



COMMENTARIES ON PRIVATE INTERNATIONAL LAW

THE PILIG NEWSLETTER

Editors' Notes

We are pleased to present the second issue of **Commentaries on Private International Law**, the newsletter of the American Society of International Law (ASIL) Private International Law Interest Group (PILIG). As readers of the newsletter know, the name of our newsletter, *Commentaries*, represents a modest tribute to one of the founding fathers of modern PIL, Joseph Story, by borrowing the name of his seminal book "Commentaries on the Conflict of Laws, foreign and domestic," and only replacing "Conflict of Laws" with "Private International Law" to better reflect the broader object of our discipline today.

The primary *purpose* of our newsletter is to communicate *news* on PIL. Accordingly, the newsletter attempts to transmit information on new developments on PIL rather than provide substantive analysis, with a view to providing specific and concise raw information that our readers can then use in their daily work. These new developments on PIL may include information on new laws, rules and regulations; new judicial and arbitral decisions; new treaties and conventions; new scholarly work; new conferences; proposed new pieces of legislation; and the like.

Commentaries aims to be a truly *global* newsletter, by reporting news from all major legal systems of the world, which may have different conceptions of PIL. Thus, the PILIG newsletter is framed in a rather broad sense, comprising all types of situations generating potential conflicts of laws and/or jurisdictions, regardless of the "international" or "internal," or "public" or

"private" nature of those conflicting regulations.

To achieve what is perhaps the first comprehensive global approach to PIL, *Commentaries* includes five sections dealing with regional issues, edited by specialists on the field: Africa, edited by Richard Frimpong Oppong; Asia, by Chi Chung, Yao-Ming Hsu and Bélig Elbalti; the Americas by Cristian Giménez Corte and Jeannette Tramhel (Central and South America), and Shawn Burkley and Mayra Cavazos Calvillo (North America); Europe, by Massimo Benedettelli, Marina Castellaneta, and Antonio Leandro; and Oceania, by Emma Wanchap. We would like to highlight the efforts made by our global editorial team in translating, both linguistically and legally, into English and for a global audience information that was originally in Japanese, Arabic, Portuguese, Spanish, Hebrew, Russian, Italian, French, German, Vietnamese, and Chinese.

This second issue of *Commentaries* covers more countries and includes in greater detail recent developments in our field. Each regional section now includes a brief introductory note, and a special chapter devoted to new scholarly work, which is of particular importance for those areas of the world where the dissemination of information on PIL is more difficult. *Commentaries* covers events that occurred in 2015 and occasionally in 2014.

In this second issue, *Commentaries* is proud to introduce a completely new section on "**Global Conflict of Laws**," edited by Cristián Giménez Corte and Javier Toniollo, with the purpose of

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presenting new developments on PIL that are not necessarily linked to one particular region or country in the world, but that are truly *transnational* or global.

From a substantive point of view, this current issue of *Commentaries* intends to bring to the surface important common global trends on PIL.

In the first place, it appears that **international procedural matters** are becoming more and more important, showing the need of practical tools for the actual recognition of foreign documents and the actual service of processes abroad. In this regard, it should be noted the new *European regulation on small claims procedure*, the new *Rules on International Civil Procedure* of Spain, and the new *Code of Civil Procedure* of Brazil. Moreover, Kazakhstan and Costa Rica have ratified the *Hague Convention on Service Abroad of Judicial and Extrajudicial Documents*, whose interpretation and application has proved to be difficult, as recent US case law indicates. In addition, Austria, Morocco, Tajikistan and Brazil have ratified the *Apostille Convention*.

Who rules **cyberspace**? In a notable trend, national courts of Mexico, Canada, the United Kingdom and Austria have affirmed their extraterritorial jurisdiction over multinational Internet companies such as Google and Facebook.

In turn, **arbitration** continues to be an ever growing matter, as the new rules on arbitration passed by Russia, Australia, Bahrain and Brazil demonstrate.

Following a very important trend from 2014, when four different countries passed **new laws on PIL**; Bahrain, Indonesia, Vietnam and Dominican Republic have also recently enacted new comprehensive legislation in our field.

