Book: Rethinking International Commercial Arbitration – Towards Default Arbitration

Professor *Gilles Cuniberti* (University of Luxembourg) has just published a new monograph on default arbitration in the *Rethinking Law* series of Edward Elgar Publishing.

The official abstract kindly provided by the publisher reads as follows:

> *This innovative book proposes a fundamental rethink of the consensual foundation of arbitration and argues that it should become the default mode of resolution in international commercial disputes.*
>
> *The book first discusses the most important arguments against this proposal and responds to them. In particular, it addresses the issue of the legitimacy of arbitrators and the compatibility of the idea with guarantees afforded by European human rights law and US constitutional law. The book then presents several models of non-consensual arbitration that could be implemented to afford neutral adjudication in disputes between parties originating from different jurisdictions, to offer an additional alternative forum in the doctrine of forum non conveniens or to save judicial costs.*
>
> *The first dedicated exploration into the groundbreaking concept of default arbitration, Rethinking International Commercial Arbitration will appeal to scholars, students and practitioners in arbitration and international litigation.*

Further information, including a table of contents and some extracts, is available on the publisher's website.

New International Commercial Arbitration Statute for Ontario

Ontario has enacted and brought into force the *International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sched 5 (available here) to replace its previous statute on international commercial arbitration. The central feature of the new statute is that it provides that BOTH the 1958 New York Convention and the 1985 Model Law have the force of law in Ontario. Previously, when Ontario had given the Model Law the force of law in Ontario it had repealed its statute that had given the New York Convention the force of law in Ontario. This made Ontario an outlier within Canada since the New York Convention has the force of law in all other provinces (as does the Model Law).

The previous statute did not address the issue of the limitation period for enforcing a foreign award. The new statute addresses this in section 10, adopting a general 10 year period from the date of the award (subject to some exceptions). Section 8 deals with the consolidation of arbitrations and section 11 deals with appeals from arbitral decisions on jurisdiction.

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eAccess to Justice – Arbitration in Hungary – Labour Migration

Dear readers, my apologies for the puzzling title of this post, but I take the opportunity to bring the following three unrelated publications to your attention before this year ends. **HAPPY 2017!**

A few months ago the book ***eAccess to Justice*** was published (eds. Karim Benyekhlef, Jane Bailey, Jacquelyn Burkell, Fabien Gélinas; University of Ottawa Press 2016), including a few papers on cross-border litigation. More information is available here. The blurb reads:

Part I of this work focuses on the ways in which digitization projects can affect fundamental justice principles. It examines claims that technology will improve justice system efficiency and offers a model for evaluating e-justice systems that incorporates a broader range of justice system values. The emphasis is on the complicated relationship between privacy and transparency in making court records and decisions available online. Part II examines the implementation of technologies in the justice system and the challenges it comes with, focusing on four different technologies: online court information systems, e-filing, videoconferencing, and tablets for presentation and review of evidence by jurors. The authors share a measuring enthusiasm for technological advances in the courts, emphasizing that these technologies should be implemented with care to ensure the best possible outcome for access to a fair and effective justice system. Finally, Part III adopts the standpoints of sociology, political theory and legal theory to explore the complex web of values, norms, and practices that support our systems of justice, the reasons for their well-established resistance to change, and the avenues and prospects of eAccess. The chapters in this section provide a unique and valuable framework for thinking with the required sophistication about legal change.

Csongor István Nagy (University of Szeged) has published **The Lesson of a Short-Lived Mutiny: The Rise and Fall of Hungary's Controversial Arbitration Regime in Cases Involving National Assets** (27 The American Review of International Arbitration 2 2016, 239-246), available on SSRN. The blurb reads:

This paper presents and analyzes Hungary's recent legislative efforts and failure to exclude arbitration in matters involving (Hungarian) national assets, demonstrating the difficulties a country faces if it attempts to defy the prevailing pattern of dispute settlement in international trade. The lesson of the Hungarian saga is that, unsurprisingly, arbitration is not only a 'take it or leave it' but even a 'take it or leave' rule of the club of international economic relations.

Last October, INT-AR Paper 6, authored by Veerle Van Den Eeckhout (University of Antwerp), was published and is entitled "**Toepasselijk arbeidsrecht bij langdurige detachering volgens het wijzigingsvoorstel voor de**

Detacheringsrichtlijn. Enkele beschouwingen vanuit ipr-perspectief" (in English: "The draft proposal to amend the Posting of Workers Directive assessed from the private international law perspective"). The paper is written in Dutch and is downloadable here and on SSRN.

