TDM Special Issue: "Reform of Investor-State Dispute Settlement: In Search of A Roadmap."

Investor-State Arbitration has become a salient feature of international dispute settlement, but its continued vitality is not beyond reproach. I myself have waded into the debate with an article published this month in the ICSID Review. Furthering this dialogue, TDM is pleased to announce a forthcoming TDM special issue: "Reform of Investor-State Dispute Settlement: In Search of A Roadmap."

Co-edited by Jean E. Kalicki (Arnold & Porter LLP and Georgetown University Law Center) and Anna Joubin-Bret (Cabinet Joubin-Bret and World Trade Institute), this special issue will explore recent calls for reform of the investor-State dispute settlement system, along with the viability of five "reform paths" recently proposed for discussion by UNCTAD, the United Nations Conference on Trade and Development (see UNCTAD IIA Issues Note, "Reform of Investor-State Dispute Settlement: In Search of a Roadmap," 29-30 May 2013).

You can find an extensive call for papers on the TDM website.

Publication is expected in October or November 2013. Proposals for papers (e.g., abstracts) should be submitted to the editors by 15 September 2013. Contact info is available on the TDM website.

Brand on Challenges to Forum Non Conveniens

Ronald A. Brand (University of Pittsburgh School of Law) has posted Challenges to *Forum Non Conveniens* on SSRN.

> *This paper was originally prepared for a Panel on Regulating Forum Shopping:*

Courts' Use of Forum Non Conveniens in Transnational Litigation at the 18th Annual Herbert Rubin and Justice Rose Luttan Rubin International Law Symposium: Tug of War: The Tension Between Regulation and International Cooperation, held at New York University School of Law, October 25, 2012. The doctrines of forum non conveniens and lis alibi pendens have marked a significant difference in approach to parallel litigation in the common law and civil law worlds, respectively. The forum non conveniens doctrine has recently taken a beating. This has come (1) in its UK form as a result of decisions of the European Court of Justice, (2) through a lack of uniformity of application throughout the common law world, (3) as a result of legislation and litigation in Latin American countries, and (4) through the misapplication of the forum non conveniens doctrine in cases brought to recognize and enforce foreign arbitration awards. This article reviews those challenges, and considers the compromise reached in 2001 at the Hague Conference on Private International Law when that body was considering a general convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It concludes with thoughts on the importance of remembering that compromise and the promise it holds for bringing legal system approaches to parallel litigation closer together.

The paper is forthcoming in the *New York University Journal of International Law and Politics.*

Second Issue of 2013's Belgian PIL E-Journal

The second issue of the Belgian bilingual (French/Dutch) e-journal on private international law *Tijdschrift@ipr.be / Revue@dipr.be* was just released.

The journal essentially reports European and Belgian cases addressing issues of private international law, but it also offers academic articles. This issue includes two:

- Herman VERBIST – Transparency In Treaty Based Investor State Arbitration – The Draft Uncitral Rules on Transparency
- Thalia KRUGER en Britt MALLENTJER – Het kind dat een voldongen feit is

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UK Supreme Court Rules on Anti Suit Injunctions

Yesterday, the Supreme Court of the United Kingdom ruled in Ust-Kamenogorsk Hydropower Plant JSC (Appellant) v AES Ust-Kamenogorsk Hydropower Plant LLP (Respondent) that English courts have jurisdiction to injunct the commencement or continuation of legal proceedings brought in a foreign jurisdiction outside the Brussels Regulation/Lugano regime where no arbitral proceedings have been commenced or are proposed.

The Court issued the following Press Summary.

Background

The appellant is the owner of a hydroelectric power plant in Kazakhstan. The respondent is the current operator of that plant. The concession agreement between the parties contains a clause providing that any disputes arising out of, or connected with, the concession agreement are to be arbitrated in London under International Chamber of Commerce Rules. For the purposes of this appeal the parties are agreed that the arbitration clause is governed by English law. The rest of the concession agreement is governed by Kazakh law.