One of the highlights of PIL during 2015 concerns cases on recognition, or non-recognition, of foreign judicial decisions based on **reciprocity**. For example, a Japanese decision refused to enforce a Chinese judgment, and a US decision rejected a Taiwanese ruling based on the ground of lack reciprocity. However, an Israeli court came to the opposition conclusion and recognized a Russian judgment despite the lack of a reciprocity agreement.

Soft law seems to be starting to compete with hard PIL as two intergovernmental organizations, Unidroit and OHADAC, have issued principles on international contracts.

When is a case international? This classic question is being advanced again by the *Hague Principles on Choice of Law in International Commercial Contracts* and the *Hague Convention on Choice of Court Agreements*, which seem to establish an objective criteria of internationality, unlike Rome I and the UNCITRAL Model Law on Arbitration. That is, the case must have real connections to more than one state. US case law seems to confirm this approach.

It also appears that PIL scholars may have to deal now not only with conflict of laws but also with **conflicts of regulations** of different natures. For example the European Court of Justice decided between the application of the 1958 New York Convention and a EU Regulation on recognition of foreign decisions; an Illinois court decided between the application of state, federal and foreign laws in an arbitration case; and UN *Convention on Transparency in Treaty-Based Investor-State Arbitration* establishes the criteria to solve conflict between "rules", between "rules" and "treaties", and between "rules" and "laws."

The **line between private and public international law** is becoming thinner as litigation on the immunity of foreign states has taken place in Italy, Zambia, Australia, the Philippines, Singapore and the US. In particular, foreign sovereign debt litigation has taken place in the US and the EU, whereas Argentina and Belgium have passed legislation on the matter following the UNGA resolution on *Basic Principles on Sovereign Debt Restructuring Processes*. Contradictorily, while this UN resolution recognizes the immunity of jurisdiction of states, the new Trans-Pacific Partnership directly subjects national states to international arbitration.

In general, the old dialectics between the **individual and the community, the private and the public, the market and the state**, are now taking place on the global stage, and PIL regulations are paradigmatically reflecting this tension. On the one hand, countries continue to pass arbitration laws, allowing their citizens to circumvent national courts; the Hague Principles on International Contracts push for a non-national law; and the TPP subjects the state to international arbitration, prohibiting the enactment of national laws that contradict TPP rules. On the other hand, those same countries continue to pass comprehensive national PIL legislation in an attempt to subject the transnational phenomena to national laws; the UN *Convention on Transparency in Treaty-Based Investor-State*

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Co-Chairs Notes

We are very pleased to provide you with the second edition of *Commentaries on Private International Law*, the newsletter of the American Society of International Law's Private International Law Interest Group. As you will see from the following pages, our fantastic editors have again compiled the best in breaking developments in the world of private international law.

This newsletter comprises just one of the several activities that PILIG has undertaken in the last year. The newest innovation involves PILIG's new webinar series. Webinars may be viewed by audiences on a live-stream basis and or through the ASIL video archives at <https://www.asil.org/resources/asil-event-videos>. Although the first two webinars were somewhat practical in their orientation, the series took a more scholarly turn this year. Thus, on March 2, 2016, we saw two giants of the world of private international law

– Professor Adrian Briggs of the University of Oxford in the U.K. and Professor Symeon Symeonides of Willamette University in the U.S. – discussing "The Nature or Natures of Agreements on Choice of Court and Choice of Law." The session, which was PILIG's first trans-Atlantic webinar, drew listeners from around the world. Although the webinars reflected a new initiative in PILIG, we also continued a number of well-established activities. One of the most visible efforts has involved PILIG's continued leadership in organizing ASIL delegations to the United Nations Commission on International Trade Law (UNCITRAL) and various UNCITRAL Working Groups. PILIG began organizing ASIL delegations in the summer of 2014, and has sent nearly two dozen PILIG members from Asia, Europe and the Americas to UNCITRAL and Working Group meetings in New York and Vienna since then. Delegates have included law students, law professors

and practitioners of varying levels of seniority.

Another event that is in progress at the time of publication is the ASIL Annual Meeting, which will include a panel organized by PILIG entitled "Domestic Implementation of International Treaties: The Next New Challenge for Private International Law?" The 2016 Annual Meeting will also mark the end of Stacie's tenure as co-chair of PILIG. Before stepping down, she would like to thank Cristian, the ASIL staff and the PILIG members who have helped make the last two years such a success. She has very much enjoyed having this opportunity.

