldi*, Law Graduate, **"Il contrasto tra lodi arbitrali e decisioni dei giudici degli Stati dell'UE nel regolamento (CE) n. 44/2001 e nuove prospettive"** (The Conflict between Arbitral Awards and EU Courts Decisions under Regulation No 44/2001 and New Perspectives; in Italian).

*This article addresses the exclusion of arbitration from the scope of Regulation EC No 44/2001, as interpreted by the Court of Justice of the European Union in the well-known case West Tankers. In West Tankers the Court maintained that the validity or the existence of an arbitration agreement determined as an incidental question comes within the scope of the Brussels Regulation when the subject-matter of the dispute comes within the scope of it. This unsatisfactory result raised the issue of recognition and enforcement of a judgment from a Member State in conflict with an arbitral award recognised and enforced in another Member State. The recognition and enforcement of a judgment may be refused in conformity with paragraphs 3 and 4 of Article 34 affirming that the arbitral award is treated like a judgment with res judicata effects. Alternatively, the recognition and enforcement of a judgment may be refused in accordance with the paragraph 1 of Article 34 stating that the New York Convention prevails over the Brussels I Regulation. Recently, the precedence of the New York Convention was explicitly provided by paragraph 2 of Article 73 and Recital 12 of the new Brussels I Regulation, i.e., Regulation EU No 1215/2012. The exclusion of arbitration was retained by the new Brussels I Regulation with further details: in fact, the ruling rendered by a Court of a Member State as to the validity or the existence of an arbitration agreement now falls within the scope of application of the Regulation, regardless of whether the Court decided*

*on this as a principal issue or as an incidental question. In the light of the new Brussels regime, it seems clearer that the question whether a judgment from a Member State shall be recognized and enforced when it is in conflict with an arbitral award is left to each national law and international conventions.*

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale.

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# Symeonides on Choice of Law in American Courts in 2013

Dean Symeon C. Symeonides (Willamette University – College of Law) has posted Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey on SSRN. It is, as usual, to be published in the American Journal of Comparative Law. Here is the abstract:

*This is the Twenty-Seventh Annual Survey of American choice-of-law cases. It is written at the request of the Association of American Law Schools Section on Conflict of Laws and is intended as a service to fellow teachers of conflicts law, both in and outside the United States. Its purpose remains the same as it has been from the beginning: to inform, rather than to advocate.*

*This Survey covers cases decided by American state and federal appellate courts from January 1 to December 31, 2013, and posted on Westlaw by midnight, December 31, 2013. Of the 1,354 cases that meet these parameters, the Survey focuses on those cases that may contribute something new to the development or understanding of conflicts law—and, particularly, choice of law. This Survey is longer than the Surveys of any of the previous 26 years because 2013 produced more, and more noteworthy, cases than any of the previous years. The following are some of the highlights:*

** Five decisions of the U.S. Supreme Court holding, respectively, that: (1) The*

*Alien Tort Statute does not apply to conduct and injury occurring entirely in another country; (2) Section 3 of the Defense of Marriage Act (DOMA), which defines "marriage" for federal law purposes so as to exclude same-sex relationships, is unconstitutional; (3) The Federal Arbitration Act trumps the provisions of the Sherman Antitrust Act; (4) The "first sale" doctrine as codified in the Copyright Act applies to copies of copyrighted works lawfully made abroad and first sold abroad; and (5) The National Voter Registration Act preempts an Arizona law that sets more stringent standard for proof of citizenship when registering to vote.*

** A sixth Supreme Court decision explaining the methodology that federal courts should use when evaluating venue challenges in cases involving choice-of-forum clauses.*

** Two federal appellate decisions involving piracy off the Somali coast, and several decisions involving the extraterritorial reach of federal statutes in civil and criminal cases.*

** Several state court decisions striving to protect consumers, employees, and other weak parties through the few cracks left by the Supreme Court's decisions on arbitration and choice-of-forum clauses.*

** An assortment of interesting cases involving products liability, other cross-border torts, economic torts, and other tort conflicts.*

** A case holding that enforcement of a Japanese tort judgment against a California Church is not "state action" triggering constitutional scrutiny under the Constitution's Free Exercise clause, and is not repugnant to the public policy.*

** A case holding that one state's dismissal of an action on statute of limitation grounds is a dismissal "on the merits," barring a second action on the same claim in another state.*

