MPI Hamburg: International Private Law in China and Europe

On June 7 and 8, 2013 the Max Planck Institute for Comparative and International Private Law Hamburg will host a symposium on "**International Private Law in China and Europe**". The registration form is available here.

The programme reads as follows:

FRIDAY, 7 JUNE 2013

- 9.00 **Registration**
- 9.15 – 9.30 Welcome
- 9.30 – 11.10 **Jurisdiction, Choice of Law, and the Recognition of Foreign Judgments in Recent Legislation**
    - 9.30 – 9.50 *Jin Huang*
    - 9.50 – 10.10 *Herbert H.P. Ma*
    - 10.10 – 10.30 *Stefania Bariatti*
    - 10.30 – 11.10 Discussion
- 11.10 – 11.30 Coffee break
- 11.30 – 13.10 **Selected Problems of General Provisions**
    - 11.30 – 11.50 *Weizuo Chen*
    - 11.50 – 12.10 *Rong-Chwan Chen*
    - 12.10 – 12.30 *Jürgen Basedow*
    - 12.30 – 13.10 Discussion
- 13.10 – 14.15 Lunch
- 14.15 – 16.00 **Property Law**
    - 14.15 – 14.35 *Huanfang Du*
    - 14.35 – 14.55 *Yao-Ming Hsu*
    - 14.55 – 15.15 *Louis d'Avout*
    - 15.15 – 16.00 Discussion
- 16.00 – 16.15 Coffee break
- 16.15 – 18.00 **Contractual Obligations**

        - 16.15 – 16.35 *Qisheng He*
        - 16.35 – 16.55 *Jyh-Wen Wang*
        - 16.55 – 17.15 *Pedro de Miguel Asensio*
        - 17.15 – 18.00 Discussion

SATURDAY, 8 JUNE 2013

- 9.00 – 10.40 **Non-Contractual Obligations**
    - 9.00 – 9.20 *Guoyong Zou*
    - 9.20 – 9.40 *En-Wei Lin*
    - 9.40 – 10.00 *Peter Arnt Nielsen*
    - 10.00 – 10.40 Discussion
- 10.40 – 11.00 Coffee break
- 11.00 – 12.40 **Personal Status (Family Law/Succession Law)**
    - 11.00 – 11.20 *Yujun Guo*
    - 11.20 – 11.40 *Hua-Kai Tsai*
    - 11.40 – 12.00 *Katharina Boele-Woelki*
    - 12.00 – 12.40 Discussion
- 12.40 – 13.45 Lunch
- 13.45 – 15.30 **Company Law**
    - 13.45 – 14.05 *Tao Du*
    - 14.05 – 14.25 *Wang-Ruu Tseng*
    - 14.25 – 14.45 *Marc Philippe Weller*
    - 14.45 – 15.30 Discussion
- 15.30 – 15.45 Coffee break
- 15.45 – 17.30 **International Arbitration**
    - 15.45 – 16.05 *Song Lu*
    - 16.05 – 16.25 *Ful-Dien Li*
    - 16.25 – 16.45 *Carlos Esplugues Mota*
    - 16.45 – 17.30 Discussion
- 17.30 – 18.00 **Conclusions**
- 18.00 End of Conference
- 19.00 **Reception by the Free and Hanseatic City of Hamburg**

Excessive English Costs Orders and Greek Public Policy

Dr. Apostolos Anthimos is attorney at law at the Thessaloniki Bar, Greece. He holds a Ph.D. in International Civil Litigation and is a visiting lecturer at the International Hellenic University.

Two recent Court of Appeal rulings in Greece have demonstrated the significance of the public policy clause in international litigation and arbitration. Both judgments are dealing with the problem of recognition and enforcement of ”excessive” costs awarded by English courts and arbitration panels. The issue has been brought several times before Greek courts within the last decade. What follows, is a brief presentation of the findings, and some concluding remarks of the author.

I.a. In the first case, the Corfu CoA refused to grant enforceability to a costs order and a default costs certificate of the York County Court on the grounds that Greek courts wouldn’t have imposed such an excessive amount as costs of the proceedings for a similar case in Greece. In particular, the court found that, granting costs of more than £ 80,000 for a case, where the amount in dispute was £ 17,000, contravenes Greek public policy perceptions. Thus, the amount of £ 45,000 + 38,251.47 was considered as manifestly disproportionate and excessive for the case at hand. Consequently, the CoA granted exequatur for the remaining sums, and refused recognition for the above costs, which could not be tolerated by a court of law in Greece.

