

# 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.

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## **Job Opening: Research Assistant in Private International Law at the University of Halle-Wittenberg**

# (Germany)

*The following announcement has been kindly provided by Professor Dr. Christoph Kumpan, University of Halle-Wittenberg:*

Professor Dr. Christoph Kumpan, University of Halle-Wittenberg, is looking to hire a highly skilled and motivated individual to work as a part-time (50%) research assistant beginning May 2016. Applications should be submitted no later than April 15, 2016.

The position will entail close collaboration on a number of new and ongoing projects, focusing especially on research on private law, international private law and business law.

The duties include the support in research and teaching in private law and private international law, as well as teaching your own classes (2 hours per week, in English or German), in particular in the areas of private law and/or private international law.

This position is expected to last three years. The work location is Halle, Germany, a city close to Berlin, Germany.

Education:

a university law degree (e.g., JD)

Competencies:

knowledge of English required, preferably also Spanish or French

knowledge of German of advantage

knowledge of private international law

ability to work in a team as well as independently

Hours/week: 20

Pay Frequency: Monthly

Payment: around 1.700 Euro (approx. 1.200 Euro net) per month

Possibility to obtain a doctoral degree (if faculty's requirements are met)

Required job seeker documents: resume, cover letter, complete transcripts.

The cover letter should include: A brief description of your career/study goals. A

brief description of any prior research assistance experience, or any other experience with legal research (e.g., thesis).

The University is committed to a policy of equal opportunity. Candidates with disabilities will be preferred in cases where they have the same qualifications as others.

If you are interested in this position, please send an application with the reference no. "Reg.-Nr. 3-1107/16-H" by April 15, 2016, preferably, via email to [sekretariat.kumpan@jura.uni-halle.de](mailto:sekretariat.kumpan@jura.uni-halle.de)

or to:

Martin-Luther-Universität Halle-Wittenberg, Juristische und Wirtschaftswissenschaftliche Fakultät, Juristischer Bereich, Lehrstuhl für Bürgerliches Recht, Wirtschaftsrecht, Internationales Privatrecht und Rechtsvergleichung, Universitätsplatz 3-5, 06099 Halle (Saale).

For more information (in German) see [http://www.verwaltung.uni-halle.de/dezern3/Ausschr/16\\_310.pdf](http://www.verwaltung.uni-halle.de/dezern3/Ausschr/16_310.pdf).

For further enquiries, please contact Professor Dr. Kumpan: [sekretariat.kumpan@jura.uni-halle.de](mailto:sekretariat.kumpan@jura.uni-halle.de)

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# **The Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA): A TDM Special**

Editors Andrea Bjorklund, John Gaffney, Fabien Gélinas and Herfried Wöss have prepared a new TDM special, which undertakes a broad-ranging study of CETA as an indicator of the evolution of EU trade and investment policy and of the kinds of tensions and innovations that can be expected to arise as a new generation of

twenty-first century trade and investment agreements emerges. The special starts off with an introduction by Professor Pieter Jan Kuijper; The Honourable L. Yves Fortier and Judge Stephen Schwebel.

You can view the table of contents of the TDM CETA special [here](#)

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## **Video From 2015 Journal of Private International Law Conference**

As many will know, in September 2015 the University of Cambridge hosted the Journal of Private International Law Conference ([see here](#)). Video of the four plenary sessions has now been uploaded to YouTube. The videos can be accessed through these links: [first plenary](#), [second plenary](#), [third plenary](#), [fourth plenary](#).

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## **Study on the laws of national civil procedure of the 28 Member States and the enforcement of European Union law.**

The Max Planck Institute Luxembourg, heading an international consortium, is undertaking a **European Commission-funded Study** (JUST/2014/RCON/PR/CIVI/0082) on the laws of national civil procedure of the 28 Member States and the enforcement of European Union law.

The Study has two strands: the first deals with the impact of national civil procedure on **mutual trust and the free circulation of judgments** within the 28 Member States of the EU and the second deals with the impact of national civil procedure on the **enforcement of consumer rights derived from EU law**. Accordingly, the Consortium has prepared two online tools, aimed at gathering information, opinions and experiences (both available in six language versions):

- **Questionnaire focusing on the impact of national procedures on mutual trust and the free circulation of judgments:**

English  
French  
German  
Italian  
Polish  
Spanish

- **Questionnaire focusing on the impact of national procedures on the enforcement of EU consumer rights:**

English  
French  
German  
Italian  
Polish  
Spanish

We would encourage consumers, lawyers, judges, academics, consumer protection associations, businesses, business/trade associations, dispute resolution facilitators, and those working in other legal professions (including bailiffs, court clerks, registrars, notaries and so on) to **respond to the questionnaire** for one or both strands of the study.