We hope to see you all soon at the ASIL Annual meeting or another similar event!

Kind regards,

Cristián Giménez Corte, PILIG Co-Chair
S.I. Strong, PILIG Co-Chair

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Arbitration is opening up arbitration to the public, based on the basic rights to a public hearing enshrined in the Universal Declaration of Human Rights; and the resolution of the United Nations General Assembly on *Basic Principles on Sovereign Debt Restructuring Processes* reinforces the principle of state immunity, and the sovereignty of the state.

Can PIL contribute to reach a balance, a common ground, a synthesis? We leave the answer to our attentive readers.

As our readers also know, in addition to its global approach, *Commentaries* attempts to present a comprehensive view of PIL. Most blogs on international law provide us with daily updates and news at a frenzied pace; while very useful, such an amount of information is sometimes difficult to process. *Commentaries* intends its readers to pause, catch their breath, take a step back, and enjoy a panoramic perspective of PIL.

Commentaries would not have been possible without the tireless support of my co-chair, S.I. Strong, and the hard and smart work of the section editors mentioned above. In addition, I would like to express our gratitude for the comments, suggestions and help provided by Trey Childress, Alex Mills, Iris Canor, Sharon Shakargy, Benjamin Hayward, Sheila Ward, Matthew Gomez, and Mitsue Steiner. And I would like also to express our gratitude to Adriana Chiuchquievich, Carola Filippon, Lucia Chignolli, and Javier Reinick, for their assistance in the research and edition of the new section "Global Conflict of Laws."

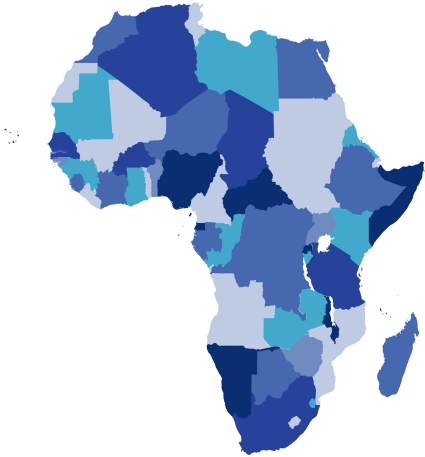
We would appreciate receiving your suggestions, comments and critiques. We welcome your feedback and participation. Please send me an e-mail at cristiangimenezcorte@gmail.com.

Cristián Giménez Corte, Editor



AFRICA

—Editor: Richard Frimpong Oppong



The African private international law scene remained relatively quiet in the past year. There were no major pieces of legislation dedicated to private international law, although academic writings and some judicial decisions have made calls for such legislation, including dealing with the issue of surrogacy. There was a steady increase in the number of academic papers on African private international law, with a major book on Nigerian Private International Law forthcoming in 2016. The Yearbook on Private International Law appointed its first African member of the Advisory Board and has a focus on Africa as part of its action plan for the next ten years. Morocco and Namibia signed two Hague Conference on Private International Law conventions, continuing the gradual increase in the number of African countries that have become party to such conventions. An important institutional development is the establishment of the African Commercial Law Foundation whose main objective is to research, analyse and publish comparative information on African commercial law systems.

International Conventions

Morocco joins the Hague Apostille Convention.

In November 2015, Morocco deposited its instrument of accession to the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. Following the usual procedural steps, the Convention will enter into force for Morocco on 14 August 2016, making it the 110th Contracting State to the Convention.

The full text of the announcement may be found here:

<https://www.hcch.net/en/news-archive/details/?varevent=445>

Namibia joins 1993 Intercountry Adoption Convention.

On 10 December 2015, the Permanent Bureau received notification that on 21 September 2015, Namibia deposited its instrument of accession to the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. The Convention will enter into force for Namibia on 1 January 2016. With Namibia's accession, the Hague Adoption Convention counts 96 Contracting States, 18 of them from Africa.