Applying the UNIDROIT Principles in International Arbitration: An Exercise in Conflicts

Prof. Massimo Benedetelli (Professor of International Law, University 'Aldo Moro', Bari. ARBLIT, Milan, partner) has just drawn my attention to this piece of his, published in the Journal of International Arbitration 33, no. 6 (2016), pp. 653–686. The abstract reads as follows:

The International Institute for the Unification of Private Law, which recently celebrated its 90th anniversary, published in 1994 the Principles of International Commercial Contracts. Since then the UNIDROIT Principles have been more and more often referred to by arbitral tribunals when settling contractual disputes. As a non-binding instrument of soft law, however, the UNIDROIT Principles may play a very different function depending on whether they are used as "rules of law" for the regulation of a contractual relationship, are incorporated as terms of a contract governed by a state contract law, or are means to interpret and supplement the applicable contract law or the 1980 United Nations Convention on Contracts for the International Sale of Goods. Moreover, they can be applied pursuant to an express or implied choice made by the parties, either in the contract or after the dispute has arisen, or when the arbitral tribunal so decides by its own motion. In all such different scenarios different problems may arise for the coordination of the UNIDROIT Principles with sources of state law that have title to regulate the contractual relationship in dispute. Understanding such problems and finding a solution to them is essential in order to avoid the risk that the award may be later challenged or refused recognition. Such understanding

could also foster the legitimacy of requests made by a party, or decisions taken by the arbitral tribunal, to apply the UNIDROIT Principles. It is submitted that private international law, taken as a technique for the coordination of legal systems, may offer a useful know-how to parties, counsel, arbitrators and courts for mastering such problems in a reasoned and sound way. This may result in enhancing the effectiveness of the UNIDROIT Principles, while balancing party autonomy with the sovereign interest of states in regulating international business.

EBS Law School Arbitration Day: All new and all better? From New Rules to New Courts: The Quest for Improved Systems of Arbitration

The EBS Law School in cooperation with Clifford Chance will host the EBS Law School Arbitration Day on 18 November 2016 organized by Professor Dr. Matthias Weller and Dr. Alexandra Diehl.

The event will focus on the quest for improved systems of arbitration. Topics will be:

- Dispute Resolution in Asia: Dominated by the Singaporean Merlion?
- The Iran-United States Claims Tribunal: a role model for international arbitration?
- TTIP and CETA: On a Road to Nowhere or to Success?

The speakers are:

- Claudia Annacker, Cleary Gottlieb, Paris

- Simon Greenberg, Clifford Chance, Paris
- Elan Krishna, Clifford Chance, Singapore
- Dr. Cristina Hoss, Legal Adviser to Judge Bruno Simma, Iran-US Claims Tribunal, Den Haag
- Prof. Dr. R. Alexander Lorz, Secretary for Public Education, German State of Hesse, Wiesbaden
- Representative from US Consulate General Frankfurt
- Prof. Dr. André Schmidt, EBS Business School/University Witten-Herdecke
- Prof. Dr. Mathias Wolkewitz, General Counsel Legal, Taxes, Insurances, Wintershall AG

The lectures as well as the panel discussions will be in English. The event will start at 1.30 p.m. in Lecture Room "Sydney" at EBS Law School in Wiesbaden.

For further information and registration see here.

Journal of International Arbitration Special BREXIT Issue (Launch)

Wilmer Cutler Pickering Hale and Dorr LLP are delighted to invite you to the launch of the special BREXIT issue of the Kluwer *Journal of International Arbitration*.
Professor Dr. Maxi Scherer, General Editor of the Journal of International Arbitration and Dr. Johannes Koepp, Special Issue Editor, will host a discussion with the authors on the content of the Special Issue.

Topics and speakers will include:
How Brexit Will Happen: A Brief Primer on EU Law and Constitutional Law Questions Raised by Brexit – Dr. Holger P. Hestermeyer
What Does Brexit Mean for the Brussels Regime? – Sara Masters QC & Belinda

McRae
Brexit Consequences for London as a Premier Seat of International Dispute Resolution in Europe – Michael McIlwrath
Impact of Brexit on UK Competition Litigation and Arbitration –Gilbert Paul
Brexit and the Future of Intellectual Property Litigation and Arbitration – Annet van Hooft
Possible Ramifications of the UK's EU Referendum on Intra- and Extra-EU BITs – Markus Burgstaller

Date: Thursday, September 29, 2016 6–9 p.m.

Venue: 49 Park Lane, London, W1K 1PS

To register: here

(The Special Issue journal launch will be followed by a champagne reception)

German Federal Court of Justice (Bundesgerichtshof) rules on the validity of arbitration agreements (Claudia Pechstein)

by Lukas Schmidt, Research Fellow at the Center for Transnational Commercial Dispute Resolution (TCDR) of the EBS Law School, Wiesbaden, Germany.

Claudia Pechstein, an internationally successful ice speed skater, claims damages against the International Skating Union (ISU) because of a two-year-suspension for doping. The essential question was whether an arbitration agreement signed by *Pechstein* is effective. This agreement includes amongst other things the exclusive jurisdiction of the Court of Arbitration for Sport (CAS) in Lausanne.