If you agree, and wish to share more information with us on any of the topics covered by the Study, it will be possible to provide us with your contact details at the end of the survey.

Please feel free to share widely the links to this webpage and to the questionnaires within your own networks.

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# Labonté on International Assignments



*Hendric Labonté* has authored a book entitled “Forderungsabtretung International. Art. 14 Rom I-Verordnung und seine Reform” (International Assignments. Art. 14 Rome I Regulation and its Reform). The volume has been published by Mohr Siebeck. It is written in German.

The official abstract reads as follows:

*The commercial significance of assignments, especially in an international context, requires a straightforward conflict of laws provision. However, art. 14 Rome I does not provide enough certainty, particularly when it comes to third party effects. These should be entirely determined by the law of the underlying debt.*

More information is available on the publisher’s website.

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## Conference for Young PIL Scholars: “Politics and Private International Law (?)” - Call for



# Papers

*The following announcement has been kindly provided by Dr. Susanne Lilian Gössl, LL.M., University of Bonn:*

## **Call for Papers**

On 6th and 7th April 2017, for the first time a young scholars' conference in the field of Private International Law (PIL) will be held at the University of Bonn.

The general topic will be

*Politics and Private International Law (?)*

We hereby invite interested junior researchers to send us their proposals for conference papers. We envisage presentations of half an hour each in German language with subsequent discussion on the respective subject. The presented papers will be published in a conference transcript by Mohr Siebeck.

## **Procedure**

If we have stimulated your interest we are looking forward to your application to

nachwuchs-ipr(at)institut-familienrecht.de

until **30 June 2016, 12 a.m. CET** (deadline!).

The application shall include an exposé of maximum 1,000 words in German language and shall be composed anonymously that is without any reference to the authorship. The author including his/her position or other affiliation shall be identifiable from a separate file.

Selection decisions will be communicated in October 2016.

For organisational reasons, a preliminary version of the paper (to measure 35,000 to 50,000 characters including footnotes) and the core statements must be received by not later than 31 March 2017.

## **Topic:**

For our purposes, we explicitly understand PIL in a broader sense: international

jurisdiction and procedure, the law of the international settlement of disputes (including ADR) as well as uniform law and comparative law and the comparison of legal cultures are included insofar as they allude to cross-border questions.

Ever since Savigny, conflict of laws rules have traditionally been perceived as “unbiased” or “value-neutral” in Central Europe as they are solely supposed to coordinate the applicable substantive law. However, during the second half of the past century the opinion that conflict of law rules may also strengthen or prevent certain results of substantive law has become prevalent. In the U.S., such discussion led to a partial abolition of the “classical” PIL in favour of balancing the individual governmental interests as to the application of their respective substantive law provisions (so called *governmental interest analysis*). But other legal systems have also explicitly or indirectly restricted classical PIL in some areas in favour of governmental interests. Our conference is dedicated to the various possibilities and aspects of this interaction between PIL and politics as well as to the advantages and disadvantages of this interplay.

Possible topics or topic areas are:

#### General questions:

- “Politicisation” of PIL on the national, European and international level, or the political target of “value-free” PIL rules (?)
- “Politicisation” of comparative law (?)
- Convergence of PIL and Public International Law, especially the protection of fundamental rights and human rights by means of PIL
- Uniform applicable law or harmonisation of PIL
- PIL in day-to-day application of law – theory and reality (?)
- General instruments of PIL to enforce political targets: overriding mandatory rules, public policy, *forum non conveniens*, extensive/narrow jurisdiction ...
- Allocative functions of PIL and International Civil Procedure Law
- Users, stakeholders and their interests in cross-border questions: parties, attorneys, judges, notaries, experts etc.
- Protection by formal requirements or third parties’ obligations to cooperate (e.g. notarial recording of the choice of law agreement)
- Parties’ or courts’ expenses due to the application of foreign law
- Regulatory competition, e.g. in order to establish a national venue of

arbitration

- Forum shopping and locational advantages through low standards of protection (e.g. regarding data protection law, copyright law, family law or consumer protection law)
- Issues of competences as regards European PIL rules
- Extraterritorial application of national (private) law (*Kiobel*, *Bodo Community*)

