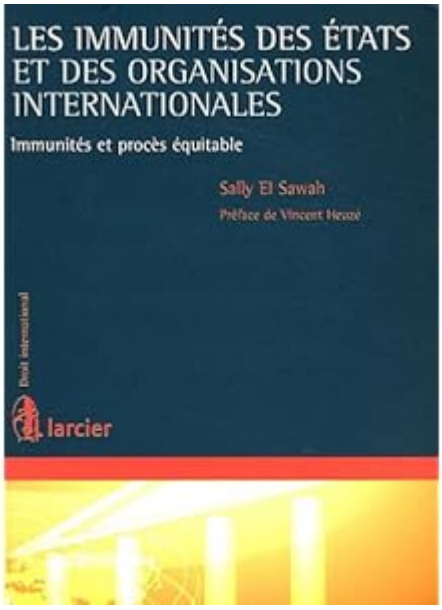
El Sawah on Immunities and the Right to a Fair Trial

Sally El Sawah, who practices at the French arbitration boutique Leboulanger, has published a monograph in French on Immunities of States and International Organizations (*Les immunités des Etats et des organisations internationales – Immunités et procès équitable*).



The book, which is more than 800 page long, is based on the doctoral dissertation of Ms El Sawah. The main project of the author is to confront the law of sovereign immunities with human rights, and more specifically the Right to a Fair Trial.

The most provocative idea of Ms El Sawah is that the existence of rules of customary international law on sovereign immunities is a myth, and that the wide divergences of the national laws on the topic clearly show that there is no superior rule binding on national states.

After arguing that customary international law is essentially silent on the matter, the author makes her central claim. States should be considered as being essentially constrained by fundamentals rights when unilaterally adopting rules on sovereign immunities. As a consequence, and contrary to the case law of the European Court of Human Rights, the laws of sovereign immunities should not be considered immune from an assessment from a human rights perspective.

Ms El Sawah concludes that the French law of sovereign immunities should be significantly amended, in particular insofar as it distinguishes between immunity to be sued in court and immunity from measures of constraint (enforcement).

More details can be found on the publisher's website.

The French abstract is available after the jump.

Le débat sur le conflit entre les immunités et le droit au procès équitable a pris toute son ampleur après les décisions décevantes de la CEDH, jugeant que les immunités constituent une limitation légitime et proportionnée au droit d'accès au juge. Or, il résulte de l'étude des fondements, sources et régimes des immunités et du droit au procès équitable que leur conflit dépasse leur antinomie étymologique : les immunités portent atteinte au droit d'accès au juge dans sa substance même.

L'imprécision et l'incohérence du régime des immunités étatiques aussi bien que l'absence de voie de recours alternative aux immunités des organisations internationales portent atteinte au droit d'accès concret et effectif au tribunal. Néanmoins, le conflit entre les immunités étatiques et le droit au procès équitable est moins problématique que le conflit entre ce dernier et les immunités des organisations internationales. Contrairement aux immunités étatiques qui n'ont qu'une source nationale, il existe un véritable conflit de normes de valeur égale entre le droit au procès équitable, droit fondamental en droit interne et international, et les immunités des organisations internationales, régies par des conventions internationales. La résolution du conflit entre le droit des immunités et le droit au procès équitable, qui ne mérite pas de se réaliser par le sacrifice de l'un au profit de l'autre et inversement, requiert l'intervention du législateur, compte tenu de la fonction politique des immunités et des principes de l'état de droit.

Une conciliation qui prend en compte les intérêts légitimes poursuivis par les droits en conflit est possible. Le droit au procès équitable ne doit plus constituer un motif d'exclusion des immunités. Il doit désormais servir à définir le régime des immunités des états et des organisations internationales. Si un déni de justice subsiste, le justiciable ne sera pas pour autant désarmé. Son droit de recours au juge sera préservé ; il pourra agir contre l'état du for pour rupture de l'égalité devant les charges publiques.