I.b. In the second case, the Piraeus CoA recognized an English arbitral award despite allegations made by the appellant, that the award’s order for costs contravened public policy. In this case the amount in dispute was in the altitude of nearly $ 3 million, whereas the costs granted did not exceed £ 100,000. The court applied the same rule as in the previous case, and found that the costs were

not disproportionate to the case at stake.

II. As already mentioned above, those decisions are the last part on a sequence of judgments since 2005. Free circulation of English judgments is generally guaranteed in Greece; the problem starts when English creditors seek to enforce the pertinent costs orders. For Greek legal views, it is sheer impossible that costs exceed the actual amount in dispute in the main proceedings. This was reason enough for the Supreme Court (Areios Pagos = AP) to establish the doctrine of public policy violation, on the occasion of an appeal against a judgment of the Athens CoA back in 2006 [AP 1829/2006, Private Law Chronicles 2007, p. 635 et seq.]. The Supreme Court held, that granting enforceability to similar orders would violate the principle of proportionality, which is embedded both in the Greek Constitution and the ECHR. At the same time, it emphasized that the excessive character of costs impedes access to Justice for Greek citizens, invoking again provisions from the Greek Constitution (Art. 20.1) and the Human Rights Convention (Art. 6.1). The reasoning of the Supreme Court is followed by later case law: In an earlier judgment of the Corfu CoA [Nr. 193/2007, Legal Tribunal 2009, p. 557 et seq.] the court reiterated the line of argumentation stated by the Supreme Court, and refused to grant exequatur (again) to an English order for costs. Two years later, the Larissa CoA [Nr. 484/2011, unreported], followed the opposite direction, based on the fact that costs were far lower than the amount in dispute.

In regards to foreign arbitral awards, mention needs to be made to two earlier Supreme Court judgments, both of which granted enforceability and at the same time rejected the opposite grounds for refusal on the basis of Art. V 2 b NYC. In the first case [AP 1066/2007, unreported], the Supreme Court found no violation of public policy by recognizing an English award, which awarded costs equivalent to half of the subject matter. A later ruling [AP 2273/2009, Civil Law Review 2010, p. 1273 et seq.] reached the same result, by making reference to the previous exchange of bill of costs particulars, for which none of the parties expressed any complaints during the hearing of the case before the Panel.

In conclusion, it is obvious that Greek courts are showing reservation towards those foreign costs orders, which are perceived as excessive according to domestic legal standards. This stance is not unique, taking into account pertinent case law reported in France and Argentina [for the former, see Cour de Cassation 1re Chambre civil, 16.3.1999, Clunet 1999, p. 773; for the latter see Kronke /

Nacimento / Otto / Port (ed.), Recognition and enforcement of foreign arbitral awards – A global commentary on the New York Convention (2010), p. 397, note 245]. The decisive element in the courts' view is the interrelation between the subject matter and the costs: If the latter is higher than the former, no expectations of recognition and enforcement should be nourished. If however the latter is lower than the former, public policy considerations do not usually prevail.

Final point: As evidenced by the case law above, it is clear that the Greek jurisprudence is applying the same criteria for foreign judgments and arbitral awards alike, irrespective of their country of origin. As far as the latter is concerned, no objections could or should be raised. However, making absolute no distinction between foreign judgments emanating from EU – Member States and non-Member States courts seems to defy the recent vivid discussion that predominated during the Brussels I recast preparation phase (2009-2012). Fact is, that public policy survived in the European context, and will continue playing a significant role in the new era (Regulation 1215/2012). Still, what is missing from Greek case law is an effort to somehow soften the intensity of public policy control in the EU landscape. Whatever the reason might be, a clear conclusion may be reached: Greek case law gives back to public policy a Raison d'être, demonstrating the importance of its existence, even when judicial cooperation and free circulation of judgments are the rules of the game.

Roger Alford's New Article on 28 U.S.C. sec. 1782: Ancillary Discovery To Prove Denial of Justice

Roger Alford has just posted on SSRN his latest article, "Ancillary Discovery to Prove Denial of Justice," which has been published in the Virginia Journal of International Law. It analyzes Section 1782 discovery proceedings in the context

of BIT arbitration and argues that there is now uniform agreement among federal courts that investment arbitration panels are "international tribunals" within the meaning of Section 1782. But as he points out today on opiniojuris, the article has relevance outside that context, too. As recent cases have demonstrated, this mechanism is becoming a typical (and powerful) tool for international litigators to obtain discovery in aid of any non-U.S. proceeding. This is a fabulous article on the recent wave developments in regard to this mechanism, and reaches a number of salient conclusions regarding the growing use of ancillary discovery in international adjudication.