Relations between the owners and holders of the concession have often been strained. In 2004 the Republic of Kazakhstan, as the previous owner and grantor of the concession, obtained a ruling from the Kazakh Supreme Court that the arbitration clause was invalid. In 2009 the appellant, as the current owner and grantor of the concession, brought court proceedings against the respondent in Kazakhstan seeking information concerning concession assets. The respondent's

application to stay those proceedings under the contractual arbitration clause was dismissed on the basis that the Kazakh Supreme Court had annulled the arbitration clause by its 2004 decision.

Shortly thereafter the respondent issued proceedings in England seeking (a) a declaration that the arbitration clause was valid and enforceable and (b) an anti-suit injunction restraining the appellant from continuing with the Kazakh proceedings. An interim injunction was granted by the English Commercial Court and the appellant subsequently withdrew the request for information which was the subject of the Kazakh proceedings. However, the respondent remained concerned that the appellant would seek to bring further court proceedings in Kazakhstan in breach of the contractual agreement that such disputes should be subject to arbitration in London. As a result the respondent continued with the proceedings. The English Commercial Court found that they were not bound to follow the Kazakh court's conclusions in relation to an arbitration clause governed by English law and refused to do so. The Commercial Court duly granted both the declaratory and final injunctive relief sought.

The appellant appealed to the Supreme Court of the United Kingdom on the grounds that English courts have no jurisdiction to injunct the commencement or continuation of legal proceedings brought in a foreign jurisdiction outside the Brussels Regulation/Lugano regime where no arbitral proceedings have been commenced or are proposed.

Judgment

The Supreme Court unanimously dismisses the appeal. The English courts have a long-standing and well-recognised jurisdiction to restrain foreign proceedings brought in violation of an arbitration agreement, even where no arbitration is on foot or in contemplation. Nothing in the Arbitration Act 1996 ("the 1996 Act") has removed this power from the courts. The judgment of the court is given by Lord Mance.

Reasons

- An arbitration agreement gives rise to a 'negative obligation' whereby both parties expressly or impliedly promise to refrain from commencing proceedings in any forum other than the forum specified in the arbitration agreement. This negative promise not to commence proceedings in

another forum is as important as the positive agreement on forum [21-26].

- Independently of the 1996 Act the English courts have a general inherent power to declare rights and a well-recognised power to enforce the negative aspect of an arbitration agreement by injuncting foreign proceedings brought in breach of an arbitration agreement even where arbitral proceedings are not on foot or in contemplation [19-23].
- There is nothing in the 1996 Act which removes this power from the courts; where no arbitral proceedings are on foot or in prospect the 1996 Act neither limits the scope nor qualifies the use of the general power contained in section 37 of the Senior Courts Act 1981 ("the 1981 Act") to injunct foreign proceedings begun or threatened in breach of an arbitration agreement [55]. To preclude the power of the courts to order such relief would have required express parliamentary provision to this effect [56].
- The 1996 Act does not set out a comprehensive set of rules for the determination of all jurisdictional questions. Sections 30, 32, 44 and 72 of the 1996 Act only apply in circumstances where the arbitral proceedings are on foot or in contemplation; accordingly they have no bearing on whether the court may order injunctive relief under section 37 of the 1981 Act where no arbitration is on foot or in contemplation [40].
- The grant of injunctive relief under section 37 of the 1981 Act in such circumstances does not constitute an "intervention" as defined in section 1(c) of the 1996 Act; section 1(c) is only concerned with court intervention in the arbitral process [41].
- The reference in section 44(2)(e) of the 1996 Act to the power of the court to grant an interim injunction "for the purposes of and in relation to arbitral proceedings" was not intended to exclude or duplicate the court's general power to grant injunctive relief under section 37 of the 1981 Act [48].
- Service out of the jurisdiction may be affected under Civil Procedure Rule 62.2 which provides for service out where an arbitration claim affects arbitration proceedings or an arbitration agreement; this provision is wide enough to embrace a claim under section 37 to restrain foreign proceedings brought or continued in breach of the negative aspect of an arbitration agreement [49].

H/T: Dominic Pellew

HEC Seeks to Recruit Assistant Professor of PIL

The Department of Law and Taxation of HEC Paris (France) invites applications for Tenure-track faculty positions to begin in 2014.