Brand on UNCITRAL Online Dispute Resolution Project

Ronald A. Brand (University of Pittsburgh School of Law) has posted Party Autonomy and Access to Justice in the UNCITRAL Online Dispute Resolution Project on SSRN.

> *The United Nations Commission on International Trade Law (UNCITRAL) has directed its Working Group III to prepare instruments that would provide the framework for a global system of online dispute resolution (ODR). Negotiations began in December 2010 and have produced an as-yet-incomplete set of procedural rules for ODR. It is anticipated that three other documents will be prepared, addressing substantive principles to be applied in ODR, guidelines and minimum requirements for ODR providers and neutrals, and a cross-border mechanism for enforcement of the resulting ODR decisions on a global basis.*
>
> *The most difficult issues in the ODR negotiations are centered on the coordination of the ODR process with national rules of private international law (conflict of laws), national rules of consumer protection, and the international arbitration law framework. If any global system of ODR is to be successful, it must avoid difficult questions about the application of national mandatory rules of law, it must be considered to provide fair procedures and results for consumers, and the results obtained must be enforceable across borders. This will only happen if the system respects the ability of individual parties (regardless of category) to enter into binding ODR agreements at the time they form the basic contract for an online transaction.*
>
> *This article reviews international efforts at constructing an acceptable system of ODR for low-value high-volume online transactions, and addresses the role of party autonomy in the success of any resulting ODR system. The ODR project will fail if parties are denied the autonomy to opt into the resulting system of dispute resolution. Party autonomy is key to the difficult issues of consumer protection, applicable law, and enforcement within the existing international litigation and arbitration regimes. It makes no sense to design a system states agree is fair to all and then, through rules that require reference to national or regional laws, prevent the use of that system.*

The paper is forthcoming in the *Loyola University Chicago International Law Review*.

Yearbook of Private International Law, Vol. XIII (2011)

The latest issue of the Yearbook of Private International Law (Volume XIII – 2011) has recently been published. Edited by *Andrea Bonomi,* Professor at the University of Lausanne, and *Gian Paolo Romano*, Professor at the University of Geneva, the volume focuses, among others, on recent developments in European private international law.

The official announcement reads as follows:

> *The current volume of the "Yearbook of Private International Law" includes three special sections: The first one is devoted to the recent European developments in the area of family law like the proposal on the matrimonial property régimes in its relation with other EU instruments, such as Brussels IIbis or Rome III. Another special section deals with the very hotly debated question of the treatment of and access to foreign law. The third one presents some recent reforms of national Private International Law systems. National reports and court decisions complete the book.*
>
> *Recent highlights include:*
>
> - *multiple nationalities in EU Private International Law*

- *the European Court of Human Rights and Private International Law*
- *parallel litigation in Europe and the US*
- *arbitration and the powers of English courts*
- *conflict of laws in emission trading*
- *res judicata effects of arbitral awards*

The *Yearbook* includes the following contributions:

Doctrine

- Stefania Bariatti, Multiple Nationalities and EU Private International Law – Many Questions and Some Tentative Answers
- George A. Bermann, Parallel Litigation: Is Convergence Possible?
- Patrick Kinsch, Private International Law Topics Before the European Court of Human Rights – Selected Judgments and Decisions (2010-2011)
- Jonathan Hill, The Powers of the English Court to Support an Arbitration in "Foreign Seat" and "No Seat" Cases
- Christa Roodt, Border Skirmishes between Courts and Arbitral Tribunals in the EU: Finality in Conflicts of Competence
- Koji Takahashi, Conflict of Laws in Emissions Trading
- Thomas Kadner Graziano, The CISG Before the Courts of Non-Contracting States? Take Foreign Sales Law as You Find It