Symeonides on Choice of Law in American Courts in 2012

Dean Symeon C. Symeonides (Willamette University – College of Law) has posted Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey on SSRN. It is, as usual, to be published in the *American Journal of Comparative Law* (Vol. 61, 2013). Here is the abstract:

> *This is the Twenty-Sixth Annual Survey of American Choice-of-Law Cases. It is intended as a service to fellow teachers and students of conflicts law, in the United States and abroad.*
>
> *Of the 4,300 cases decided in 2012 by state and federal courts, this Survey reviews 1,225 appellate cases, focusing on those cases that may contribute something new to the development or understanding of conflicts law, particularly choice of law. Highlights include:*
>
> - *Numerous cases exemplifying the valiant efforts of state courts, and some lower federal courts, to protect consumers, employees, and other presumptively weak parties from the Supreme Court's ever-expanding interpretation of the Federal Arbitration Act;*
> - *A few cases enforcing choice-of-law clauses unfavorable to their drafters, and many more cases involving deadly combinations of choice-*

of-law and choice-of-forum clauses;

- *Several interesting products liability cases, and other tort conflicts, including maritime torts and workers' compensation claims by professional football players;*
- *The first appellate case interpreting the recent amendments of the anti-terrorism exception to the Foreign Sovereign Immunity Act (FSIA);*
- *The first cases holding unconstitutional the Defense of Marriage Act (DOMA);*
- *A Massachusetts case holding that an undissolved Vermont same-sex union was an impediment to a subsequent same-sex marriage in Massachusetts;*
- *An Arizona case holding that a Canadian same-sex marriage was against Arizona's public policy, but — unlike other cases — also holding that the trial court had jurisdiction to annul the marriage and divide the parties' property;*
- *The first case in decades upholding a foreign marriage by proxy;*
- *A case upholding, on First Amendment grounds, an injunction against Oklahoma's "Anti-Shari'a" Amendment; and*
- *A case refusing to recognize a Japanese divorce, custody, and child support judgment rendered in a bilateral proceeding because the husband did not receive notice of a subsequent guardianship proceeding.*

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (1/2013)

Recently, the January/February issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Heinz-Peter Mansel/Karsten Thorn/Rolf Wagner***: "European conflict

of laws: Progressing process of codification– patchwork of uniform law”

The article gives an overview on the developments in Brussels in the judicial cooperation in civil and commercial matters from November 2011 until November 2012. It summarizes current projects and new instruments that are presently making their way through the EU legislative process. It also refers to the laws enacted on a national level in Germany which are a consequence of the new European instruments. Furthermore, the article shows areas of law where the EU has made use of its external competence. The article discusses both important decisions and pending cases before the ECJ touching the subject matter of the article. In addition, the present article turns to the current projects of the Hague Conference as well.

- ***Stefan Leible/Doris Leitner***: “Conflict of laws in the European Directive 2008/122/EG”

The following essay is about the conflict of laws in the European Directive 2008/122/EG on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, being effective since 2/23/2008 and being transformed into German law since 1/17/2011, and its relevance for German law. After giving information about the regulation’s history, scope and content, the authors make a detailed analysis on the directive’s conflict of laws rule art. 12 par. 2 as well as its national transformation rule art. 46b EGBGB and demonstrate the differences to the former legal norms.

- ***Christoph Benicke***: “Haager Kinderschutzübereinkommen” – the English abstract reads as follows:

The 1996 Hague Protection of Children Convention provides a modern legal instrument in the field of international child protection and overcomes the shortcomings of the 1961 Hague Protection of Minors Convention. International jurisdiction is primarily assigned to the authorities of the State of habitual residence of the child. In addition, a flexible consideration of the particularities of the case is made possible by the fact that the jurisdiction may be transferred to the authorities of a State with which the child has a close relationship e.g. based on nationality. The principle that the court applies its own law promotes

rapid and effective procedures. Since the general jurisdiction lies with the authorities in the State of the habitual residence of the child, the law of the habitual residence of the child will be applied in most proceedings. This is consistent with the choice of law rule in Article 16, which establishes the applicable law outside the realm of protective measures. The Convention also includes a modern system for the recognition and enforcement of decisions from other Contracting States. The international jurisdiction of the authority which issued the decision can still be checked, but the recognizing State is bound in respect to the factual findings in the decision to be recognized. Once recognition and enforceability are certified, the foreign decision will be enforced under the same conditions as a national one. Difficult questions arise about the relationship between the Hague Child Protection Convention and the Brussels II regulation. Among Member States the Brussels II regulation displaces the Protection of Children Convention for the jurisdictional issues in most cases. The same is true for the recognition and enforcement of decisions from other Member States of the Brussels II regulation. On the other hand, the choice of law rules of the Protection of Children Convention apply in all procedures, even when the jurisdiction is based on the Brussels II regulation.

