Call for Participation in a Questionnaire on Dispute Resolution Clauses

Guest post by Maryam Salehijam:

There is a lack of clarity regarding the obligations that arise from dispute resolution agreements with a mediation/conciliation component. In order to reduce this uncertainty, a chapter of the BOF funded PhD research of Maryam Salehijam (supervisor: Professor Maud Piers) from the Transnational Law Center at the University of Ghent focuses on the question "What are the parties' obligation under an ADR agreement?" To answer this question, the research is divided into two stages, the first stage involves a questionnaire that assesses the familiarity of legal professionals –including lawyers and third-party neutrals- in selected jurisdictions* with dispute resolution clauses calling for non-binding ADR mechanisms such as mediation/conciliation. Moreover, the questionnaire provides willing participants the opportunity to copy and paste a model or previously utilized dispute resolution clause. In the second stage, the clauses gathered as well as clauses extracted from other sources will be content coded using the software NVivo in order to determine which obligations tend to be reoccurring in the majority of the clauses under analysis.

The questionnaire targets individuals who have experience with commercial dispute resolution. The participation in the short questionnaire will require minimum effort, as most questions only require a simple mouse-click. Please note that the information entered in the survey is kept anonymous unless indicated to the contrary by the participants. Moreover, as the analysis takes place on an aggregated level, the findings will not disclose personally identifiable information. Accordingly, the information provided will only serve scientific purposes.

To complete the questionnaire, please click on the following link:**http://lawsurv.ugent.be/limesurvey/index.php/678366?lang=en** (closing date 29th of April 2017).

Thank you for taking this request into consideration.

**Austria, Australia, England & Wales, Germany, Singapore, the Netherlands, and the United States*

SSRN: Recent articles on Private International Law/Conflict of Laws

I thought it might be worth to draw your attention to a couple of interesting papers that I came across on SSRN recently (without any claim of completeness):

On Brexit and Private International Law:

- *Matthias Lehmann & Nihal Dsouza* (University of Bonn), What Brexit Means for the Interpretation and Drafting of Financial Contracts
- *John Armour* (University of Oxford), *Holger Fleischer* (MPI Hamburg), *Vanessa Jane Knapp* (Queen Mary University of London) & *Martin Winner* (Vienna University of Economics and Business), Brexit and Corporate Citizenship
- *Mukarrum Ahmed* (Lancaster University) & *Paul R. Beaumont* (University of Aberdeen), Exclusive Choice of Court Agreements: Some Issues on the Hague Convention on Choice of Court Agreements and its Relationship with the Brussels I Recast Especially Anti-Suit Injunctions, Concurrent Proceedings and the Implications of Brexit
- *Mukarrum Ahmed* (Lancaster University), Brexit and English Jurisdiction Agreements: The Post-Referendum Legal Landscape

On EU Private International Law:

- *Jean-Sylvestre Bergé* (Université de Lyon), The Gap between Legal Disciplines, Blind Spot of the Research in Law: Remarks on the Operation of Private International Law in the EU Context
- *Evangelos Vassilakaki*s (Aristotle University of Thessaloniki), The Choice of the Law Applicable to the Succession under Regulation 650/2012 – An Outline
- *Laura van Bochove* (Leiden University), Purely Economic Loss in Conflict of Laws: The Case of Tortious Interference with Contract
- *Ilaria Pretelli* (Swiss Institute of Comparative Law), Exclusive and Discretionary Heads of Jurisdiction for Third States and Lugano States:

The Way Forward
- *Ugljesa Grusic* (Faculty of Laws, University College London), Long-Term Business Relationships and Implicit Contracts in European Private Law
- *Matthias Haentjens & Dorine Verheij* (Leiden University), Finding Nemo: Locating Financial Losses after Kolassa/Barclays Bank and Profit
- Remus Titiriga (INHA University), Revival of Rabel's Trans-National Characterization for Rules of Conflict? Some Answers in a European Convention
- *Berk Demirkol* (University of Galatasaray), Droit Applicable aux Contrats de Construction (Law Applicable to Construction Contracts)

On non-EU Private International Law:

- *Patrick Borchers* (Creighton University School of Law), Is the Supreme Court Really Going to Regulate Choice of Law Involving States?
- *Akawat Laowonsiri* (Thammasat University), Conflict of Genders in Conflict of Laws: Unresolved Problems in Thailand and Elsewhere
- *Ralf Michaels* (Duke University School of Law) The Conflicts Restatement and the World
- *Jinxin Dong* (China University of Petroleum), On the Internationally Mandatory Rules of the PRC
- *Hannah L. Buxbaum* (Indiana University Bloomington Maurer School of Law), Transnational Legal Ordering and Regulatory Conflict: Lessons from the Regulation of Cross-Border Derivatives
- *Patrick Borchers* (Creighton University School of Law), An Essay on Predictability in Choice-of-Law Doctrine and Implications for a Third Conflicts Restatement
- *John F. Coyle* (University of North Carolina School of Law), The Canons of Construction for Choice-of-Law Clauses

On International Arbitration

- *Csongor István Nagy* (University of Szeged), Central European Perspectives on Investor-State Arbitration: Practical Experiences and Theoretical Concerns
- *Evangelos Kyveris* (University College London), An In-Depth Analysis on the Conflicting Decisions in Dallah v. Pakistan: Same Law, Same

Principles, Different Decisions

Brexit and Family Law Conference in Cambridge on 27 March 2017

The UK's withdrawal from the EU will precipitate important change in international family law. EU law has increasingly come to define key aspects of both jurisdiction and recognition & enforcement of judgments on divorce, maintenance, and disputes over children, including international child abduction, and provided new frameworks for cross-national cooperation.

Child & Family Law Quarterly and Cambridge Family Law will, therefore, host a joint seminar on 27 March 2017. International experts and practitioners will discuss the impacts of 'Brexit' on family law, from a range of national and European perspectives, and reflect on the future of international family law practice in the UK.

Academic speakers include:

- Nigel Lowe, University of Cardiff
- Anatol Dutta, University of Regensburg, Germany
- Paul Beaumont, University of Aberdeen
- Helen Stalford, University of Liverpool
- Janeen Carruthers, University of Glasgow
- Ruth Lamont, University of Manchester
- Elizabeth Crawford, University of Glasgow

Panel discussion participants include

- Rebecca Bailey-Harris, 1 Hare Court
- David Hodson, International Family Law Group
- Rachael Kelsey, Sheehan Kelsey Oswald, Edinburgh
- Gavin Smith, 1 Hare Court

Conference registration fees:

- £ 150 for practitioners
- £ 100 for academics/Civil Servants/NGO
- £ 25 for students

For more details, registration, accommodation and dinner tickets: www.fambrexit.law.cam.ac.uk/

Book: Human Rights in Business

Just published by Routledge, the book **Human Rights in Business: Removal of Barriers to Access to Justice in the European Union** presensts the final results of the project which received a 2013 Civil Justice Action Grant from the European Commission Directorate General for Justice. The book is edited by Juan José Álvarez Álvarez Rubio and Katerina Yiannibas and includes a long list of reknown contributors from academia, legal practice and civil society. The begining of the official description from the book reads:

> *The capacity to abuse, or in general affect the enjoyment of human, labour and environmental rights has risen with the increased social and economic power that multinational companies wield in the global economy. At the same time, it appears that it is difficult to regulate the activities of multinational companies in such a way that they conform to international human, labour and environmental rights standards. This has partially to do with the organization of companies into groups of separate legal persons, incorporated in different states, as well as with the complexity of the corporate supply chain. Absent a business and human rights treaty, a more coherent legal and policy approach is required.*

It is available for free download as an eBook:

– To download from the book's page on the Routledge website, choose "Other eBook Options" button for download options.
– To download the free ebook from Amazon, click here.
– To download the free ebook from iTunes, click here.

Belgium signs the 2000 Adults Convention

Belgium has today signed the 2000 Hague Convention on the International Protection of Adults.

This Convention is currently in force in nine States: Austria, the Czech Republic, Estonia, Finland, France, Germany, Monaco, Scotland and Switzerland. It has been signed but not yet ratified by nine other States, now including Belgium.

For more information see the website of the Hague Conference on Private International Law.

New publication: Human Rights in Business Removal of Barriers to Access to Justice in the European

Union

This new book, edited by Juan José Álvarez Rubio and Katerina Yiannibas, addresses the fact that the increased social and economic power of multinational parties has augmented their capacity to affect human, labour and environmental rights.