** A case defining "habitual residence" and "wrongful" removal or retention of a child under the Hague Convention on Child Abduction.*

# Third Issue of 2013's Journal of Private International Law

The latest issue of the *Journal of Private International Law* contains the following articles:

Richard Garnett, Coexisting and Conflicting Jurisdiction and Arbitration Clauses

> *It is increasingly common for parties to an international contract to include both jurisdiction and arbitration clauses. While in some cases the clauses can be reconciled by principles of contractual interpretation, in other circumstances a true conflict between the clauses exists. The main contention of this article is that it is not appropriate, as many common law courts appear to have done, to resolve such a conflict by choosing arbitration over litigation based on some presumed superiority of the arbitral process. Instead, courts should adopt an evenhanded approach and apply a version of the 'more appropriate forum' test.*

Pippa Rogerson, Problems of the Applicable Law of the Contract in the English Common Law Jurisdiction Rules: The Good Arguable Case

> *English law as the applicable law of the contract is a basis for jurisdiction in English service out cases (ie cases involving foreign defendants that are not covered by the Brussels I Regulation or the Lugano Convention). It is also a factor in the exercise of jurisdiction. In both instances the determination of the applicable law and the assessment of its relevance raise difficult legal and practical questions. The courts use the "good arguable case" test to resolve those difficulties. Many recent decisions illustrate that the test is insufficiently clear. This article discusses those questions. It concludes that the differences between the existence and the exercise of jurisdiction have been overlooked. Further it suggests that the problem lies in the competing objectives underlying the decision on jurisdiction.*

Uglješa Grušic, The Right to Strike Versus Fundamental Economic Freedoms in the English Courts, Again: Hiding Behind the "Public Law Taboo" In Private International Law

> *This article notes the High Court's decision in British Airways Plc v Sindicato Espanol de Pilotos de Lineas Aeras, a case concerning the relationship between the right to strike and fundamental economic freedoms guaranteed by the TFEU. The court declined jurisdiction on the ground that the case involved the*

*enforcement of foreign public law, thus falling outside the scope of the European rules of adjudicatory jurisdiction. By analysing the CJEU case-law on the concept of "civil and commercial matters", and the nature and detailed rules on which the claim in BA v SEPLA was based, this article concludes that the High Court was wrong in hiding behind the "public law taboo" in PIL. The discussion, in turn, underlines the relevance of PIL for the relationship between the right to strike and fundamental freedoms and, more generally, the role of this discipline in the EU legal framework.*

Verity Winship, Personal Jurisdiction and Corporate Groups: *Daimlerchrysler AG v Bauman*

*This article proposes a framework for understanding what is at stake in the US Supreme Court's upcoming decision in DaimlerChrysler AG v Bauman. Argentine plaintiffs sued a German corporation in US courts, alleging violations of the Alien Tort Statutes. The outcome and consequences of the Supreme Court's decision depend on how the Court analyses three aspects of personal jurisdiction. The first is the extent to which a subsidiary's contacts with a forum state can be attributed to the corporate parent. The second is whether the contacts are so extensive that the court may exercise jurisdiction over a defendant for any cause of action, even one unrelated to the contacts. The third is whether jurisdiction is "reasonable". The opinion promises to provide either much-needed guidance about jurisdictional attribution within corporate groups, or an example of the discretionary, policy-driven analysis of when jurisdiction is reasonable in the context of multinational businesses.*

Chukwuma Okoli, The Significance of the Doctrine of Accessory Allocation As a Connecting Factor Under Article 4 of the Rome I Regulation

*The doctrine of accessory allocation is given special significance as a connecting factor by the framers of Rome I Regulation (through Recitals 20 and 21) in utilising the escape clause and principle of closest connection under Article 4. This article analyses the application of the doctrine under the Rome Convention; the possible reasons why the framers of Rome I gave the doctrine special significance; the nature of inquiry a Member State court would be faced with in applying the doctrine especially in very closely related contracts such as back-to-back contracts; and the dilemma faced by the court in determining the quantum of weight to attach to the application of the doctrine as it relates to displacing the main rule(s). The author concludes by stating that there is need for more clarity on the significance of the doctrine of accessory allocation as a*

*connecting factor under Article 4 of Rome I.*

Sharon Shakargy, Marriage by the State or Married to the State? on Choice of Law in Marriage and Divorce