- ***Jan von Hein***: "Jurisdiction at the place of performance according to Art. 5 no. 1 Brussels I Regulation in the case of a gratuitous consultancy agreement"

The annotated judgment of the OLG Saarbrücken deals with the question whether a gratuitous consultancy agreement falls within the scope of Art. 5 no. 1 Brussels I Regulation. After establishing that the present decision concerns a contract and not a mere act of courtesy, it is discussed whether Art. 5 no. 1(b) or Art. 5 no. 1(a) Brussels I Regulation is applicable to a gratuitous consultancy agreement. Subsequently, the reasons why the non-remuneration is the decisive factor for ruling out the application of Art. 5 no. 1(b) Brussels I Regulation are elaborated followed by some remarks concerning the determination of the place of performance of the obligation in question under Art. 5 no. 1(a) Brussels I Regulation. The possibility of establishing a concurring competence – a forum attractivitatis – of the court having special jurisdiction in contract for related tort claims e.g. resulting from product liability is analysed. The annotation concludes with final remarks on the revision of the Brussels I Regulation and the proposed changes concerning the jurisdiction at the place of performance.

- ***Markus Würdinger***: "Language and translation barriers in European service law – the tension between the granting of justice and the protection of defendants in the European area of justice"

The problem of languages implicates considerable obstacles in international legal relations. Regulation No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (European Regulation on the service of documents) provides in Article 8, in which cases the addressee may refuse to accept the document to be served. This right exists if the document is not written in, or accompanied by a translation into a language which the addressee understands (1. lit. a) or the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected (1. lit. b). The article analyses this statute on the basis of a judgment of the LG Bonn (District Court Bonn), formulates principles of interpretation and arrives at the conclusion that the language of correspondence has by right a great importance in commercial legal relations. Whoever engages here in a certain language and is able to communicate adequately in it, has in case of doubt not the right provided by Article 8 of the Regulation to refuse the acceptance of the document to be served.

- ***Christian Tietje***: "Investitionsschiedsgerichtsbarkeit im EU-Binnenmarkt" – the English abstract reads as follows:

More than 170 Bilateral Investment Treaties (BITs) exist between the EU Member States. In the last years several investment arbitrations were initiated by investors from EU Member States against other Member States. This has led to an intense legal and political discussion on intra-EU BITs with regard to their validity and enforceability as well as the effects of public international law on European Union Law in general. In this context, the EU Commission calls on the EU Member States to denounce the existing intra-EU BITs because of an alleged incompatibility with Union law. This contribution discusses and illustrates relevant legal issues of this debate based on a recent Decision of the Regional High Court of Frankfurt, Germany. The Court in its decision of 10 May 2012 intensively discussed the question of whether intra-EU-BITs are in

violation of EU law and thus not applicable as a base for jurisdiction of an international tribunal. The Court convincingly rejects all arguments in this regard and declares intra-EU-BITs in full conformity with EU law.

- ***Johannes Weber***: "Actions against Company Directors from the Perspective of European Rules on Jurisdiction"

The interaction of European and International Company Law has until now been primarily viewed in the context of conflict of laws. The practice of national and European courts, however, indicates that issues of international jurisdiction are getting more and more important. Focusing on the Brussels I Regulation, this paper deals with jurisdiction on actions against company directors for breach of their duties. It argues that these actions fall within the scope of Art. 5 (1)(b) BR and that the courts both in the state of the company's statutory and administrative seat may claim competence.

- ***Bernd Reinmüller/Alexander Bücken:*** "The scope of an arbitration clause in the event of a "brutal termination of an existing business relationship" under French Law"

The contribution deals with a decision by the Cour de Cassation (1ère civ. of 8 July 2010 – Case no. 09-67.013) on the scope of an arbitration clause in respect of damage claims on grounds of a "brutal breach" of a trade relation- ship.

Art. L 442-6 I 5 of the French Commercial Code stipulates that persons engaged in a trade or business who "brutally" breach an established trade relationship are obliged to compensate the ensuing damages. This provision serves for the upholding of law and order (ordre public) and as part of the French law of torts it is not subject to the disposition of the parties.