The book's publicity reads:

Faced with the challenge of how to effectively access the right to remedy in the European Union for human rights abuses committed by EU companies in non-EU states, a diverse research consortium of academic and legal institutions was formed. The consortium, coordinated by the Globernance Institute for Democratic Governance, became the recipient of a 2013 Civil Justice Action Grant from the European Commission Directorate General for Justice. A mandate was thus issued for research, training and dissemination so as to bring visibility to the challenge posed and moreover, to provide some solutions for the removal of barriers to judicial and non-judicial remedy for victims of business-related human rights abuses in non-EU states. The project commenced in September 2014 and over the course of two years the consortium conducted research along four specific lines in parallel with various training sessions across EU Member States.

The research conducted focused primarily on judicial remedies, both jurisdictional barriers and applicable law barriers; non-judicial remedies, both to company-based grievance. The results of this research endeavour make up the content of this report whose aim is to provide a scholarly foundation for policy proposals by identifying specific challenges relevant to access to justice in the European Union and to provide recommendations on how to remove legal and practical barriers so as to provide access to remedy for victims of business-related human rights abuses in non-EU states.

More information is available on the Routledge's site.

Conflict of Laws Section: Call for Papers and Panels for 2017 SLS Annual Conference at University College Dublin

Professor Andrew Dickinson, St Catherine's College, University of Oxford, has kindly provided this information regarding the conference referred to below. Dr Lorna Gillies, University of Strathclyde, and Dr Máire Ní Shúilleabháin, University College Dublin are co-conveners.

This is a call for papers and panels for the Conflict of Laws section of the 2017 SLS Annual Conference to be held at University College Dublin from Tuesday 5th September – Friday 8th September. This year's theme is 'The Diverse Unities of Law'.

This section is new to the SLS Annual Conference and is being run as a trial section. With your support, we can ensure that the section is included in future conferences.

The Conflict of Laws section will meet in the first half of the conference on Tuesday 5th and Wednesday 6th September. Two speakers (**Professor Alex Mills, UCL and Professor Eva Lein, BIICL/University of Lausanne**) have kindly already agreed to give a paper within the section.

We intend that the section will comprise four sessions of 90 minutes, with 3 or more papers being presented in each session, followed by discussion. At least three of the sessions will be organised by subject matter. We hope, if submissions allow, to be able to set aside the fourth session for papers by early career researchers (within 5-years of PhD or equivalent).

We welcome proposals from scholars in the field for papers or panels on any issue relating to any topical aspect of the Conflict of Laws (private international law), including but not limited to those addressing this year's conference theme.

If you are interested in delivering a paper, please submit a proposed title and abstract of around 300 words. If you wish to propose a panel, please submit a document outlining the theme and rationale for the panel and the names of the proposed speakers (who must have agreed to participate), together with their proposed titles and abstracts.

All abstracts and panel details must be submitted by midnight on Monday 27th March through the EasyChair conference system which can be accessed using this link. Full instructions on how to use the EasyChair system can be found here. If you experience any issues in using EasyChair, please contact Jed Meers at jed.meers@york.ac.uk.

As the SLS is keen to ensure that as many members with good quality papers as possible are able to present, we discourage speakers from presenting more than one paper at the conference. With this in mind, when you submit an abstract via EasyChair, you will be asked to note if you are also responding to calls for papers or panels from other sections.

We should also note that the SLS offers a Best Paper Prize which can be awarded to academics at any stage of their career and which is open to those presenting papers individually or within a panel. The Prize carries a £250 monetary award and the winning paper will be published in the first issue of Legal Studies in 2018. To be eligible:

- speakers must be fully paid-up members of the SLS;
- papers must not exceed 12,000 words including footnotes (as counted in Word);
- papers must be uploaded to EasyChair by midnight on Monday 28th August; and
- papers must not have been published previously or have been accepted or be under consideration for publication.

We have also been asked to remind you that **all speakers will need to book and pay to attend the conference and that they will need to register for the conference by the end of June in order to secure their place within the programme**, though please do let me/us know if this is likely to pose any

problems for you. Booking information will be circulated in due course.

A call for posters will be issued separately in due course.

JuristenZeitung, Issue 2 (2017): Two More Articles on the Effects of Brexit

The current issue of the JuristenZeitung features two articles dealing with the effects of Brexit on private and economic law, including private international law.