#### Business Law:

- Financial crisis, e.g. resolution of globally operating banks
- Gender Quotas of in Corporate Law, e.g. application of German law on foreign companies or comparison between international regulatory models
- Protection of competition in case of worldwide groups operating, e.g. Google antitrust proceedings by FTC and EU Commission
- Law on co-determination within the European context, e.g. questions referred for a preliminary ruling by KG (Court of Appeal in Berlin) and LG Frankfurt
- Worker protection

#### Family and Inheritance Law:

- Protection of minors, i.e. regarding repatriation of children or international adoptions: successful legal unification (?)
- Cross-border protection of adults
- Application of religious law and judgements of religious courts

#### Consumer protection:

- Consumer protection and market freedom (i.a. in the Internet)
- Special jurisdiction, party autonomy and the enforcement of minimum standards in substantive law

#### Internet and new media:

- Territoriality of rights to ubiquitous goods (e.g. copyright law and data protection rules) and cross-border trade
- Copyright Law and "Fair Use"
- Data protection/privacy and freedom of information

Other recent focal points:

- Migration and refugee crisis, e.g. the determination of the law of the person between integration or preservation of cultural identity
- Environmental protection, e.g. enforcement of titles from class actions or international litigation regarding mass damages
- Protection of cultural property – issues regarding ownership and repatriation

For more information, please visit <https://www.jura.uni-bonn.de/en/institut-fuer-deutsches-europaeisches-und-internationales-familienrecht/pil-conference/>.

If you have any further questions, please contact Dr. Susanne Gössl, LL.M. (sgoessl(at)uni-bonn.de).


We are looking forward to thought-provoking and stimulating discussions!

Yours faithfully,

Susanne Gössl  
Rafael Harnos  
Leonhard Hübner  
Malte Kramme  
Tobias Lutzi  
Michael Müller  
Caroline Rupp  
Johannes Ungerer

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# Schünemann on Company Names in Cross-Border Transactions

*Julia Alma Schünemann* has authored a book entitled “Die Firma im internationalen Rechtsverkehr. Zum Kollisionsrecht der Firma unter 

besonderer Berücksichtigung des Rechts der Europäischen Union" (Company Names in Cross-Border Transactions. The Applicable Law to the Name of a Company in the European Union). The Volume has been published in German by Mohr Siebeck.

The official abstract reads as follows:

*Does an English Limited need to adapt its company name in order to operate in Germany? Julia Alma Schünemann designs an overall concept for dealing with this rarely discussed interface between private and public international and EU law.*

More information is available on the publisher's website.

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# ASIL Private International Law Prize

The Private International Law Interest Group of the American Society of International Law invites submissions for this year's ASIL Private International Law prize. The prize is given for the best text on private international law written by a young scholar. Essays, articles, and books are welcome, and can address any topic of private international law, can be of any length, and may be published or unpublished, but not published prior to 2015. Submitted essays should be in the English language. Competitors may be citizens of any nation but must be 35 years old or younger on December 31, 2014. They need not be members of ASIL. This year, the prize will consist of a \$400 stipend to participate in the 2016 ASIL Annual Conference, and one year's membership to ASIL. The prize will be awarded by the Private International Law Interest Group based upon the recommendation of a Prize Committee. Decisions of the Prize Committee on the winning essay and on any conditions relating to this prize are final. Submissions to the Prize Committee must be received by June 1, 2016. Entries should be submitted by email in Word or pdf format. They should contain two different

documents: a) the essay itself, without any identifying information other than the title; and b) a second document containing the title of the entry and the author's name, affiliation, and contact details. Submissions and any queries should be addressed by email to Private International Law Interest Group Co-Chair Cristian Gimenez Corte (cristiangimenezcorte@gmail.com). All submissions will be acknowledged by e-mail.