The Cour de cassation held that an action based on this legal norm can be covered by a contractual arbitration clause regardless of its tortious nature and its coercive character, because it has a sufficient contractual reference. This presupposes a sufficiently broad formulation of the arbitration clause.

- ***Wilfried Meyer-Laucke***: "Zur Frage der Anerkennung russischer Urteile auf dem Gebiet des Wirtschaftsrechts" – the English abstract

reads as follows:

Up to now no Russian judgments have been admitted in the Republic of Germany and declared enforceable due to the rule that this can only be done in case reciprocity is ensured. The same rule is applied in the Russian Federation. It let into a dead end.

However, things have changed. Since 2006 Russian arbitrage-courts handling commercial matters have admitted foreign judgments to be enforced in Russia despite the lack of international agreements. Following this line the arbitrage-court of St. Petersburg has applied this practice to an order of the local court of Frankfurt a.M. by which a bankruptcy procedure has been opened, and has based its grounds on general rules in particular on Art. 244 of the Arbitrage Procedure Rules. These grounds are given in accordance with the jurisdiction of the High Arbitrage Court of Russia. Thus, it can be taken as granted for the German jurisdiction that reciprocity is ensured from now on as far as judgments of arbitrage-courts are concerned.

- ***Francis Limbach***: "About the End of the "Witholding Right" in French International Law of Succession"

The "withholding right" ("droit de prélèvement") has been a singular instrument in French international private law for nearly 200 years. In succession cases where foreign (i.e. non-French) law of succession applied and a French citizen was to inherit as a legal heir, the withholding right aimed to protect the latter from disadvantages related to applicable foreign provisions. Thus, if it occurred that his share determined by foreign law was less than what he would have received under French law, his withholding right entitled him to seek adequate compensation by "withholding" assets of the estate located on French territory. Criticized for decades in scholarly literature as a "nationalist rule", the provision pertaining to the withholding right has eventually been declared unconstitutional by the French Constitutional Council on August 5th, 2011 on the grounds of un- equal treatment of French and foreign nationals. The present article aims to determine the impact of this decision on French international law of succession, especially on French-German cross-border cases.

- ***Erik Jayme/Carl Zimmer*** on the question whether there is a need for a Rome Regulation on the general part of the European PIL:"Brauchen wir eine Rom 0-Verordnung? – Überlegungen zu einem Allgemeinen Teil des Europäischen IPR"
- ***Erik Jayme*** on methodical questions of European PIL: "Systemfragen des Europäischen Kollisionsrechts"
- ***Jan Jakob Bornheim*** on the conference on the European law on the sale of goods held in Tübingen on 15./16.6.2012: "GPR-Tagung zum Gemeinsamen Europäischen Kaufrecht und Kollisionsrecht in Tübingen, 15./16.6.2012"

Fourth Issue of 2012's Flemish PIL E-Journal

The fourth issue of the Belgian e-journal on private international law *Tijdschrift@ipr.be / Revue@dipr.be* for 2012 was just released.

The journal is meant to be bilingual (French/Dutch), but this issue is exclusively in Dutch, except for one article in English.

The issue includes two articles. The first seems to be presenting Belgian new statute on nationality. The second presents the new rules of arbitration of Belgian arbitral center CEPANI.

- Jinske Verhellen – Nieuwe nationaliteitswet wijzigt het Wetboek IPR
- Herman Verbist – New CEPANI rules of Arbitration in force as from 1 january 2013

London Conference on the Brussels I Recast

Reed Smith LLP will host a conference organized by the *Journal of Private International Law* on the Brussels I Regulation Recast on February 7th in London.

Programme:

Chair: Professor Trevor Hartley, LSE

1.30 pm – 2.00 pm: Overview of the revision of the Brussels I Regulation

- Oliver Parker**,** Legal Adviser, UK Ministry of Justice

2.00 pm – 2.30pm: Choice of Court Agreements: Reversal of *Gasser*, etc

- Alex Layton QC**,** 20 Essex Court Chambers, London

2.30 pm – 3.00 pm: The Relationship between Arbitration and Brussels I Revised

- Dr George Panagopoulos**,** Reed Smith, Piraeus and London

3.00 pm – 3.30 pm: Question and answer and discussion of the first three talks

3.30 pm – 4.00 pm: Coffee/Tea Break

Chair: David Warne, Partner, Reed Smith LLP

4.00 pm – 4.30pm: The Abolition of Procedural Exequatur and Retention of Public Policy

- Professor Paul Beaumont**,** University of Aberdeen

4.30 pm – 5.00 pm: Conflicts of Jurisdiction with Third States

- Professor Jonathan Harris, Serle Court; King’s College London

5.00 pm – 5.30 pm: Extension of Jurisdiction to Third State Defendants and other changes to Brussels I