The first article, authored by Matthias Lehmann, University of Bonn, and Dirk Zetzsche, University of Liechtenstein, discusses the various options to bring about Brexit and analyses their consequences for the law of contractual and non-contractual obligations (including choice of law), corporate law, insolvency law and procedural law (*Die Auswirkungen des Brexit auf das Zivil- und Wirtschaftsrecht, pp. 62-71*).

The second article, authored by myself, sheds light on the effects Brexit will have on London as a place for settling international legal disputes (*Die Wahl englischen Rechts und englischer Gerichte nach dem Brexit. Zur Zukunft des Justizstandorts England, pp. 72-82*). It shows that Brexit creates substantial uncertainty (1) as regards the enforcement of English choice of law and English choice of forum clauses and (2) as regards the recognition and enforcement of English judgments abroad. Unless the UK and the EU agree on the continued application of the Rome I Regulation, the Rome II Regulation and the (recast) Brussels I Regulation (or enter into a new treaty designed to enhance judicial cooperation in civil matters), Brexit will, therefore, make it less attractive to settle international disputes in London.

Both articles can be downloaded here and here (behind pay wall, unfortunately).

Suing TNCs in the English courts: the challenge of jurisdiction

By Ekaterina Aristova, PhD in Law Candidate, University of Cambridge

On 26 January 2017, Mr Justice Fraser, sitting as a judge in the Technology and Construction Court, ruled that a claim against Royal Dutch Shell plc, an English-domiciled parent company ("**RDS**"), and its Nigerian operating subsidiary Shell Petroleum Development Company of Nigeria Ltd ("**SPDC**") will not proceed in the English courts. These proceedings represent one of the many private claims brought by the foreign citizens in the courts of the Western states alleging direct liability of parent companies for the overseas human rights abuses. Despite an increased number of such foreign direct liability cases in the English courts, the issue of jurisdiction still remains one of the principle hurdles faced by the claimants and their lawyers in pursuing civil litigation against transnational corporations ("**TNCs**") outside the territory of the state where main events leading to the alleged crime took place and damage was sustained.

Last year, Mr Justice Coulson allowed a legal claim against English-based mining corporation Vedanta Resources plc and its Zambian subsidiary to be tried in England. The overall analysis of the judgement in *Lungowe v Vedanta Resources plc* suggested that (i) the claims against the parent company in relation to the overseas operations of the foreign subsidiary can be heard in the English courts; and (ii) the existence of an arguable claim against the English-domiciled parent company also establishes jurisdiction of the English courts over the subsidiary even if the factual basis of the case occurs almost exclusively in the foreign state. Although Mr Justice Fraser has not questioned any of the conclusions reached by his colleague, he made it very clear that establishing an arguable claim on the liability of the English-domiciled parent company for the foreign operations of its overseas subsidiary is a challenging task.

The claimants in *Okpabi v Shell* were Nigerian citizens who commenced two sets of proceedings against RDS and SPDC. The first claim was brought on behalf of

the Ogale community, while the second was initiated by the inhabitants of the Bille Kingdom in Nigeria. Both claims alleged serious and ongoing pollution and environmental damage caused by oil spills arising out of the Shell operations in and around the claimants' communities. The claimants argued that RDS breached the duty of care it owed to them to ensure that SPDC's operations in the Niger Delta did not cause harm to the environment and their communities. The claims against SPDC were brought on the basis that it was a necessary or proper party to the proceedings against RDS. The defendants argued that both claims have nothing to do with England and should proceed in Nigeria. They claimed that RDS was used as an "anchor defendant" and a device to ensure that the real claim against SPDC was also litigated in England.

Mr Justice Fraser has responded to these arguments by raising several questions which should have been answered in order to assert jurisdiction of the English courts over both claims (at [20]). It was agreed by both of the parties that the principal question was whether the claimants had legitimate claims in law against RDS. In the opinion of the judge, the claimants failed to provide evidence that there was any duty of care upon RDS as an ultimate holding company of the Shell Group for the acts and/or omissions of SPDC, and the claims against RDS should not proceed (at [122]). In the absence of the proceedings against RDS, the claims against SPDC did not have any connection with the territory of England as they were brought by the Nigerian citizens against Nigerian company for the breach of Nigerian law for acts and omissions in Nigeria (at [119]). Hence, application of SPDC also succeeded (at [122]).