*The paper suggests reshaping the choice of law rules for marriage and divorce and basing them on the parties' will rather than on the will of the parties' home country. The paper discusses the evolution of choice-of-law in matters of marriage and divorce in relation to that of substantive marriage law in Western legal systems prior to WWII and today. It argues that the early view of marriage and divorce as matter of state concern was reflected in the choice of law rules. However these current rules have not internalized changes that have occurred in the way national laws treats marriage today, according to which marriage is regarded far more as a private matter. The paper therefore agues that while in the early period there was a close correlation between the substantive regulation of marriage and divorce and the choice-of-law rules in this field, this correlation no longer exists. In order to re-establish the correlation between substantive law and the choice of law rules, the paper identifies leading theoretical features of modern-day marriage law, including the principle of party autonomy. The paper concludes by suggesting ways of incorporating the modern view of marriage and divorce in choice of law.*

Elena Rodríguez-Pineau, Book Review: Brauchen Wir Eine Rom O-verordnung? (Do We Need a Rome 0 Regulation?)

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# Scherer on Effects of Award Judgments

Maxi Scherer (Queen Mary, University of London) has posted Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road? on SSRN.

*This article examines and critically assesses the 'judgment route' in*

*international arbitration. The 'judgment' route refers to a growing trend in many jurisdictions to grant effects to foreign judgments relating to international arbitral awards, such as judgments setting aside, confirming, recognizing or enforcing an arbitral award (called 'award judgments' for the purposes of the article). Although there is abundant commentary on the effects of set aside judgments, very little attention has been paid to the other equally important situations where courts confirm, refuse to set aside or simply recognize or enforce an award. This article aims to fill this gap. It is submitted that national courts often err when they grant effects to foreign award judgments. On a theoretical level, the judgment route ignores the distinctive, ancillary nature of award judgments: award judgments differ from other judgments insofar as they relate to a prior adjudication — the award — and thus need to be treated differently. Moreover, on a practical level, the judgment route risks encouraging forum shopping and the multiplication of parallel proceedings, and it increases the likelihood of conflicting decisions. On the basis of these findings, the article concludes that the judgment route taken by courts in many jurisdictions is often the wrong road.*

The article was published in the *Journal of International Dispute Settlement*, Vol. 4, No. 3 (2013), p. 587.

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# Cartel Damage Claims, Non-Exclusive Jurisdiction Clauses and the "One-Stop Shop" Presumption: What Do Rational and Reasonable Businessmen Really Want?

*Many thanks to Polina Pavlova, Research Fellow at the MPI Luxembourg.*

On November 19th the England and Wales Court of Appeal (Civil Division) ruled on the scope of a contractual non-exclusive jurisdiction clause in the context of a damage claim for breach of EU competition law (*Ryanair Ltd v Esso Italiana Srl* [2013] EWCA Civ 1450). The Court opted for a narrow interpretation of the clause and decided against the inclusion of a purely tortious cartel damage claim in its scope.

The dispute at issue arose between the Irish airline Ryanair and the Italian jet fuel supplier Esso Italiana. The parties had concluded a fuel supplying contract containing the following clause:

> *For the purposes of the resolution of disputes under this Agreement, each party expressly submits itself to the non-exclusive jurisdiction of the Courts of England.*

After a decision of the Italian Competition Authority finding that Esso Italiana participated in a jet fuel cartel, Ryanair initiated proceedings in London seeking damage recovery from it. The claims were based on breach of contract and of statutory duty.

The Commercial Court held that it had jurisdiction under the agreement. Justice Eder based his reasoning on the presumption that reasonable and rational businessmen would generally intend one-stop adjudication and that in the given case there was "an almost complete overlap" between the contractual and the tortious claim. He relied on the so called *Fiona Trust* doctrine (see *Fiona Trust & Holding Corp v. Privalov* [2007] UKHL 40) and *The Angelic Grace* case-law (*The Angelic Grace* [1995] 1 Lloyd's Rep 87), both dealing with the parallel issue of interpretation of arbitration clauses.

The Court of Appeal, however, reversed this decision, stating that any "one-stop shop" presumption requires a parallel contractual claim. Where such a claim has no prospects of success, as was the case with Ryanair's contractual claim, Lord Justice Rix saw no reason to presume that the parties would have wanted a dispute purely based on breach of competition law to be covered by the contractual jurisdiction agreement. Despite the evident relevance of Article 23 of the Brussels I Regulation, at no point did he refer to European procedural law.