HEC Paris is the leading Business School in France and one of the leading Business Schools in Europe. The teaching of Law is one of its distinctive features. In addition to a large diversity of mandatory and elective law and taxation courses, HEC Paris offers to its students specializations in international business law and taxation.

JOB DESCRIPTION/QUALIFICATIONS: The position's opening is in International Private Law, with emphasis on International Contract law, Legal environment of International negotiations, Arbitration. A strong track record in both research and teaching is required. Support for research is excellent, including grants from HEC. During their first three years at HEC, assistant professors benefit from a reduced number of teaching hours, simplified access to research funds and an exemption of administrative duties.

The remuneration and benefits package is competitive by international standards and will be commensurate with experience and profile. While HEC Paris is a bilingual school (English/French), the ability to teach in French is not mandatory.

Applicants are required to have (or be about to complete) a Ph.D. degree.

APPLICATION PROCEDURE: Interested applicants should send a cover letter, vitae, and selected research papers, to Elizabeth Hautefeuille by June 10, 2013 at the following address: email: hautefeuille@hec.fr

For additional information about HEC Paris, please refer to our website at: http://www.hec.fr

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

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

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

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

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

In their article *Paolo Bertoli* and *Zeno Crespi Reghizzi*, respectively Associate Professor at the University of Insubria and Associate Professor at University of Milan, provide an assessment of "Regulatory Measures, Standards of Treatment and the Law Applicable to Investment Disputes" (in English).

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

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

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

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

civil matters provided by, respectively, Regulation No 805/2004, Regulation No 1896/2006, Regulation No 861/2007, and Regulation No 1215/2012. Directive 2010/24/EU sets out a new instrument, named uniform instrument, which is subject to automatic recognition and it is formally distinct from the initial instrument permitting enforcement issued in the applicant Member State.

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

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

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

Strong on Discovery under 28 USC 1782

Stacie Strong (University of Missouri School of Law) has posted Discovery Under 28 U.S.C. §1782: Distinguishing International Commercial Arbitration and International Investment Arbitration on SSRN.

> *For many years, courts, commentators and counsel agreed that 28 U.S.C. §1782 – a somewhat extraordinary procedural device that allows U.S. courts to order discovery in the United States "for use in a proceeding in a foreign or international tribunal" – did not apply to disputes involving international arbitration. However, that presumption has come under challenge in recent years, particularly in the realm of investment arbitration, where the Chevron-Ecuador dispute has made Section 1782 requests a commonplace procedure. This Article takes a rigorous look at both the history and the future of Section 1782 in international arbitration, taking care to distinguish between requests made in the context of international commercial arbitration and requests made in the context of international investment arbitration. In so doing, the Article considers issues relating to grants of jurisdiction, state interests and standard interpretive canons.*

The paper is forthcoming in the *Stanford J. of Complex Litigation.*

Second Issue of 2013's ICLQ

The second issue of *International and Comparative Law Quarterly* for 2013 includes three articles exploring private international law issues and a case commentary of the *VALE Építési Kft* decision of the European Court of Justice.

Pablo Cortés and Fernando Esteban de la Rosa, *Building a Global Redress System for Low-Value Cross Border Disputes*

This article examines UNCITRAL's draft Rules for Online Dispute Resolution (ODR) and argues that in low-value e-commerce cross-border transactions, the most effective consumer protection policy cannot be based on national laws and domestic courts, but on effective and monitored ODR processes with swift out-of-court enforceable decisions. The draft Rules propose a tiered procedure that culminates in arbitration. Yet, this procedure neither ensures out-of-court enforcement, nor does it guarantee compliance with EU consumer mandatory law. Accordingly, this article argues that the draft Rules may be inconsistent with the European approach to consumer protection.

Sirko Harder, *The Effects of Recognized Foreign Judgment in Civil and Commercial Matters*

This article investigates what effects a recognized foreign judgment in civil and commercial matters has in English proceedings. Does the judgment have the effects that it has in the foreign country (extension of effects) or the effects that a comparable English judgment would have (equalization of effects), or a combination of these? After a review of the current law, it will be discussed what approach is preferable on principle. The suggested approach will then be illustrated by considering whether a foreign decision on one legal basis of a certain claim ought to preclude English proceedings involving another legal basis of the same claim. Finally, it will be discussed whether and how the effects of a recognized foreign judgment in England are affected by interests of a third country.