Analysis of the Shell Group corporate structure and its relevance to the existence of the duty of care of the parent company represents the core of the judgement. The judge relied on the fact that RDS was a holding company with no operations whatsoever (at [114]). He took into account that only two officers of RDS were members of the Executive Committee of the Shell Group; RDS only dealt with the financial matters of the group's business that affect it as the ultimate holding company; it did not hold any relevant license to conduct operations in Nigeria; and it did not have specialist knowledge on the oil exploration (at [114-116]). Mr Justice Fraser noted that evidence on the part of the claimants was "extremely thin" and "sketchy" (at [89]). The claimants heavily relied on the public statements by RDS regarding control over SPDC and environmental strategy of the Shell Group (at [99]). The judge did not consider that such evidence could

alone demonstrate that RDS owed a duty of care to the claimants. Mr Justice Fraser stated that separate legal personality of the constituent entities of corporate group represents a fundamental principle of English law (at [92]) and claimants failed to provide evidence of high degree of control and direction by RDS sufficient to meet the three-fold test on the existence of duty of care set by *Caparo Industries plc v Dickman* and clarified by *Chandler v Cape*.

The judgment raises several sets of issues. First of all, it clearly confirmed the dominance of the entity-based approach to the nature of TNCs. It was established that certain powers of RDS such as adoption of the group policies does not alone put it in any different position than would be expected of an ultimate parent company (at [102, 106]). In this sense, decision of Mr Justice Fraser is in line with previous practice of the UK courts on the rules of jurisdiction in cases involving TNCs. Thus, in *Young v Anglo American South Africa Limited*, the Court of Appeal ruled that the powerful influence of the parent company does not by itself causes legal consequences, and should not have any impact on the determination of the domicile of the subsidiaries. Secondly, the judge argued that any references to Shell and Shell Group made by RDS in public statements do not dilute the concept of separate legal personality. This finding is of utmost importance since "common legal persona" is often considered to be not only a particular feature of TNC itself but the factor evidencing that parent company and the subsidiary operate as a single economic unit.

Moreover, attention should be paid to the note of warning expressed by Mr Justice Fraser with respect to the scale of the litigation against Shell. It was stated that approach of the parties to produce an extensive amount of witness and expert statements, authority bundles and lengthy skeleton arguments is "wholly self-defeating and contrary to cost-efficient conduct of litigation" (at [10]). It is inevitable, however, that mass tort actions against TNCs raise a number of complex legal and factual issues which require examination of the considerable amount of evidence, authorities and data. Given the fact that UK Parliament is currently in the process of Human Rights and Business inquiry, including access to effective remedy in the UK, the burden of litigation against TNCs on the English courts could easily become a policy argument.

The judgement in *Okpabi v Shell* definitely has an impact on the development of the tort litigation against TNCs in the English courts. Amnesty International has suggested that it "gives green light for corporations to profit from overseas

abuses". Although the judge did not fundamentally challenged the *Vedanta* decision, the strict adherence to the entity-based legal concepts suggests that the novel foreign direct liability cases are still far from advancing to the new level. Leigh Day, solicitors representing the Nigerian communities, have already confirmed that their clients will appeal the decision of Mr Justice Fraser. Even if the Court of Appeal reverses the ruling, the claimants would still struggle in establishing direct liability of the parent company for environmental pollution in Nigeria, since the jurisdictional test is easier to meet as opposed to a liability one. It has become known that *Vedanta* decision is itself being appealed by the corporate defendants. In any case, 2017 promises to be a momentous year for the victims of corporate human rights abuses looking at the English courts as their last hope for justice.

PIL and IP: Special Issue 2016.4 of the Dutch Journal on Private International Law (NIPR)

The fourth issue of 2016 of the Dutch Journal on Private International Law, Nederlands Internationaal Privaatrecht, is dedicated to Private International Law and Intellectual Property. It includes papers on the law applicable to copyright infringements on the Internet, how to handle multiple defendants in intellectual property litigation, the incorporation of the Unified Patent Court into the Brussels I bis regulation, principles of private international law and aspects of intellectual property law and the territoriality principle in intellectual property.