European Family Private International Law

- Cristina González Beilfuss, The Proposal for a Council Regulation on the Property Consequences of Registered Partnerships
- Ilaria Viarengo, The EU Proposal on Matrimonial Property Regimes – Some General Remarks
- Andrea Bonomi, The Interaction among the Future EU Instruments on Matrimonial Property, Registered Partnerships and Successions
- Beatriz Campuzano Díaz, The Coordination of the EU Regulations on Divorce and Legal Separation with the Proposal on Matrimonial Property Regimes
- Simone Marinai, Matrimonial Matters and the Harmonization of Conflict of Laws: A Way to Reduce the Role of Public Policy as a Ground for Non-Recognition of Judgments

Application of Foreign Law

- Carlos Esplugues Mota, Harmonization of Private International Law in Europe and Application of Foreign Law: The “Madrid Principles” of 2010
- Shaheeza Lalani, A Proposed Model to Facilitate Access to Foreign Law

News from Brussels

- Mel Kenny / Lorna Gillies / James Devenney, The EU Optional Instrument: Absorbing the Private International Law Implications of a Common European Sales Law

News from Rome

- Alessandra Zanobetti, UNIDROIT’s Recent Work: An Appraisal

National Reports

- Yasuhiro Okuda, New Provisions on International Jurisdiction of Japanese Courts
- Tomasz Pajor†, Introduction to the New Polish Act on Private International Law of 4 February 2011
- Mathijs H. ten Wolde, Codification and Consolidation of Dutch Private International Law: The Book 10 Civil Code of the Netherlands
- Seyed N. Ebrahimi, An Overview of the Private International Law of Iran: Theory and Practice (Part Two)
- Nikolay Natov / Boriana Musseva / Teodora Tsenova / Dafina Sarbinova / Zahari Yanakiev / Vasil Pandov, Application of the EU Private International Law
  Instruments in Bulgaria
- William Easun / Géraldine Gazo, Trusts and the Principality of Monaco

Court Decisions

- Michael Bogdan, Defamation on the Internet, *forum delicti* and the E-Commerce Directive:
  Some Comments on the ECJ Judgment in the *eDate* Case
- Michel Reymond, The ECJ *eDate* Decision: A Case Comment

- Matthias Lehmann, Exclusive Jurisdiction under Art. 22(2) of the Brussels I Regulation:
  The ECJ Decision *Berliner Verkehrsbetriebe v JPMorgan Chase Bank* (C-144/10)
- Jan von Hein, Medical Malpractice and Conflict of Laws: Two Recent Judgments by the German Federal Court of Justice
- Kun Fan, The Risks of Apparent Bias when an Arbitrator Acts as a Mediator – Remarks on Hong Kong Court's Decision in *Gao Haiyan*

Forum

- Jeremy Heymann, The Relationship between EU Law and Private International Law Revisited: Of Diagonal Conflicts and the Means to Resolve Them
- Ilaria Pretelli, Cross-Border Credit Protection against Fraudulent Transfers of Assets – *Actio pauliana* in the Conflict of Laws

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Word Class Actions (ed. by P.G. Karlsgodt, OUP)

Class action and other group litigation procedures are increasingly being adopted in jurisdictions throughout the world, as more countries deal with the realities of increased globalization and access to information. As a result, attorneys and their clients face the ever-expanding prospect of a class or group action outside their home jurisdictions. This book intends to be a guide to group and representative actions around the Globe for attorneys and their clients. It helps lawyers navigate and develop strategies for litigation and risk management in the course of doing business abroad, or even in doing business locally in a way that impacts interests abroad.Part I of the book provides a jurisdiction-by-jurisdiction survey of the class action, group, collective, derivative, and other representative action procedures available across the globe. Each chapter is written from a local perspective, by an attorney familiar with the laws, best practices, legal climate, and culture of the jurisdiction.Part II provides guidance from the perspective of international attorneys practicing in foreign jurisdictions and the art of counseling and

representing clients in international litigation. It also covers a variety of topics related to transnational, multi-jurisdictional, and class or collective actions that involve international issues and interests, such as:
Chapter 26 Prosecuting Class Actions and Group Litigation