Christopher Bisping, *The Common European Sales Law, Consumer Protection and Mandatory Overriding Provisions in Private International Law*

This article analyses the relationship of the proposed Common European Sales Law (CESL) and the rules on mandatory and overriding provisions in private international law. The author argues that the CESL will not achieve its stated aim of taking precedence over these provisions of national law and therefore not lead to an increase in cross-border trade. It is pointed out how slight changes in drafting can overcome the collision with mandatory provisions. The clash with overriding mandatory provisions, the author argues, should be taken as an opportunity to rethink the definition of these provisions.

5th Journal of Private International Law Conference, Madrid, 12-13 Sep 2013

Building on the very successful Journal of Private International Law conferences in Aberdeen (2005), Birmingham (2007), New York (2009), and Milan (2011) the **5th Conference of the Journal will take place in Madrid on 12-13 September 2013**. The organization of the Conference is shared by the Law Faculties of Universidad Autónoma de Madrid and Universidad Complutense. The Programme is reproduced in full below. All of the details on venue, accommodation and registration can be found on the **conference website**.

The Programme

Thursday 12th September 2013

9.00 – 9.30 Registration

9.30 – 10.00 Welcome session (J. Harris + local judicial or academic authorities)

10.00 – 11.30 Panels

Group 1 – MINORS & NAME

CARPANETO, Laura	Few proposals on the "adaptation" of Brussels II-bis with specific reference to the rules on parental responsibility
FIORINI, Aude	The Hague Child Abduction Convention and the Habitual Residence of Newborns – a Comparative Study

GONZÁLEZ MARTÍN, Nuria	International Child Abduction and Mediation: Feasibility and Suitability of a Guide of Good Practice
TRIMMINGS, Katarina	Embryo transfer in international context
GUZMÁN ZAPATER, Mónica	The right to a name: observatory on the progress made by the EU on the continuity of civil status
Mikša, Katažyna	New rule – old problem? The law applicable to surnames in new Polish Act on Private International Law

Group 2 – CODIFICATION

FRANZINA, Pietro	Codifying Private International Law – Some Thoughts on the Reasons of a Resurgent Trend
ERDÖS, Itsvan	Unity or Diversity? Should there be a European Code of Private International Law?
PAUKNEROVA, Monika & PFEIFFER, Magdalena	New Act on Private International Law in the Czech Republic: Starting Points and Perspectives within the European Union
ALMEIDA, Bruno& ARAUJO, Nadia	Two steps forwards, one step back? Recent developments and pending challenges of PIL practice in Brazil
Deskoski, Toni &Dokovski, Vangel	Choice of court agreements in Macedonian Private International Law and in the Brussels I Regulation (and the influence of the Brussels I Regulation on the legal systems of the third countries)

Group 3 – TORTS – JURISDICTION

DYRDA, Lukas	Autonomous interpretation in European private international law – several remarks on the notion of “the place where the harmful event occurred or may occur” under the Brussels I Regulation and the new Regulation No 1215/2012 in intellectual property infringement cases
CORDERO, Clara Isabel	The need for an EU coordinated legislative approach on cross-border violations of privacy
VALLAR, Julia	Is art. 5.3 of EC Reg. NO. 44/2001 applicable in respect of an action for a negative declaration in tort matters?
KNÖFEL , Oliver	Taming the Leviathan – Liability of States for Sovereign Acts (Acta Iure Imperii) as a Challenge for EU Private International Law

Group 4 – ARBITRATION

ASON, Agnieszka	The Revised Brussels Regulation: A New Approach To Arbitration in the European Rulemaking
HAUBERG WILHEMSEN, Louise	European Perspectives on International Arbitration
ZACARIASIEWICZ, Maciej	Vindicating public interest through application of mandatory rules in international commercial arbitration
GROSSU, Manuela	Waving the Right to Challenge Arbitral Awards as the Outcome of Hybrid Procedures
Hacibekiroglu, Ekin	Taking evidence in international commercial arbitration