- Dr Karen Vandekerckhove, European Union Commission

5.30 pm – 6.00 pm: Question and answer and discussion of the last three talks

6.00 pm: Drinks Reception

Registration: The event is free but has a limited number of places and therefore you need to register in advance to guarantee a place on a first come first served basis. Please email events@reedsmith.com to register, including the event title "The Brussels I Regulation Recast" in the subject line of the email. **Update: the limit has been reached, any new registrant will be put on the waiting list.**

Location: Reed Smith LLP, The Broadgate Tower, 20 Primrose Street, London EC2A 2RS

Russian Court Strikes Down Unilateral Option Jurisdiction Clauses

The *Financial Times* has reported yesterday on a recent judgment of the Russian Arbitration Court in *Sony v. RTC* in which the court struck down a unilateral option jurisdiction clause.

The case involved two commercial companies, Sony and Russian Telephone Company (RTC). The contract included a clause which forbad the Russian party to sue in Russia while, it seems, giving much more freedom to Sony to bring proceedings. The Russian party nevertheless sued in a Russian court, which retained jurisdiction notwithstanding the jurisdiction clause.

The chief of staff of the Russian court is reported to have specifically referred to

the judgment of the French supreme court which struck down a one way jurisdiction clause in September.

Update:

- A full report on the case is available here.
- See also the guest post of MM Sullivan and Maynard on the Russian judgment in today's *FT*

A Principled Approach to Choice of Law in Contract?

On 16 November, a Special Commission of the Hague Conference on Private International Law approved the text of the Hague Principles on the Choice of Law in International Contracts.

The Principles, an amended version of the draft text produced by the Conference's working group, are intended to be used (among other functions) as a model for national, regional, supranational or international instruments. They deal with the effectiveness and effect of a choice of law in cross-border trade/business contracts, but not consumer or employment contracts (Art. 1). They allow not only a choice of national law (Art. 2) but also (albeit subject to conditions that are riddled with uncertainty, obfuscation and self-serving terminology) a choice of non-national rules of law (Art. 3).

The remaining Principles address other aspects of the choice of law (express and tacit choice, formal validity, law to be applied in determining choice, severability, renvoi, scope of chosen law, assignment, mandatory provisions and public policy).

The text of the Principles (which will, in due course, be accompanied by a Commentary) is as follows:

> *The Preamble*

1. This instrument sets forth general principles concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions.

2. They may be used as a model for national, regional, supranational or international instruments.

3. They may be used to interpret, supplement and develop rules of private international law.

4. They may be applied by courts and by arbitral tribunals.

Article 1 – Scope of the Principles

1. These Principles apply to choice of law in international contracts where each party is acting in the exercise of its trade or profession. They do not apply to consumer or employment contracts.

2. For the purposes of these Principles, a contract is international unless the parties have their establishments in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State.

3. These Principles do not address the law governing – a) the capacity of natural persons; b) arbitration agreements and agreements on choice of court; c) companies or other collective bodies and trusts; d) insolvency; e) the proprietary effects of contracts; f) the issue of whether an agent is able to bind a principal to a third party.

Article 2 – Freedom of choice

1. A contract is governed by the law chosen by the parties.

2. The parties may choose (i) the law applicable to the whole contract or to only part of it and (ii) different laws for different parts of the contract.

3. The choice may be made or modified at any time. A choice or modification made after the contract has been concluded shall not prejudice its formal validity or the rights of third parties.

4. No connection is required between the law chosen and the parties or their

transaction.

Article 3 – Rules of law

In these Principles, a reference to law includes rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.

Article 4 – Express and tacit choice

A choice of law, or any modification of a choice of law, must be made expressly or appear clearly from the provisions of the contract or the circumstances. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law. Article 5 – Formal validity of the choice of law

A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties.

Article 6 – Agreement on the choice of law

1. Subject to paragraph 2, a) whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to; b) if the parties have used standard terms designating different laws and under both of these laws the same standard terms prevail, the law designated in those terms applies; if under these laws different standard terms prevail, or if no standard terms prevail, there is no choice of law.

2. The law of the State in which a party has its establishment determines whether that party has consented to the choice of law if, under the circumstances, it would not be reasonable to make that determination under the law specified in paragraph 1.

Article 7 – Severability

A choice of law cannot be contested solely on the ground that the contract to which it applies is not valid.

Article 8 – Exclusion of renvoi A choice of law does not refer to rules of private international law of the law chosen by the parties unless the parties expressly

provide otherwise.