This interpretation might come as a surprise. Against the background of the

*Provimi* judgment (*Provimi Ltd v. Aventis Animal Nutrition SA* [2003] WHC 961), the decision not to extend the presumption in favour of one-stop adjudication to tortious cartel damage claims was not an inescapable outcome. In *Provimi*, the High Court ruled on the scope of a contractual jurisdiction clause and decided that an interpretation under Swiss, German and French law excluded claims based on breach of competition law. The reasoning of the High Court in *Provimi* was, however, generally interpreted as implicitly suggesting that English law would favor a different, broader interpretation of jurisdiction clauses. In the aftermath of the *Ryanair* judgment, such an assumption seems rather questionable.

At first sight, the *Ryanair* decision focuses primarily on the lack of a founded contractual claim. The contract between Ryanair and Esso Italiana contained a clause imposing a price adjustment obligation in case of non-conformity with relevant "applicable laws, regulations or orders". The Court correctly observed that the parties could not have envisaged a breach of competition law to fall under this provision. An implied contractual obligation that the prices would not be inflated due to breach of competition law was also regarded as an unnecessary construction. Since in the Court of Appeal's view the justification of the one-stop adjudication presumption lies in the close connection between the tortious claim and the analogous contractual one, in the absence of a founded contractual claim the presumption was decided to be inapplicable. This conclusion was reinforced by the fact that the parties explicitly excluded claims "for indirect or consequential damages" from their agreement on jurisdiction and choice of law.

Furthermore, it is necessary to bear in mind that the case before the Court of Appeal was different from the typical situation insofar as the jurisdiction clause was non-exclusive. Such contractual terms promote forum shopping to a great extent and should, therefore, be interpreted with extreme caution. Where the parties have opted for this kind of a wider choice of jurisdiction, an intention in favor of one-stop adjudication is by no means evident. Against this background, it seems questionable whether the "*Ryanair* presumption" could be extended to exclusive jurisdictional agreements.

The specific circumstances of the case, the prospects of success of the particular contractual claim and the non-exclusive character of the particular jurisdiction clause should not, however, lead to an undervaluation of the general significance of the ruling. For the *Ryanair* judgment might set a new trend in English case-law:

It remains to be seen whether it will mark the emergence of a new presumption on the intention of rational and reasonable parties – one that does not assume they would have wanted to adjudicate cartel disputes before the court designated to rule on their contractual disputes. This might be a first step towards a turnabout of the concept of the will of the reasonable contracting parties. The underlying policy decision is revealed in the last paragraph of the judgment: The fact that the buyer wants to limit the tortious claim to one cartelist should not enable the cartel member to rely on a contractual jurisdiction clause. In other words, private enforcement of competition law should be encouraged regardless of individual jurisdiction agreements.

The narrow interpretation of the jurisdiction clause is in line with the recent developments in Europe: On July 4th, 2013, an interlocutory judgment of the Helsinki District Court in the *Hydrogen Peroxide Cartel* case also decided that cartel damage claims are not covered by jurisdiction clauses contained supply agreements.

If this approach is further pursued and a default narrow interpretation of jurisdiction (and arbitration) clauses in the context of breach of competition law is established, prorogation arguments would practically be excluded in the majority of cartel damage disputes. Unless the jurisdiction clause is clearly drafted in favour of a broad interpretation, a claimant seeking to obtain damages for breach of competition law would be able to proceed against all EU domiciled cartel members by making use of Article 6 (1) of the Brussels I Regulation. This trend is to be welcomed – it would remove significant hurdles on the way to private enforcement of competition law.

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# Forum Shopping and Post-Award Judgments

Such is the title of a recent article co-authored by L. Silberman (Martin Lipton Professor of Law, New York University School of Law) and M. Scherer (School of

International Arbitration, Queen Mary, University of London; Wilmer Cutler Pickering Hale and Dorr LLP, m.scherer@qmul.ac.uk), published in *Forum Shopping in the International Commercial Arbitration Context*, ed. F. Ferrari, Sellier, 2013, pp.313-345. The abstract reads as follows:

> *Forum shopping has become increasingly common in the context of post-award judgments. Post-award judgments can take several forms, depending on whether the award is set aside, confirmed, recognized or enforced. Creative parties may forum shop for a set-aside, confirmation, recognition or enforcement judgment and seek to rely on its effects in subsequent proceedings relating to the same award in another country. The courts in that other country will have to assess the effects they give to the foreign post-award judgment, including under existing doctrines of res judicata, issue/claim estoppel. The paper examines how courts should respond to such forum shopping attempts. It assesses whether a decision to set aside, confirm, recognize or enforce an arbitral award might affect subsequent attempts to recognize or enforce that award elsewhere.*

The paper is also available on SSRN (click here).