11.30 – 12.00 Coffee Break

12.00 – 13.30 Panels

Group 5 – MARRIAGE & MATRIMONIAL PROPERTY

RAITIERI, Marco	Citizenship as a connecting factor in private international law for family matters

SHAKARGY, Sharon	Marriage by the State or Married to the State? On Choice of Law in Marriage and Divorce
QUINZA, Pablo	The establishment of an optional common European matrimonial property regime: an alternative way for international couples.
TORGA, Maarja	Establishing the 'cross-border' nature of a matrimonial property dispute under the proposed EU regulation on the matrimonial property regimes
SAPOTA, Anna	Compromise or enhanced cooperation – the possible ways to deal with EU proposal on matrimonial property regimes and property consequences of registered partnership

Group 6 – GENERAL PIL

CANOR, Iris	The Principle of Non-Discrimination in Private International Law
FULLI-LEMAIRE, Samuel	Characterisation – a problem reborn?
MAUNSBACH, Ulf	Justifying the exclusion of choice
HOLLOWAY, David &SCHULTZ, Tomas	Comity in European PIL
SHRIVASTAVA, Vishal	A Case Study on the Need for Strengthening the International Court of Justice

Group 7 – RECOGNITION AND ENFORCEMENT IN THE EU

TORRALBA, Elisa & RODRÍGUEZ PINEAU, Elena	What's in a Judgment? Reflections on res judicata, jurisdiction and ECJ's activism

AZCÁRRAGA MONZONÍS, Carmen	New Developments in the Scope of Free Movements of Public Documents in the European Union
SERRANO, Giuseppe	Private enforcement of administrative acts adopted by a foreign competition authority: a PIL perspective
DOWERS, Neil	Underpinning the internal market: the doctrine of mutual trust, the fundamental freedoms, and European private international law
GILLIES, Lorna	Assessing the Role of Public Policy and the Utility of Jurisdiction and Choice of Law Rules for the Effective Return of Cultural Property Objects Unlawfully Removed from a Member State

Group 8 – COMPANY LAW & FINANCE

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

13.30 – 15.00 Lunch (a short guided visit to "La Corrala" will be available at 14.30)

15.00 – 16.30 Panels

Group 9 – SUCCESSION

Yatsunami, Ren	Characterization of Trust in Consideration of Neighboring Legal Relationships
HOLLIDAY, Jayne	Habitual residence: room for improvement?
PERONI, Giulio	From the principle of unity to the principle of divisibility of the patrimony: new tendencies in international private law
NAGY, Csongor Itsván	The functions of party autonomy in international family and succession law – an EU perspective
WYSOCKA-BAR, Anna	Modification and revocation of professio iuris under the EU Succession Regulation

Group 10 – CONTRACTS

RESZCZYK	Law applicable to voluntary representation
Van Hoek, Aukje	Private international law for cross-border posting of workers: one union, many models of protection
ÁLVAREZ ARMAS, Eduardo	Private International Law and the rights of air and sea passengers in the EU: A puzzle and a lock in the access to justice.
POLIDO, Fabricio	Critical interactions between Private International Law and the Vienna Convention on Contracts for the International Sale of Goods of 1980 – CISG: A view from the Brazilian legal environment
ÖZGENC, Zeynep	Choice of Law in contract of affreightment: the approach of Turkish private international law.

Group 11 – BRUSSELS I RECAST – JURISDICTION

CAMPUZANO DÍAZ, Beatriz	The scope of application of the rules on jurisdiction after the recast of Brussels I Regulation
MIGLIO, Alberto	The Recast of Brussels I and Jurisdiction Over Third State Defendants

HERRANZ BALLESTEROS, Mónica	Law applicable to choice of court agreements in Brussels I Recast
SÁNCHEZ DÍAZ, Sara	Choice of court agreements: Brussels I Regulation Recast
AÑOVEROS TERRADAS, Beatriz	Collective Redress and Consumer Protection in Europe