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## **Fourth “journées Mohamed Charfi de droit international privé” colloquium in Tunis**

*The following announcement has been kindly provided by Béligh Elbalti, Assistant Professor, Graduate School of Law, Kyoto University.*

Since 2008, the Research Unit on International Private Relations, Commerce, Arbitration and Migrations of the Faculty of Legal, Political and Social Sciences of Tunis (Carthage University) has been organizing the “*journées Mohamed Charfi de droit international privé*” colloquium which address various Private International Law issues. These colloquiums are organized on the memory of the late Dr. Mohamed Charfi, an eminent and leading Tunisian scholar specialized in the field of family law, human rights and private international law.

On April 2016, the Research Unit will organize its fourth *journées Mohamed Charfi de droit international privé* under the theme of international contracts and private international law. The colloquium will be held at the Faculty of Legal, Political and Social Sciences of Tunis on the 13 and 14 April 2016. Eminent and distinguished professors, as well as leading Tunisian law professors and private international law specialists will take part in this event.

The program will be as follow:

**First Day : 13 avril 2016 (Wednesday) :**

# ***Les tendances générales dans le droit du contrat international***

## **Morning Sesseion**

**8h30 - 9h15: Welcome Speech**

**9h15 - 9h30: Ali MEZGHANI** (*Professeur, Faculté de Droit des sciences juridiques, politiques et sociales de Tunis*)

**Présentation générale du colloque : « À propos du contrat international »**

**9h30 - 10h : Pierre MAYER** (*Professeur émérite, École de Droit de la Sorbonne*)

**Rapport introductif : « L'internationalité du contrat »**

**10h -10h30 : Jean-Michel JACQUET** (*Professeur, Institut des Hautes études internationales et du développement de Genève*)

**« Sanctions économiques internationales et contrats internationaux »**

**10h30-11h : Coffee Break**

**11h - 11h30 : Souhayma BEN ACHOUR** (*Professeur, Faculté de Droit et des sciences politiques de Tunis*)

**« L'essor de l'autonomie de la volonté en Droit international privé tunisien »**

**11h30 - 12h : Salma TRIKI** (*Maitre-assistante, Institut supérieur des études juridiques et politiques de Kairouan*)

**« La hiérarchie des normes dans le droit du commerce international »**

**12h - 12h30 : Debate**

## **Afternoon Session**

**15h - 15h30 : Imed BÉJAoui** (*Maitre-assistant, École supérieure de commerce de Sfax*)

**« La pérennité du contrat international entre *pacta sunt servanda* et *rebus sic stantibus* : réflexions au regard du pouvoir interprétatif de l'arbitre»**

**15h30 - 16h : Donia ALLANI** (*Assistante, Faculté des sciences juridiques, politiques et sociales de Tunis*)

**« La loi applicable au contrat d'après l'article 62 du Code tunisien de droit international privé »**

**16h-16h30 : Coffee Break**

**16h30h-17h: Thouraya AHMADI** (*Assistante, Faculté des sciences juridiques, politiques et sociales de Tunis*)

**« Les lois de police étrangères et le contrat international »**

**17h-17h30 : Debate**

**Second Day : 14 avril 2016 (Thursday) :**

***De quelques solutions particulières dans le droit du contrat international***

**Morning Session**

**9h - 9h30 : Lotfi CHEDLY** (*Professeur, Doyen de la Faculté de Droit des sciences juridiques, politiques et sociales de Tunis*)

**« La protection du consommateur en Droit international privé tunisien »**

**9h30 - 10h : Fatma BOURAOU** (*Maitre assistante, Faculté de Droit des sciences juridiques, politiques et sociales de Tunis*)

**« Les contrats de transmission des créances en droit international privé »**

**10h - 10h30 : Rym BEN KHELIFA** (*Maitre-assistante, Faculté de Droit et des sciences politiques de Tunis*)

**« L'impact des traités relatifs à la protection des investissements sur les contrats conclus entre États-hôtes et investisseurs étrangers »**

**10h30 - 11h : Coffee Break**

**11h - 11h30: Jallel BACCAR** (*Maitre-assistant, École supérieure de commerce de Sfax*)

**« Le crédit documentaire international »**

**11h30 - 12h : Inès YOUSSEF** (*Maitre-assistante, Faculté des sciences juridiques, économiques et de gestion de Jendouba*)

**« Le paiement d'un contrat international par crédit documentaire »**

**12h - 12h30: Debate**

**12h30 : End of the Colloquium**

All presentations are in French. Participation to this event is free of charge and



no prior reservation is required.