Chapter 27 Multijurisdictional and Transnational Class Litigation: Lawsuits Heard ‘Round the World’

Chapter 28 International Class Action Notice

Chapter 29 International Class Actions Under the U.S. Alien Tort Claims Act

Chapter 30 International Class Arbitration

Chapter 31 Representing Clients in Litigation Abroad

Each chapter offers practice tips and cultural insights helpful to an attorney or litigant facing a dispute in a particular part of the world. Many of the chapters introduce key books, treatises, articles, or other reference materials to foster further research. Its focus on international class and group litigation law from a practitioner’s perspective makes World Class Actions an essential guide for the lawyer or client.

Liber Amicorum for the Croatian Professor Emeritus Krešimir Sajko

Liber Amicorum for Professor Emeritus Krešimir Sajko was published within the *Collected Papers of the Zagreb Law Faculty*, volume 62, numbers 1-2. The papers in Croatian, German and English language published in the Liber Amicorum fall under the topics on private international law, international civil procedure, international commercial arbitration and alternative dispute resolution, as well as private law – comparative and Croatian. The table of contents is available here: 00 Nulti.indd. Professor Emeritus Sajko is one of the renowned Croatian professors of private international law, while his interests

reach much further which is confirmed in his rich opus listed here 27 Popis radova.indd.

Drahozal on the Economics of Comity

Christopher Drahozal (University of Kansas Law School) has posted Some Observations on the Economics of Comity on SSRN.

> *Comity is the deference one State shows to the decisions of another State. Comity is manifested in an array of judicial doctrines, such as the presumption against the extraterritorial application of statutes and the presumption in favor of recognition of foreign judgments. Comity does not require a State to defer in every case (it is not "a matter of absolute obligation"), but determining when comity requires deference poses difficult doctrinal and theoretical issues.*
>
> *This paper offers some observations on the economics of comity in an attempt to provide insights into those issues. It first describes the (largely unsatisfactory) attempts to define comity and identifies the various judicial doctrines that are based on comity. Generalizing from the existing literature, which uses game theory (most commonly the prisoners' dilemma game) to analyze legal doctrines based on comity, the paper then sets out a basic and tentative economic analysis of comity. Comity often serves a cooperative function: courts rely on comity as the basis for doctrines that enhance cooperation with other States. In such cases, refusing to grant comity to a decision of another State constitutes defection from the cooperative solution. But if the original decision itself constitutes defection — such as a State opportunistically entering a judgment against a foreign citizen — refusing to grant comity would not be defection but would instead be an attempt to sanction the other State's defection. Thus, the central inquiry when a court decides whether to grant comity can be framed as whether the State decision being examined constitutes cooperation or defection. Further, given the*

uncertainty courts face in making such a determination, comity itself then can be seen as establishing a default presumption that a particular type of State decision constitutes cooperation (or, in cases in which courts refuse to grant comity, as a default presumption of defection).

The paper then argues that any rule a court adopts on the basis of comity should be treated as a default rule rather than a mandatory rule. The argument in favor of default rules over mandatory rules is a familiar one, and seems to apply well here. Thus, as U.S. and U.K. courts have held — but contrary to decisions of the European Court of Justice — comity concerns should not preclude a court specified in an exclusive forum selection clause from entering an anti-suit injunction against foreign court litigation. An arbitration clause, by comparison, provides a much weaker case for finding that the parties contracted around the comity-based default. Finally, the paper suggests possible avenues for future research: in particular, examining the importance of rent-seeking and judicial incentives in the economics of comity.

The paper is forthcoming in *The Economic Analysis of International Law* (Eger & Voigt eds, 2013).