Group 12 – JURISDICTION & ENFORCEMENT

ARZANDEH, Ardavan	Spiliada: An unpredictable doctrine?
TARMAN, Zeynep Derya	Jurisdiction Turkish courts
KEYES, Mary & MARCHALL, Brooke	*Potestativité* and party autonomy
DARIESCU, Cosmin	When Forum non Conveniens objection can be invoked before Romanian Courts?
Ozcelik, Gulum	Public Policy Intervention in the Recognition and Enforcement of Foreign Judgments: Turkish Perspective

16.30 – 17.00 Coffee Break

17.00 – 18.30 Panels

Group 13 – TORTS- APPLICABLE LAW

Grusic, Ugljesa	Regulating the Environment and Private International Law
ERKAN, Mustafá	Product Liability in Turkish Private International Law: Is Turkey Looking Towards the Rome II Regulation?

BRIGHT, Clair	Civil Liability for Corporate Human Rights Abuse; The issue of extraterritorial jurisdiction
Sousa Gonçalves, Anabela Susana de	The General Rules of the EU Regulation No 864/2007 (Rome II)
PITEL, Stephen & HARPER, Jesse	The Law Governing Tort Claims: Twenty Years of the *Lex Loci Delicti*

Group 14 – INSOLVENCY

HEREDIA CERVANTES, Iván	Arbitral agreements and arbitral procedures in the Insolvency Regulation.
PENADÉS FONS, Manuel	Conflict of laws to solve laws in conflict: Balancing cross-border insolvency and international arbitration.
McCORMACK, Gerard	Reforming the European Insolvency Regulation – changing what is on the menu
GUANJIAN Tu, andXiaolin Li	Cross-Border Bankruptcy: A Call and A Suggestion for Cooperation within China

Group 15 – SALES/CESL

HEIDEMANN, Maren	Choice of law under the proposed Common European Sales Law
PORCHERON, Delphine	Unification of substantive rules and private international law: a study of their relationship through the example of the Common European Sales Law
RUIZ ABOU NOGM, Verónica	Designing Ways Forward: Lateral Thinking, Private International Law and the Common European Sales Law'
Strecker, Sophie & BERRY, Elspeth	Rome I, Party Autonomy and the Choice of Non-State Law: Difficulty or Opportunity?
SÜRAL, Ceyda	Conflict of laws rules: a barrier before the application of Unidroit principles or not?

20.30 Conference Dinner in Pabellón de los Jardines de Cecilio Rodríguez (El Retiro)

Friday 13th September 2013

9.30 -11.00 Plenary session I RECOGNITION & ENFORCEMENT

Chair: Francisco J. Garcimartín Alférez

GASCÓN INCHAUSTI, Fernando	The abolition of exequatur proceedings in the "new" Brussels Regulation
TUO, Chiara E.	The re-evaluation of foreign judgments under EU Regulation 1215/12: between prohibitions and mutual trust
LEHMANN, Matthias	A System sui generis?Res judicata effect of Member State Judgments in the European Union
BEAUMONT, Paul & WALKER, Lara	Recognition and Enforcement of Judgments in Civil and Commercial Matters: Lessons from Brussels for the Hague
OPPONG, Richard Frimpong & NIRO, Lisa	Recognition and Enforcement of Judgments of *International* Courts in National Courts: Emerging Jurisprudence and Challenges Ahead

11.15 -11.45 Coffee break

11.45 – 13.15 Plenary session II CONTRACTS & TORTS

Chair: Pedro A. De Miguel Asensio

LEIN, Eva	Extending Jurisdiction under Art 5(3) Brussels I Regulation to Accomplices?
DANOV, Mihail	Private Antitrust Litigation and Private International Law in a Global Context
TERAMOTO, Shinto & Jur?ys Paulius	IP Intermediaries In Conflict Of Laws: A Social Network Perspective
ALBORNOZ, Mª Mercedes	The internet and private international law of contracts

OREJUDO PRIETO DE LOS MOZOS, Patricia	PIL matters relating to crowdfunding
MÄSCH	Agency and conflict of laws