The full text of the announcement may be found here:

<https://www.hcch.net/en/news-archive/details/?varevent=453>

National Case Law

Zambia: COMESA Court issue advisory opinion on immunities of COMESA and COMESA institutions in Member States.

In February 2015 the Court of Justice of the Common Market for Eastern and Southern Africa held that the immunities and privileges to be granted to COMESA and its institutions are limited to acts which fall within the objectives of the COMESA Treaty and the respective constitutive Charters; the immunities and privileges do not extend to commercial transactions between individuals or entities and COMESA Institutions; and the immunities and privileges of the Institutions are restricted to transactions between Member States and COMESA. This advisory opinion was sought following a number of conflicting decisions in member states' courts. See *In the Matter of Article 32 of the Treaty establishing the Common Market for Eastern and Southern Africa, Reference No 1 of 2013* (COMESA Court of Justice, Zambia, 2015).

The full text of the judgment may be found here: http://www.comesa.int/attachments/article/1489/150504_comesa_%20court_advisory_opinion_2015.pdf

Kenya: Court Orders AG to Fast-track Enactment of Legislation on Surrogacy Arrangements in Kenya.

In February 2015, the Kenya High Court held that in cases of surrogacy, the surrogate mother should be registered as the mother of a born child pending legal proceedings to transfer legal parenthood to the commissioning parents.



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The court further directed that the Attorney General to fast track the enactment of legislation to cater for surrogacy arrangements in Kenya.

See *A.M.N v Attorney General* [2015] eKLR. The full text of the case may be found here: <http://kenyalaw.org/caselaw/cases/view/105803/>

Egyptian Supreme Court Enforces a Choice of Court Agreement

On 24 March 2014, the Egyptian Supreme Court rendered a very important decision enforcing a choice of court agreement granting jurisdiction to a foreign court (the Court of Jersey, Channel Islands), and thus superseding the otherwise applicable Egyptian rules on jurisdiction. This judicial decision marks a milestone in Egyptian PIL, since before it was not clear on whether a choice of court clause displacing the application of the procedural law rules on jurisdiction would be considered as valid. Indeed, in most Arab countries, such choice of court clauses was permitted only in absence of an express rule on jurisdiction. As Article 32 of the Code of Civil Procedure states "in cases in which Egyptian court have no jurisdiction in accordance with the early provision, they can nevertheless assume jurisdiction if the defendant submit to it either expressly or impliedly." In brief, the Supreme Court held that, in certain cases, and subject to certain conditions, the parties may choose a foreign court and thus displace the application of the procedural rules on jurisdiction, which would be consider a non-mandatory provision. The Court concluded by stating that in order to have a valid choice of court clause, should not violate Egyptian sovereignty or the public order, it should be valid under the law of the foreign court, the dispute has to be international, there should be a close link between the case and the foreign court.

Reference: Hicham Ali Sadeq, *Madahaq al-qadha' al-masri fit-takhalli 'an ikhtisasi-hi addowalibil-monaza'at al-madaniya wat-tijariya : Chourout at-takhalliwami'yari-hi fi halatittifaq al-khosoum 'ala al-khodhou' al-ikhtiyari li mahakemdowlaajnaabiya – ta'liq 'ala hokmmahkamat an-naqdh al-masriya as-sadif fi 24/3/2014* [To what extent Do Egyptian Courts have the Right to Decline International Jurisdiction in Civil and Commercial Litigations : Condition and Standards for Declining Jurisdiction in case where the Parties Agree to Submit to the Jurisdiction of Courts of a Foreign State – Note on the Decision of the Egyptian Supreme Court of 23/3/2014] (Al-Wafa Legal Library, 2015).

Associations and Events

University of Johannesburg organizes conference on PIL

In September 2015, the Research Centre for Private International Law in Emerging Countries of the Faculty of Law of the University of Johannesburg organised a conference on "commercial private international law in East and Southern Africa". The conference examined among others the *Hague Convention on Choice of Court Agreement* and the *Principles on Choice of Law in International Commercial Contracts*.