Book: Pocar – Viarengo – Villata (Eds.), Recasting Brussels I

The Italian publishing house CEDAM has published a new volume on the review of the Brussels I regulation: "Recasting Brussels I". The book, edited by *Fausto Pocar*, *Ilaria Viarengo* and *Francesca Clara Villata* (all from the Univ. of Milan) includes twenty-five papers divided into five parts, devoted to the scope of application (I), rules on jurisdiction (II), choice-of-court agreements (III), coordination of proceedings (IV) and recognition and enforcement of judgments (V).

Here's the table of contents (.pdf file):

PART I – SCOPE OF APPLICATION

- *Rainer Hausmann,* The Scope of Application of the Brussels I Regulation;
- *Ilaria Viarengo*, The Removal of Maintenance Obligations from the Scope of Brussels I;
- *Claudio Consolo – Marcello Stella*, Brussels I Regulation Amendment Proposals and Arbitration;
- *Peter Kindler*, Torpedo Actions and the Interface between Brussels I and International Commercial Arbitration;
- *Stefano Azzali – Michela De Santis*, Impact of the Commission's Proposal to Revise Brussels I Regulation on Arbitration Proceedings Administered by the Chamber of Arbitration of Milan.

PART II – RULES ON JURISDICTION

- *Burkhard Hess*, The Proposed Recast of the Brussels I Regulation: Rules on Jurisdiction;
- *Riccardo Luzzatto*, On the Proposed Application of Jurisdictional Criteria of Brussels I Regulation to Non-Domiciled Defendants;
- *Fausto Pocar*, A Partial Recast: Has the Lugano Convention Been Forgotten?;
- *Alexander R. Markus*, Harmonisation of the EU Rules of Jurisdiction Regarding Defendants Outside the EU. What About the Lugano Countries?;
- *Ruggiero Cafari Panico*, Forum necessitatis. Judicial Discretion in the Exercise of Jurisdiction;
- *Marco Ricolfi*, The Recasting of Brussels I Regulation from an Intellectual Property Lawyer's Perspective;
- *Eva Lein*, Jurisdiction and Applicable Law in Cross-Border Mass Litigation;
- *Zeno Crespi Reghizzi*, A New Special Forum for Disputes Concerning Rights in Rem over Movable Assets: Some Remarks on Article 5(3) of the Commission's Proposal.

PART III – CHOICE-OF-COURT AGREEMENTS

- *Ilaria Queirolo*, Prorogation of Jurisdiction in the Proposal for a Recast of the Brussels I Regulation;

- *Christian Kohler*, Agreements Conferring Jurisdiction on Courts of Third States;
- *Francesca C. Villata*, Choice-of-Court Agreements in Favour of Third States' Jurisdiction in Light of the Suggestions by Members of the European Parliament.

PART IV – COORDINATION OF PROCEEDINGS

- *Luigi Fumagalli*, Lis Alibi Pendens. The Rules on Parallel Proceedings in the Reform of the Brussels I Regulation;
- *Pietro Franzina*, Successive Proceedings over the Same Cause of Action: A Plea for a New Rule on Dismissals for Lack of Jurisdiction;
- *Lidia Sandrini*, Coordination of Substantive and Interim Proceedings;
- *Cristina M. Mariottini*, The Proposed Recast of the Brussels I Regulation and Forum Non Conveniens in the European Union Judicial Area.

PART V – RECOGNITION AND ENFORCEMENT OF JUDGMENTS

- *Sergio M. Carbone*, What About the Recognition of Third States' Foreign Judgments?;
- *Thomas Pfeiffer*, Recast of the Brussels I Regulation: The abolition of Exequatur;
- *Stefania Bariatti*, Recognition and Enforcement in the EU of Judicial Decisions Rendered upon Class Actions: The Case of U.S. and Dutch Judgments and Settlements;
- *Manlio Frigo*, Recognition and Enforcement of Judgments on Matters Relating to Personality Rights and the Recast Proposal of the Brussels I Regulation;
- *Marco De Cristofaro*, The Abolition of Exequatur Proceedings: Speeding up the Free Movement of Judgments while Preserving the Rights of the Defense.