Pechstein claimed that the arbitration agreement was invalid under § 19 GWB (German Antitrust Legislation) because the ISU (nationally and internationally only the ISU organizes competitions in ice speed skating) has abused its dominant position. *Pechstein* had to sign the arbitration agreement to be admitted to the competition. She claimed that the list of arbitrators of the CAS, from which the parties must each select an arbitrator, has not been prepared impartially because the sports federations and Olympic committees have a clear predominance in creating the list.

However, the German Federal Court of Justice (Bundesgerichtshof) does not agree with these propositions. The Court, by its decision of 7 June 2016, docket no. KZR 6/15, ruled that the action is inadmissible because of the arbitration agreement. The Court held that the ISU is indeed dominant in the organization of international speed skating competitions, but has shown no abusive conduct because the associations and the athletes do not confront each other as guided by fundamentally conflicting interests. There was no structural imbalance in the composition of the tribunal ruling on *Pechstein's* suspension. Furthermore, in the Court's view, *Pechstein* has signed the agreement voluntarily, even if she otherwise could not have participated in the contest. A consideration of the mutual interests in the light of § 19 GWB justifies the application of the arbitration clause. However *Pechstein* is entitled to invoke the internationally competent Swiss courts following the arbitral procedure.

German Federal Court of Justice (Bundesgerichtshof) requests ECJ to give a ruling on the validity of

arbitration agreements in Bilateral Investment Treaties amongst Member States

Slovakia and the Netherlands concluded a BIT in 1992 which included an arbitration agreement for disputes between foreign investors and one of the contracting parties. Slovakia became a EU member state in 2004. Later, a health insurance company from the Netherlands that had operated on the Slovakian market obtained an award from an arbitral court in Frankfurt, Germany, granting € 22 million damages against Slovakia.

Slovakia now argues before German state courts that by its accession to the EU its offer for concluding an arbitration agreement had become invalid because of its incompatibility with EU law. The Upper Regional Court (*Oberlandesgericht*) of Frankfurt, decision of 18 December 2014, docket no. 26 Sch 3/13, decided against Slovakia. By its appeal to the Federal Court of Justice (*Bundesgerichtshof*) Slovakia continues seeking the setting aside of the arbitral award for lack of jurisdiction of the arbitral tribunal. The *Bundesgerichtshof*, by its decision of 3 March 2016, docket no. I ZB 2/15, requested the Court of Justice of the European Union to give a ruling on the validity of arbitration agreements in BITs between Member States of the European Union, in particular in light of Articles 344, 267 and 18 I TFEU.

The *Bundesgerichtshof* expressed its view that there should be no conflict with Articles 344, 267. However, the Court poses the question whether there might be a discrimination against investors of other Member States unable to proceed under equivalent BIT proceedings. Even if this were the case, the Court further holds that the consequence of a dicrimination of this kind would not necessarily be the invalidity of the arbitration clause but rather the access of discriminated investors to the BIT dispute settlement mechanism.

For those who read German, the Court’s press release of today about its decision (full text is not yet available) can be found here:

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2016&Sort=3&nr=74606&pos=1&anz=82

ICC and OAS Survey on Arbitration in the Americas

As you may (or may not) already know, a team of researchers recently concluded a study for the European Parliament on arbitration across the European Union and Switzerland. As part of this study the researchers undertook a large-scale survey of arbitration practitioners across Europe, including 871 respondents from every country in the European Union and Switzerland. The results of this survey have allowed the research team to produce far more information on the practice of arbitration in Europe than has previously been available. (see, e.g. this discussion of arbitration in six southern European countries)

A new team of researchers (Tony Cole, Paolo Vargiu, Masood Ahmed at the University of Leicester; S.I. Strong at the University of Missouri, Manuel Gomez at Florida International University, Daniel Levy at Escola de Direito da Fundação Getúlio Vargas – São Paulo, and Pietro Ortolani at the Max Planck Institute Luxembourg) is now working in collaboration with the ICC International Court of Arbitration and the the Organisation of American States to deliver a survey that will generate similar information on the practice of arbitration in the Americas. Letters of support have been received from both the ICC and the OAS. Results from the survey will be used to draft articles on arbitration in the Americas, written by the members of the research team.

The survey consists almost entirely of multiple-choice questions, and only takes approximately half an hour to complete. Moreover, it need not be completed in a single sitting, and if respondents return to the survey on the same computer and with the same browser, they can resume where they left off. The survey team will keep responses confidential and will not divulge any respondent's identity at any time without his or her explicit consent.

All response data from the survey will be stored securely under password on SurveyMonkey. All research records will be retained for a period of 7 years following the completion of the study. Responses by an individual can, however,

be deleted at any time upon request of that individual. Responding to the survey will be taken as consenting to the use of the information provided, for the purposes of drafting the articles deriving from this project.