For more information see <https://www.hcch.net/en/news-archive/details/?varevent=434>

University of Dar es Salaam and the University of Bayreuth organise a workshop

In August 2015 the University of Dar es Salaam and the University of Bayreuth organised a workshop in Tanzania under the theme "Eastern African Common Legal Space in Economic Law: State of the Art and Future Perspectives, with Consideration of the European Experience". It was dedicated to the harmonization of private laws in East Africa. A book based on the workshop presentations is forthcoming in 2016. For more information see <http://www.tgcl.uni-bayreuth.de/en/news/Research-Workshop-on-Harmonisation-of-Economic-Law/index.html>

Conference on "cross border co-operation in civil and commercial matters in Rabat

In November 2014, an international conference on "cross border co-operation in civil and commercial matters through Hague Conventions" was held in Rabat, Morocco. The conference examined the relevance and possible implementation of selected Hague Conventions in the field of international child protection, international civil procedure and the production of public documents abroad. For more information see <https://www.hcch.net/en/news-archive/details/?varevent=390>

Recent scholarly work

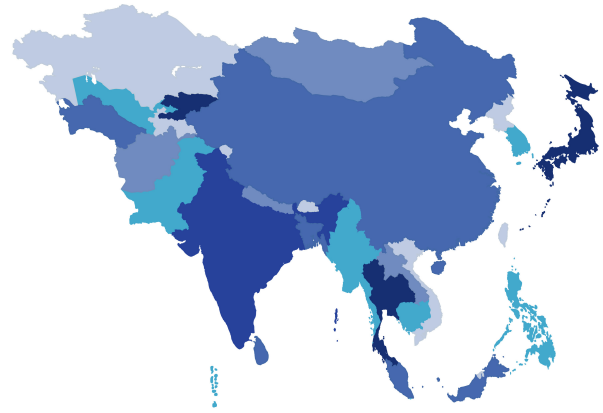
The following publications examine interesting issues in African private international law including judgment enforcement and harmonization of laws: Adewale A. Olawoyin, 'Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws' (2014) 10 *Journal of Private International Law* 129-156; Chukwuma S.A. Okoli, 'Review Article Sowing the Seeds of a Future African Union Private International law: A Review of Private International law



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in Commonwealth Africa' (2014) 10 Journal of Private International Law 517-533; Hakeem A Olaniyan, 'The Commonwealth Model and Conundrum in the Enforcement of Foreign Judgment Regime in Nigeria' (2014) 40 Commonwealth Law Bulletin 76-94; Yomi Olukolu, 'The Enforcement of Foreign Judgments in Nigeria: Scope and Conflict of Laws Questions' (2015) 23 African Journal of International and Comparative Law 129-143; Richard Oppong, 'Recognition and Enforcement of Foreign Judgments in Commonwealth African Countries' (2014) 15 Yearbook of Private International Law 365-386; Richard Oppong & Lisa C. Niro, 'Enforcing Judgments of International Courts in National Courts' (2014) 5 Journal of International Dispute Settlement 344-371; Annelies Nachtergaele, 'Harmonization of Private International Law in the Southern African Development Community' (2014-15) 16 Yearbook of Private International Law 365-403; Jan L. Neels, 'Article 5 of the Hague Principles on Choice of Law in International Contracts' in C. Visser, JT Pretorius & MM Koekemoer eds., *Essays in Honour of Frans Malan, Former Judge of the Supreme Court of Appeal* (Durban: LexisNexis, 2014); JL Neels & EA Fredericks, 'The Proper Law of the Proprietary Consequences of Marriage: Mauritian Law in the South African Supreme Court of Appeal' 2015 Journal of South African Law 918. ■

ASIA —Editors: Chi Chung, Yao-Ming Hsu, and Bélih Elbalti



Private International Law continues to develop vibrantly in Asia. Last year, several countries acceded to international conventions and enacted national legislation. The role of case law in the field assumed increased importance, with a wide variety of decisions being handed down. In addition, scholars and practitioners attended conferences worldwide and published valuable academic articles and books.

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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, 2015. They need not be members of ASIL. This year, the prize will consist of a \$400 stipend to participate in the 2017 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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International Conventions

Kazakhstan accedes to three conventions on Private International Law

On January 29, 2015, Kazakhstan acceded to the *Hague Convention of 1 March 1954 on civil procedure* and the *Hague Convention of 25 October 1980 on International Access to Justice*. The 1954 Convention entered into force on October 14, 2015, while the 1980 Convention entered into force for Kazakhstan on April 1, 2015.