13.30 – 15.00 Lunch

15.00 -16.30 Plenary session III GLOBAL LITIGATION

Chair: Paul Beaumont

PERTEGÁS, Marta & Teitz, L.E.	The benefits of regional and global litigation instruments for foreign trade and investment
CHILDRESS, Donald Earl	Transnational litigation and PIL
GROSSE RUSE-KHAN, Henning	A conflict of laws approach to competing rationalities in international law. The Case of Plain Packaging between IP, Trade, Investment and Health
UBERTAZZI, Benedetta	Private International Law before the International Court of Justice
MAHER, Gerard & RODGER, Barry	Countries, States, and Legal Systems: An International Private Law Perspective
TANG, Zheng Sophia	Corruption in International Commercial Arbitration—Special Conflict of Laws Challenges

16.30 -17.00 Coffee Break

17.00 -18.00 Conference by A.G. Pedro Cruz Villalón

18.00 – 18.30 Concluding remarks and closing words by P. Beaumont

French Supreme Court Upholds Argentina's Immunity despite Waiver

Last week, the French Supreme Court for private and criminal matters (*Cour de cassation*) set aside three series of enforcement measures carried out by NML Capital Ltd against the Republic of Argentina in three judgments dated 28 March 2013 (see here, here and here).

Readers will recall that NML Capital Ltd was the beneficial owner of bonds issued by Argentina in year 2000. As the relevant financial contracts contained a clause granting jurisdiction to New York courts, the creditor sued Argentina before a U.S. federal court, and obtained in 2006 a judgment for USD 284 million. In the summer 2009, NML Capital initiated enforcement proceedings in Europe.

The contracts also contained a waiver of immunity from enforcement. NML Capital first attached assets covered by diplomatic immunity. In a judgment of 28 September 2011, the *Cour de cassation* ruled that the waiver did not cover diplomatic assets. This was because, the Court explained, diplomatic immunity is governed by special rules which require a waiver to be both express and specific, i.e. provide specifically that it covers diplomatic assets. As the Court was aware that the 1961 Vienna Convention only provides that waiver of diplomatic immunity should be express, the Court ruled that the special rules governing diplomatic immunity were to be found in customary international law.

This time, NML Capital focused on non diplomatic assets. It attached monies owed by French companies to Argentina through their local branches (and could thus be attached from France). The assets were public, however: they were tax and social security claims. But, at first sight, they fell within the scope of the waiver. Indeed, I understand that the Republic of Argentina had waived immunity "for the Republic, or any of its revenues, assets or property".

Requirements for Waiving Sovereign Immunity

International law is changing really fast in Paris, however. The *Cour de cassation* decided to extend its new doctrine that waiver of immunity of enforcement should be both express and specific to public assets. The new rule is that waivers should specifically mention the assets or categories of assets to which they apply. As a consequence, as the waiver did not specifically mention, the Court found, tax and social revenues, it did not apply to them.

The judgments also explain that the new rule originates from customary public international law, as reflected in the 2004 UN Convention on Jurisdictional Immunities of States and Their Property. This is clearly the most creative part of the judgments.

Article 19 of the 2004 Convention reads:

> *Article 19*
> *State immunity from post-judgment measures of constraint*
> *No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:*
> *(a) the State has expressly consented to the taking of such measures as indicated:*
> *(i) by international agreement;*
> *(ii) by an arbitration agreement or in a written contract; or*

I am not sure where the requirement that the waiver be asset specific appears.

Furthermore, when Germany argued that Article 19 reflected customary international law in the *Jurisdictional Immunities of the State* case, the International Court of Justice responded:

> *117. When the United Nations Convention was being drafted, these provisions gave rise to long and difficult discussions. The Court considers that it is unnecessary for purposes of the present case for it to decide whether all aspects of Article 19 reflect current customary international law.*

Human Rights

Interestingly enough, the *Cour de cassation* also refers to several judgments of

the European Court of Human Rights which held that rules on sovereign immunities necessarily comply with the ECHR as long as they reflect international law.

In other words, the French court recognizes that should it grant a wider immunity to foreign states than the one recognized by international law, it might infringe the European Convention. The ECHR also considers that the 2004 UN Convention reflects customary international law, but would it read Article 19 as liberally as the *Cour de cassation*?