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Title: Recasting Brussels I, edited by *F. Pocar*, *I. Viarengo* and *F.C. Villata*, CEDAM (Series: Studi e pubblicazioni della Rivista di diritto internazionale privato e processuale – Volume 76), Padova, 2012, XXIV – 382 pages.

ISBN 9788813314699. Price: EUR 32,50. Available at CEDAM.

(Many thanks to Prof. Francesca Villata for the tip-off)

Book on the Brussels I Review Proposal

A new book on the Brussels I Review Proposal was just published. It is edited by Eva Lein, who is the Herbert Smith Senior Research Fellow in Private International Law at the British Institute for International and Comparative Law.

The Brussels I Review Proposal Uncovered includes the following contributions:

Foreword: The Right Hon the Lord Mance

1. The Brussels I Review Proposal – An Overview (Pamela Kiesselbach)

2. A Neverending Story? Arbitration and Brussels I: The Recast (Jonathan Harris and Eva Lein)

3. The Application of the Brussels I Regulation to Defendants Domiciled in Third States: From the EGPIL Proposal to the Commission Proposal (Alegría Borrás)

4. The Brussels I Regulation in the International Legal Order: Some Reflections on Reflectiveness (AlexanderLayton)

5. Choice Of Court Agreements in the Review Proposal for the Brussels I Regulation (Ulrich Magnus)

6. Lis Pendens and Third States: The Commission's Proposed Changes to the Brussels I Regulation (Pippa Rogerson)

7. The Proposed Recast of Rules on Provisional Measures under the Brussels I Regulation (Michael Bogdan)

8. Free Movement of Judgments in the EU: Knock Down the Walls but

Mind the Ceiling (Andrew Dickinson)

9. The Brussels I Review Proposal: Challenges for the Lugano Convention? (Andreas Furrer)

10. Protection Against the Abuse of Law in the Brussels I Review Proposal? (Luboš Tichý)

11. The Revision of the Brussels I Regulation: A View from the Hague Conference (Marta Pertegas)

As announced earlier, a book launch reception will take place on June 27 at the BIICL.

Conference Announcement: Collective Redress in Cross-Border Context

Conference on Collective Redress in the Cross-Border Context
In the framework of the Henry G. Schermers Fellowship Programme<http://www.hiil.org/henry-g-schermers-fellowship>, held this year by Professor S.I. Strong, the Hague Institute for the Internationalisation of Law (HiiL) and the Netherlands Institute of Advanced Studies (NIAS)<http://www.nias.nl/Pages/NIA/2/764.bGFuZz1FTkc.html> announce a workshop on the theme 'Collective Redress in the Cross-Border Context: Arbitration, Litigation and Beyond.'
The workshop aims to explore the various means that can be used to resolve collective legal injuries that arise across national borders. The types of dispute resolution mechanisms to be discussed range from class and collective arbitration, mass arbitration and mass claims processes, class and collective litigation, and large-scale settlement and mediation. The workshop will bring together practitioners, academics, and representatives of non-governmental

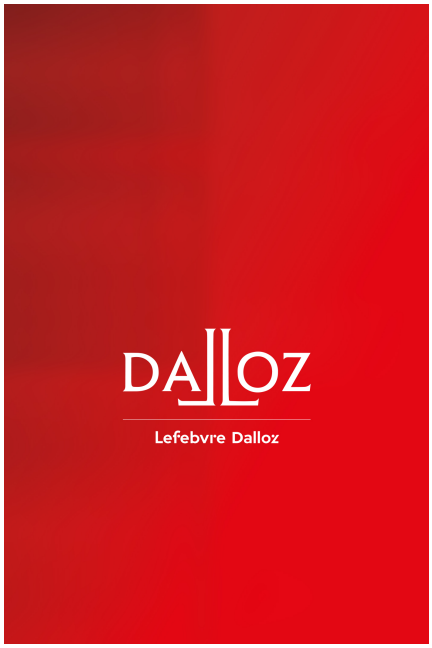
organisations, all of whom have an interest and expertise in public and private resolution of collective redress in the international realm.