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# Lithuanian Court Asks ECJ whether Brussels Regime Forbids Recognition of Arbitral Antisuit Injunctions

The Lithuanian Supreme Court has made a preliminary reference to the Court of Justice of the European Union asking whether the Brussels Regime forbids the recognition of arbitral anti-suit injunctions. In this case, after one party initiated court proceedings in Lithuania, the other party commenced arbitral proceedings in Sweden. The arbitral tribunal found that the Lithuanian court proceedings were in breach of the arbitral agreement and issued an antisuit injunction. The

beneficiary of the injunction then sought recognition in Lithuania.

The Lithuanian Supreme Court is therefore asking the CJEU whether the Brussels Regime forbids arbitral antisuit injunction as well, and whether this might mean that the Brussels Regime would have impact on the recognition of arbitral awards issuing such injunctions.

See this report of John Gaffney @ OGEMID:

> *In proceedings before the Lithuanian Supreme Court (LSC) concerning the recognition and enforcement of an arbitral award in SCC arbitral proceedings between Gazprom and the Lithuanian Ministry of Energy, the LSC has decided to make a preliminary reference to the Court of Justice of the EU (CJEU).*
>
> ***Background***
>
> *In 2004, Gazprom and the Ministry of Energy of Lithuania and other shareholders in the Lithuanian natural gas company, Lietuvos Dujos, entered into a shareholders' agreement ("SHA"), which required all disputes arising out of or in connection with it to be resolved by arbitration under the Rules of the Stockholm Chamber of Commerce (SCC).*
>
> *In 2011, the Ministry of Energy commenced proceedings before the Lithuanian courts in respect of the actions of Lietuvos Dujos in relation to the terms of a gas supply and gas transit concluded with Gazprom.*
>
> *Gazprom commenced the SCC arbitration proceedings, arguing that Lithuania's attempt to litigate certain matters relating to the management of Lietuvos Dujos before the Lithuanian courts was a breach of SHA.*
>
> *In a 2012 award, the arbitral tribunal (Derains, Nappert, Lamb) declared that the Ministry's initiation and prosecution of the Lithuanian court proceedings was partially in breach of the arbitration agreement contained in the SHA and ordered the Ministry to withdraw certain requests in the court proceedings and to limit its request in the same proceedings to measures that would not jeopardize the rights and obligations established in the SHA and that the Ministry could not request before an arbitral tribunal constituted pursuant to the arbitration clause of the SHA.*
>
> ***West Tankers***

*In the West Tankers case, which also involved a preliminary reference concerning the relationship of arbitration and the Brussels I Regulation, but which involved a court-ordered anti-suit injunction, the CJEU held that it is incompatible with the Brussels I Regulation for a court of an EU Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement, where such proceedings come within the scope of the Regulation.*

***Preliminary reference***

*In the Lithuanian proceedings brought by Gazprom to recognize and enforce the SCC award, the question arose, whether, by analogy with West Tankers – if an EU Member State court should not recognize a court-ordered anti-suit injunction, and if an arbitral tribunal were treated as an equivalent to a court – an EU Member State court should not enforce an arbitral award that constitutes an anti-suit injunction or limits claims in court proceedings.*

*In this regard, the LSC decided to refer three questions to the CJEU:*

*1. Does an EU Member State court have a right to refuse to recognize an arbitration award, which constitutes a form of anti-suit injunction, on the grounds that such an award limits the jurisdiction of the national court to rule on its own competence in examining the case in accordance to the rules of jurisdiction of the Brussels I Regulation?*

*2. If the answer to 1. is yes, does the same apply in the case where the arbitral tribunal orders a party to limit its claims in proceedings before an EU Member State court?*

*3. Can a national court, for the purpose of ensuring the supremacy of the EU law and full effectiveness of the Brussels I Regulation, refuse to recognise the arbitral award if such an award limits the right of the national court to rule on its own jurisdiction and authority in a case that falls under the jurisdiction of Brussels I Regulation?*

*The premise of the questions, i.e., that arbitral tribunals should be considered as equivalent to courts, has a special resonance in EU law, considering that they are not considered as such under the Article 234 EC procedure itself.*

# Fourth Issue of 2013's ICLQ

The fourth issue of *International and Comparative Law Quarterly* for 2013 includes several pieces on private international law.