Article 9 – Scope of the chosen law

1. The law chosen by the parties shall govern all aspects of the contract between the parties, including but not limited to – a) interpretation; b) rights and obligations arising from the contract; c) performance and the consequences of non-performance, including the assessment of damages; d) the various ways of extinguishing obligations, and prescription and limitation periods; e) validity and the consequences of invalidity of the contract; f) burden of proof and legal presumptions; g) pre-contractual obligations.

2. Paragraph 1 e) does not preclude the application of any other governing law supporting the formal validity of the contract.

Article 10 – Assignment In the case of contractual assignment of a creditor's rights against a debtor arising from a contract between the debtor and creditor – a) if the parties to the contract of assignment have chosen the law governing that contract, the law chosen governs the mutual rights and obligations of the creditor and the assignee arising from their contract; b) if the parties to the contract between the debtor and creditor have chosen the law governing that contract, the law chosen governs (i) whether the assignment can be invoked against the debtor, (ii) the rights of the assignee against the debtor, and (iii) whether the obligations of the debtor have been discharged.

Article 11 – Overriding mandatory rules and public policy (ordre public)

1. These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.

2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.

3. A court may only exclude application of a provision of the law chosen by the parties if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (ordre public) of the forum.

4. The law of the forum determines when a court may or must apply or take into

account the public policy (ordre public) of a State the law of which would be applicable in the absence of a choice of law.

5. These Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (ordre public), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.

Article 12 – Establishment If a party has more than one establishment, the relevant establishment for the purpose of these Principles is the one which has the closest relationship to the contract at the time of its conclusion of the contract.

Immunity of Warships: Argentina Initiates Proceedings against Ghana under UNCLOS

Matthew Happold is Professor of Public International Law at the University of Luxembourg and an associate tenant at 3 Hare Court, London.

Cross posted at EJILTalk!

Another chapter has begun in the saga of NML Capital Ltd's attempts to collect on its holdings of Argentinean bonds (see here for earlier reporting on this blog and here for earlier reporting on *EJILTalk!*) with the initiation of inter-State proceedings by Argentina against Ghana under the 1982 UN Convention of the Law of the Sea.

It will be recalled that on 2 October 2012, whilst on an official visit, the Argentinean naval training vessel the *ARA Libertad* was arrested in the Ghanaian port of Tema. Its arrest was ordered by Justice Richard Adjei Frimpong, sitting in the Commercial Division of the Accra High Court, on an application by NML to enforce a judgment against Argentina obtained in the US courts (see here for the decision of the US Court of Appeals for the 2nd Circuit). The judge considered that the waiver of immunity contained in the bond documents, which provided that:

> *To the extent the Republic [of Argentina] or any of its revenues, assets or properties shall be entitled … to any immunity from suit, … from attachment prior to judgment, … from execution of a judgment or from any other legal or judicial process or remedy, … the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment).*

extended to lift the vessel's immunity from execution. Argentina has strongly resisted this assertion of jurisdiction, claiming that it violates the immunity enjoyed by public vessels, which cannot be impliedly waived. It appears that the vessel remains under the control of a skeleton crew, who have prevented any efforts by the Ghanaian authorities to move the vessel, whilst being preventing themselves from leaving port.

Both States being parties to UNCLOs, on 29 October 2012 Argentina instituted arbitration proceedings against Ghana under Annex VII UNCLOS (Ghana not having made a declaration under Article 287 UNCLOS: see Article 287(3)). On 14 November 2012 Argentina applied to the International Tribunal for the Law of the Sea for the prescription of provisional measures prior to the constitution of the Annex VII tribunal (see ITLOS press release here).

The prescription of provisional measures by ITLOs is covered by Article 290(5), which provides that:

> *Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea … may prescribe … provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.*

However, even given the rather low hurdle to be vaulted, it is perhaps doubtful whether the first criterion ('that *prima* facie the tribunal which is to be constituted would have jurisdiction') can be satisfied. Article 287(1) UNCLOS provides that such a tribunal 'shall have jurisdiction over any dispute concerning the interpretation or application of this Convention', and it is unclear whether the dispute falls within the provisions of UNCLOS. Argentina may well have the law on its side as regards State immunity for warships. It may be, however, that ITLOs and an UNCLOS Annex VII arbitral tribunal are not the right fora for the settlement of its dispute with Ghana.

