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*?

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"