Simon Camilleri, Recast 12 of the Recast Regulation: a New Hope?

> *This article seeks to consider the EU's new approach to arbitration as set out in Recital 12 of the Brussels I Regulation (Recast). The article first considers the Court of Justice of the European Union's West Tankers decision and the foremost English authority applying that case (The Wadi Sudr) in order to provide some background to the problem which gave rise to Recital 12. Following this, the article goes on to consider whether Recital 12 does in fact act as a solution to the problem created by the West Tankers decision.*

Justine Pila, The European Patent: an Old and Vexing Problem.

> *In December 2012, the European Parliament supported the creation of a European patent with unitary effect. For the next year at least, the international patent community will be on the edge of its proverbial seat, waiting to see whether the proposal becomes a reality. If it does, it will be a significant event in both the long and rich history of patent law, and in the equally rich and understudied history of attempts to create a European patent system. In this article I consider the three post-war European patent initiatives of the most direct and enduring relevance in that regard with a view to answering the following questions. First, what drove them? Second, what issues confronted them? And third, how were those issues resolved and with what ultimate effect? In the concluding section I relate the discussion back to the present by offering some remarks on the current European patent proposal in light of the same.*

Csongor István Nagy, The Application Ratione Temporis of the Insolvency Regulation in the New Member States.

# Anuario Español de Derecho Internacional Privado (2012)

The last volume of the *Anuario Español de Derecho Internacional Privado* (2012), has just been released: for the table of contents click here.

Backed by the most prominent Spanish scholars on private international law, by lawyers, practitioners from the judiciary and other bodies of the State administration, the purpose of this volumen of the *Anuario* is to provide the Spanish legal community with a theoretical and a practical overview of the legal phenomena, related to cross-border situations linked to our country, that have taken place in 2012 in the fields of commercial arbitration, business law, labor law, social security law, criminal law, procedural law, nationality, immigration, family and inheritance law, foreign investment and exchange control regulations. This outline is aimed to work as point of reference for the doctrinal and practical Spanish developments to be presented to foreign academia.

With this aim the publication is divided into different sections, starting with an ambitious doctrinal one gathering the most important scientific contributions from Spanish and foreign authors, published after a prior comprehensive control by the members of the Editorial Board specialized therein. Also, the volume highlights the most interesting Spanish decisions, legislative reforms and international agreements signed by Spain in 2012, all of them accompanied by a deep and critical comment. News are given about the work of various international forums, such as the Hague Conference. A systematized set of the several hundred decisions delivered by the Spanish courts last year, as well as a comprehensive chronicle of the Spanish literature in the field of private international law (in a broad sense) completes the Yearbook.

# Sciences Po PILAGG Series, 2013-2014

The seminars on Private International Law as Global Governance (PILAGG) at the Law School of the Paris Institute of Political Science (*Sciences Po*) will be conducted this year according to a slightly different format, as they will be run in part with the LSE.

This year' series will be beginning with an informal round-table in Paris on methodological shifts in the conflict of laws. This discussion is designed to link up with last year's reflections on the changing paradigms in (private international) legal thought.

Speakers will discuss proportionality, the impact of collective redress in individualist schemes of intelligibility, the renewal of characterization, the articulation of the conflict of laws and public policies on immigration, the access to justice paradigm, and how conceptualizing networks might be helpful in transnational settings. They were asked to focus specifically on the ways in which their area of expertise may (or not) bring methodological renewal. Participants will be Catherine Kessedjian, Samuel Lemaire, Toni Marzal, Hélène van Lith, Sabine Corneloup, Karine Parrot, Ferderico Lenzi, Diego P. Fernández Arroyo and Horatia Muir Watt.

When: 17 October from 13:00 to 16:45.

Where: 13 rue de l'Université, 75007 Paris, salle de réunion Ecole de droit 4$^{th}$ floor.
The language for presentation and debate will be either French or English.

Next will be the first London session (November 19) on PIL and legal theory and then events on the political economy of the law of investment arbitration and on the interface of PIL and civil procedure.