The survey will remain open until July 11, 2016. The survey is available here.

New Cases at the U.S. Supreme Court: CVSG Orders Concerning Private International Law, Sovereign Immunity and International Arbitration

As explained in a previous post from a few years back, if the Justices of the United States Supreme Court are considering whether to grant a petition for certiorari and review a decision from the Courts of Appeals, and they think the case raises issues on which the views of the federal government might be relevant—but the government is not a party—they will order a CVSG brief. "CVSG" means "Call for the Views of the Solicitor General." In the past two months, the Court ordered CVSG briefs in two new cases concerning matters of private international law, sovereign immunity and international arbitration.

If the issues are interesting to the Justices of the Supreme Court, and are about to be addressed by the U.S. Executive branch, then they should, *ipso facto*, be interesting to the practicing bar as well. The fact that each of these cases involve claims being made against foreign sovereigns makes them even more interesting for international dispute resolution lawyers steeped in the crossroads of litigation, commercial and investment arbitration. Below is a brief review of these two cases and the interesting issues being raised.

The first case is *Belize Social Development Ltd. v. Government of Belize*. It

involves the relatively uncommon juxtaposition of arbitration award enforcement and the doctrine of *forum non conveniens*. In that case, a private company had a contractual dispute with the government of Belize, and obtained an arbitration award of $38 million. It then sought to confirm the award in the United States. Belize defended on numerous grounds, including by arguing that the arbitration exception to the Foreign Sovereign Immunities Act did not apply because the contract was entered without proper legal authority in Belize, and by asserting that the New York Convention does not mandate recognition and enforcement where, as here, the dispute was not purely a "commercial" one, but rather promised favorable tax treatments. These defenses were dismissed by the D.C. Circuit; Ted Folkman has discussed that decision on Letters Blogatory.

The other unsuccessful defense raised by the debtor is now the subject of a petition for certiorari before the Supreme Court. The basic question is whether a party may dismiss a petition to recognize and enforce an arbitration award under the doctrine of *forum non conveniens*. The District Circuit held that a foreign forum is *per se* inadequate—and thus ineligible as a *forum conveniens*—because the focus of a recognition and enforcement action (*viz*. U.S.-based assets) cannot be reached by a foreign court. The D.C. Circuit affirmed this holding without any explication. This holding plainly splits from the Second Circuit, which has affirmed the *forum non conveniens* dismissal of recognition and enforcement actions when the alternative forum has some assets of the debtor, and thus offers the possibility of a remedy. This case is complicated by the fact that the Belize Supreme Court has issued an injunction against enforcement proceedings, and the Caribbean Court of Justice has held that the Award convenes public policy.

The decision below and the parties' briefs before the Court can be found here.

The second case is *Helmerich & Payne Int'l Drilling Co. et al v. Bolivarian Republic of Venezuela*. This case concerns the a lawsuit by a U.S. company regarding breaches of contract by PdVSA and the expropriation of its assets in Venezuela. The claims were brought under both the expropriation and commercial activity exceptions to the FSIA; the District Court permitted the claims to proceed under the latter but not the former. The D.C. Circuit flipped those conclusions, allowing the expropriation but not the contract claims to proceed, and remanded the case. Both sides have filed crossing petitions for a writ of certiorari, presenting the following questions.

(1) Whether, under the third clause of the Foreign Sovereign Immunities Act of 1976, a breach-of-contract action is "based … upon" any act necessary to establish an element of the claim, including acts of contract formation or performance, or solely those acts that breached the contract;

(2) whether, under Republic of Argentina v. Weltover, a breaching party's failure to make contractually required payments in the United States causes a "direct effect" in the United States triggering the commercial activity exception where the parties' expectations and course of dealing have established the United States as the place of payment, or only where payment in the United States is unconditionally required by contract.

(3) Whether, for purposes of determining if a plaintiff has pleaded that a foreign state has taken property "in violation of international law," the Foreign Sovereign Immunities Act recognizes a discrimination exception to the domestic-takings rule, which holds that a foreign sovereign's taking of the property of its own national is not a violation of international law;

(4) whether, for purposes of determining if a plaintiff has pleaded that "rights in property taken in violation of international law are in issue," the FSIA allows a shareholder to claim property rights in the assets of a still-existing corporation; and

(5) whether the pleading standard for alleging that a case falls within the FSIA's expropriation exception is more demanding than the standard for pleading jurisdiction under the federal-question statute, which allows a jurisdictional dismissal only if the federal claim is wholly insubstantial and frivolous.

The decision below and the parties briefs before the Court can be found here and here.

What the Solicitor General says about these issues and whether the Court takes the cases will not be known until the next Term, which begins in October.