On October 15, 2015, Kazakhstan deposited its instrument of accession to the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. The Convention will become binding in Kazakhstan on 1 June 2016.

For more information see <https://www.hcch.net/en/news-archive/details/?varevent=394>

Tajikistan ratifies Apostille Convention

On February 20, 2015, Tajikistan deposited its instrument of accession to the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents* (the Apostille Convention).

For more information see <https://www.hcch.net/en/news-archive/details/?varevent=395>

National Legislation

People's Republic of China passes regulation on Recognition and Enforcement of Taiwanese Civil Judgments

On June 2, 2015, the Committee on Judgments of the Supreme People's Court of the People's Republic of China promulgated the "Rule for Recognition and Enforcement of Taiwanese Civil Judgments and Decisions" (FA-XI-ZHI 2015 No.13), which took effect on July 1, 2015. Article 23 of the new regulation repeals the pre-existing rules of 1998, 1999, 2001, and 2009.

A separate but similar rule for recognition and enforcement of Taiwanese arbitral awards was also passed on the same date. According to this new rule, parties subject to a judgment rendered by a Taiwanese civil court and requesting that the judgment be recognized in China are entitled to file an application before a "middle level court" (appellate level court) located in either party's domicile, habitual residence or the place of the assets (Rule 4).

Briefly, the new rule states that Taiwanese judgments would be recognized and be enforced in China, except when: (1) one party is not properly summoned and a default judgment is entered; (2) the judgment violates exclusive Chinese jurisdiction; (3) the parties have agreed to submit the case to arbitration; (4) the same subject matter was already decided by Chinese courts or Chinese arbitral tribunals; (5) the same subject matter was already decided by Hong Kong courts or Macau courts and these judgments have been previously recognized by Chinese courts; (6) the same subject matter was subject to arbitration in Taiwan, Hong Kong, Macau or any other country and the arbitral award have been previously recognized; (7) the judgment violates the principle of "One China" and other fundamental legal principles or public societal interests (Art.15). However, quite curiously, if the parties to a judgment rendered by Taiwanese civil court bring the same case before Chinese courts, the case should be accepted (Art.12) – creating a possible conflict with respect to the principle of *res judicata*, which is considered in Article 15. This provision may be explained on reciprocity basis. That is, while Taiwanese case law has revealed that a judgment rendered by Chinese court would be enforceable in Taiwan, those decisions do not have any effect of *res judicata*.

New law on conflict of laws in Bahrain

On 2 July 2015, the Kingdom of Bahrain adopted a new act on conflict of laws, published in the Official Gazette of No. 3217 of 9 July 2015, pp.5ff (Act No. 6/2015 relating to Conflict of Laws in Civil and Commercial Matters Including a Foreign Element). The Act includes 28 articles, divisible into two categories. The first category deals with the general principles of choice of law, including: characterization (Article 3); party autonomy (Article 4), public policy (Article 5), determination of the foreign law (Article 6), exclusion of the applicable law (Article 7), inter-temporal and applicable law under a plural law system (Article 8), proof (Article 8), interim and precautionary measures (Article 10), capacity of natural persons (Article 11), capacity of legal persons (Article 12), plurality or absence of nationality (Article 13), and plurality or absence of domicile (14). The second category of provisions deals with specific choice of law issues. This includes the law applicable to immovable (Article 15); movables (Article 16); contractual obligations (17); stock market contracts (Article 18); employment contracts (Article 19); franchise agreements (Article 20); agency and commercial representation (Article 21); consumer contracts (Article 22); bonds and securities (Article 23); checks, bills of exchange, promissory notes and other negotiable instruments (Article 24); delicts and torts



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(Article 25); unjust enrichment, payment of amounts wrongly received and *negotiorum gestio* (Article 26); intellectual property rights (Article 27); and regulations on the entry into force of the new law (Article 28).