For the first time, NIAS and HiiL are offering a works-in-progress conference in association with the Henry G. Schermers workshop. This conference is designed to allow practitioners and scholars who are interested in this area of law to discuss their work and ideas in the company of other experts in the field.

Confirmed speakers for the Schermers workshop include:
* Jan Willem Bitter, Simmons & Simmons LLP/Netherlands Arbitration Institute (The Netherlands) * Christian Borris, Freshfields/German Arbitration Institute (Germany) * Laura Carballo Piñeiro, University of Santiago de Compostela (Spain) * Christopher R. Drahozal, University of Kansas (USA) * Gregory A. Litt, Skadden, Arps, Slate, Meagher & Flom LLP (USA) * Daan Lunsingh Scheurleer, NautaDutihl (The Netherlands) * Gerard Meijer, Nauta Dutihl/Erasmus University Rotterdam/PRIME Finance (The Netherlands) * Rachel Mulheron, University of London, Queen Mary (UK) * Victoria Orlowski, ICC International Court of Arbitration (France) * Geneviève Saumier, McGill University (Canada) * Garth Schofield, Permanent Court of Arbitration (The Netherlands) * S.I. Strong, Henry G. Schermers Fellow, HIIL/NIAS, University of Missouri (USA)
The three-day event will be held June 20-22, 2012, at the NIAS site in Wassenaar, twenty minutes outside of the Hague. The events are free to the public, but registration is required. For more information on the event, including the full programme for both the Schermers workshop and works in progress event, see the HiiL website at: http://www.hiil.org/events/hiil-nias-workshop-collective-redress. Questions may also be directed to Professor S.I. Strong at strongsi@missouri.edu<mailto:strongsi@missouri.edu>.

First Issue of 2012's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains four articles and several casenotes.



The first article is a survey of the 2011 Polish law of private international law by the late Tomasz Pajor, who was a professor at Lodz University (*La nouvelle loi polonaise de droit international privé*).

The second article is authored by Isabelle Veillard and explores the scope of res judicata of arbitral awards (*Le domaine de l'autorité de la chose arbitrée*). It is this only one to include an English abstract:

> *Expanding from specific arguments to the cause of action itself, the requirement that the dispute be concentrated may, in the field of arbitral res judicata, be beneficial from the standpoint of procedural speed and fairplay, but it threatens the adversarial principle all the more so that there is a presumption in favour of renunciation of the right to appeal ; this is why the non-concentration of the legal grounds of action should not be sanctioned unless it is the fruit of gross negligence or abuse in the exercise of the right to bring suit. The distrust of French law towards res judicata could be mitigated in respect of arbitral awards given the contractual nature of arbitration, by the adoption as between the parties of a mechanism of collateral estoppel, along*

with safeguards designed to guarantee both efficiency and fairplay with the requirements of a fair trial ; the distinction between res judicata and third party effects suffices no doubt to protect the latter.

In the third article, Aline Tenenbaum, who lectures at Paris Est Creteil University, discusses the issue of the localization of financial loss for jurisdictional purposes in the light of the Madoff case (*Retombées de l'affaire Madoff sur la Convention de Lugano. La localisation du dommage financier*).

Finally, in the last article, Fabien Marchadier, who is a professor at Poitiers University, explores the consequences of the ECHR case *Genovese v. Malta* as far as awarding citizenship is concerned (*L'attribution de la nationalité à l'épreuve de la Covnentino européenne des droits de l'homme. Réflexion à partir de l'arrêt* Genovese c. Malte).