It may well be, as argued by Argentina in its request for the indication of provisional measures (see here), that the *Libertad* is a warship for the purposes of Art 29 UNCLOs. However, Article 32 then states:

> *With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.*

Subsection A of Section 3 of Part II of UNCLOs deals with the rules applying to all ships concerning innocent passage in the territorial sea. Articles 30 and 31 respectively cover non-compliance with warships of the laws and regulations of a coastal State concerning passage through the territorial sea, and flag State responsibility for any loss or damage to a coastal State resulting from the non-compliance by warships with the laws and regulations of the coastal State concerning passage through the territorial sea. Put simply, therefore, the Convention states that it says nothing about the immunities of warships in the

territorial sea (Article 32 falling within Part II of UNCLOs dealing with the legal regime of the territorial sea – despite the provision's blanket terms another provision does exist (Article 95) concerning the immunities of warships on the high seas), still less about the immunities of warships in internal waters (which no provision of UNCLOs covers), leaving the matter to be dealt with elsewhere.

In addition to relaying on Article 32, Argentina also refers to the right of innocent passage and freedom of navigation (Articles 18(1)(b), 87(1)(a) and 90). However, the Libertad was arrested whilst in port, within Ghanaian internal waters (Article 11 UNCLOS), so that it does not seem apt to see its seizure as impeding its right of innocent passage, still less its freedom of navigation. If so, any arrest pursuant to judicial proceedings would be a similar violation. It is also difficult to see the *Libertad's* official visit to Tema as an incident of innocent passage. Indeed, Argentina, in its request for provisional measures (paragraph 4), argues that the visit was specifically governed by an agreement between the two States, which would seem unnecessary were the vessel simply exercising an already-existing right. Moreover, Article 28 UNCLOs provides that although a coastal State can only levy execution against or arrest a ship for the purpose of civil proceedings in respect of obligations or liabilities assumed or incurred by the ship herself in the course or for the purpose of her voyage through the waters of the coastal State, this limitation is without prejudice to the right of a coastal State:

> *in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters*

which strongly suggests that the limitation itself only applies to vessels exercising their right of innocent passage within the coast State's territorial sea, not those within its internal waters (as does the location of Article 28 within Part II of UNCLOS). It is not Ghana's assertion of a general jurisdiction to arrest ships within its ports and harbours that Argentina objects to, but its exercise of that jurisdiction with regard to a vessel which Argentina argues is immune from it. In reality, the dispute revolves around whether, as a matter of international law, Ghana should accord State immunity to the *ARA Libertad*. Argentina's request, by spending 18 out of its 22 paragraphs of legal grounds on the matter, makes this point clearly.

The other criterion for the prescription of provisional measures set out in Article 290(5) ('urgency') might be thought less problematic. The provisional measures sought by Argentina, however, are that Ghana 'unconditionally enables' the *Libertad* to leave Tema and Ghana's jurisdictional waters, and to be resupplied to that end (paragraph 72bis, Argentina's request for provisional measures). Provisional measures are intended 'to preserve the respective rights of the parties to the dispute … pending the final decision' (Article 290(1)). It cannot be said that the measures requested by Argentina do anything to preserve any rights Ghana might have. Indeed, it prescribed, they would seem essentially to settle the dispute. A case can be made for the release of the vessel, not least because NML has already made it clear that it would permit it on payment of US$20 million, but not, at this stage, unconditionally.

Interestingly, on 26 October 2012, just prior to commencing arbitration proceedings against Ghana, Argentina withdrew, 'with immediate effect' its declaration under Article 298 UNCLOs exempting disputes falling within Article 298(1)(a), (b) and (c) from the compulsory procedures entailing binding decisions provided for in section 2 of Part XV of UNCLOS insofar as it concerned 'military activities by government vessels and aircraft engaged in noncommercial service'. Article 298(1)(b), which covers: 'Disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service …' This may have been *ex abundanti cautela*. Although the training of naval cadets could be seen as a military activity, a goodwill visit to Tema perhaps could not, still less the arrest, following a court order, of a vessel on such a visit.

As yet, Ghana's attitude to the proceedings has not been revealed. Argentina's request for provisional measures (paragraph 39) indicates that the Ghanaian Government did argue before Justice Frimpong that the *Libertad* was immune from the jurisdiction of the Ghanaian courts. However, acts of the Ghanaian courts are equally acts of the Ghanaian State and it is the court's opinions which have prevailed and which Argentina complains about. In general, it would seem that the Government is between a rock and a hard place. It cannot overrule its court's decisions without breaching domestic law. Indeed, it might even be, given NML's penchant for litigation, that any interference with the judicial process leading to the *Libertad's* release could give rise to a claim for denial of justice by NML under the UK-Ghana BIT.