Sierd J. Schaafsma, 'Editorial: Private International law and intellectual property', p. 685-686 (guest editor)

Paul L.C. Torremans, 'The Law applicable to copyright infringement on the Internet', p. 687-695

This article looks at the law applicable to copyright infringement on the Internet. In order to do so we need to look first of all at the rules concerning the applicable law for copyright infringement in general. Here the starting point is the Berne Convention. Its provisions give an indication of the direction in which this debate is going, but we will see that they merely provide starting points. We then move on to the approach in Europe under the Rome II Regulation and here more details become clear. Essentially, the existing rule boils down to a lex loci protectionis approach, which is in conformity with the starting point that is found in the Berne Convention. It is however doubtful whether such a country by country approach can work well in an Internet context and suggestions are made to improve the legal framework by adding a rule for ubiquitous infringement and a de minimis rule. Finally, we also briefly look at the issues surrounding the cross-border portability of online content services and the impact that the current focus on these may have in terms of the choice of law.

Sierd J. Schaafsma, 'Multiple defendants in intellectual property litigation', p. 696-705

One of the key provisions in international intellectual property litigation is the forum connexitatis in Article 8(1) of the Brussel I bis Regulation. This jurisdiction provision makes it possible to concentrate infringement claims against various defendants, domiciled in different EU Member States, before one court: the court of the domicile of any one of them. The criteria of Article 8(1) are, however, complicated and the case law of the Court of Justice is not always very clear. This contribution seeks to explore, evaluate and comment on the current state of affairs in respect of Article 8(1) in the context of intellectual property litigation.

Michael C.A. Kant, 'The Unified Patent Court and the Brussels I *bis* Regulation', p. 706-715

According to the Agreement on a Unified Patent Court (UPCA), the establishment of a Unified Patent Court (UPC) for the settlement of disputes relating to European patents and European patents with unitary effect also depends upon amendments to the Brussels I bis Regulation (BR) concerning its relationship with the UPCA. In light of this, the European legislator established

new Articles 71a to 71d BR. Unfortunately, these provisions have effected uncertainties and schematic inconsistencies within the Brussels system. Besides, inconsistencies have been established between jurisdiction rules of the BR and competence rules of the UPCA. The most notable flaws in this respect are discussed in this contribution.

Michelle van Eechoud, 'Bridging the gap: Private international law principles for intellectual property law', p. 716-723

This past decade has seen a veritable surge of development of 'soft law' private international instruments for intellectual property. A global network has been formed made up of academics and practitioners who work on the intersection of these domains. This article examines the synthesizing work of the International Law Association's Committee on intellectual property and private international law. Now that its draft Guidelines on jurisdiction, applicable law and enforcement are at an advanced stage, what can be said about consensus and controversy about dealing with transborder intellectual property disputes in the information age? What role can principles play in a world where multilateral rulemaking on intellectual property becomes ever deeply politicized and framed as an issue of trade? Arguably, private international law retains it facilitating role and will continue to attract the attention of intellectual property law specialists as a necessary integral part of regulating transborder information flows.

Dario Moura Vicente, 'The territoriality principle in intellectual property revisited', p. 724-729

This essay revisits territoriality as the founding principle of international IP law. Both copyright and rights in patents and trademarks were essentially conceived by the drafters of the Berne and Paris Conventions as territorial rights which should be governed by the law of the country for which their protection is claimed. This is still the starting point of the relevant provisions in several recent soft law instruments adopted, inter alia, by the American Law Institute and the European Max Planck Group on Conflict of Laws in IP. An important deviation therefrom has, however, been enshrined in conflict of jurisdictions rules that allow for the extraterritorial enforcement of IP rights. Other relevant developments in this respect concern Internet uses of protected works, with

regard to which certain restrictions to territoriality have been adopted in order to promote the applicability of a single law to online infringements. The liability of Internet service providers should, in turn, be governed by the law of the country where the centre of gravity of their activities is located, not necessarily the lex protectionis. Other alternatives to the lex protectionis, such as the lex originis or the lex contractus, have gained prominence concerning the initial ownership of unregistered IP rights. And a choice of the applicable law by the parties has been allowed in respect of remedies for infringement acts, as well as of contracts providing for the creation or the transfer of securities in IP rights. A mitigated form of territoriality has thus emerged in recent IP law instruments, which allows for greater diversity and flexibility in conflict of laws solutions in this field.