For more information see <http://www.alwasatnews.com/news/1005073.html> (in Arabic)

New arbitration law in Bahrain

On July 5, 2015, the Kingdom of Bahrain enacted a new law on international commercial arbitration, published in the Official Gazette of No. 3217 of 9 July 2015, pp. 109ff (Law No. 9/2015 relating to arbitration). Article 1 of the new law simply incorporates the UNCITRAL Model Law on International Commercial Arbitration into the national legal system, and makes it applicable to any arbitration taking place in Bahrain or abroad when the parties agreed to apply the UNCITRAL Model Law. The new law consists of nine Articles accompanied by the official Arabic translation of the UNCITRAL Model Law as modified in 2006 and repeals all older provisions relating to arbitration (Article 8). The legislation took effect on August 9, 2015.

For further information in English, see <http://zubipartners.com/a-summary-of-the-impact-of-bahrains-new-arbitration-law/>

New laws on private international law issues in Vietnam

In Vietnam, lawmakers have recently been very active in modernizing many aspects of Vietnamese law by way of reform. Some of these reforms closely relate to private international issues. For example, on June 19, 2014 the Vietnamese National Assembly passed a new law on Marriage and Family. The new law contains provisions dealing with international jurisdiction and the recognition of foreign judgments (Chapter VIII – Marriage and Family Relations Involving Foreign Elements [Articles 121 et s.]). The full text of the law in English is available at <http://vbpl.vn/TW/Pages/vbpqen-toanvan.aspx?ItemID=10874&Keyword>. Additionally, on November 24, 2015, the National Assembly adopted a new Civil Code. The Code contains 25 provisions dealing with civil relations involving foreign elements (Part V, Articles 663 to 687). The code will come into force on 1 January 2017. The text of the law has not been yet made available.

Legislative proposal on international jurisdiction in family matters in Japan

By considering a new law on international jurisdiction in civil

and commercial matters in 2011 (Law No. 36 of 2 May 2011), Japan continues its endeavors to legislate in the field of PIL. Currently, a new law on international jurisdiction over personal status and family matters is being considered. On 18 September 2015, the Division of the Legislative Council of the Ministry of Justice on International Jurisdiction on Personal Status and Family Matters released a final legislative proposal, which was adopted by the Legislative Council on 9 October 2015. The proposal consists mainly of three parts. The first part deals with international jurisdiction relating to personal status litigation. This covers matrimonial matters including divorce, annulment of marriage and parentage matters. The second part deals with international jurisdiction on family matters. This covers cases relating to the commencement of adult guardianship, declaration of disappearance, adoption, parental responsibilities, child guardianship, maintenance obligations, succession and division of matrimonial assets. The third part deals with the recognition and enforcement of foreign court decisions in family matters. Currently, the recognition of foreign judgments in personal status matters is governed by Article 118 of the Code of Civil Procedure. One of the main features of the legislative proposal is the adoption of common Japanese nationality as a ground of jurisdiction for divorce and annulment of marriage. The domicile of the plaintiff can also constitute a jurisdictional ground for Japanese courts when the last common domicile was located in Japan and the plaintiff continues to be domiciled in Japan or when the defendant has gone missing. However, the proposal allows Japanese courts to decline jurisdiction on the ground of "special circumstances" (comparable to the *forum non conveniens* doctrine). With regard to the recognition and enforcement of foreign court decisions, the proposal maintains reciprocity as a ground of refusing recognition. http://www.moj.go.jp/shingi1/shingikai_kokusai.html

National Case Law

China court applies international law

In *Abdul Waheed v. China Eastern Airlines*, Mr. Waheed, a Pakistani national, filed a case against a Chinese airline company, alleging the breach of an international air transportation contract. Mr. Waheed claimed that the defendant company improperly refused his request to reschedule his flight, since the original one had been cancelled because of a snow storm. The defendant argued that it was not liable for failing to perform any of its obligations as the non-performance was excused by an

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impediment beyond its control (force majeure).

At trial, the Court applied the *Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air*, since both China and Pakistan are signatories. Basing its decision on article 19 of the Warsaw Convention, the court held that the defendant was liable because it did not take all necessary measures required to avoid the damage. Hearings were held in Shanghai Pudong District Court and a judgment was delivered in favor of Mr. Waheed. An appeal filed before No. 1 Intermediate People's Court of Shanghai was rejected. For the full decision see No. 51 of the Guiding Cases announced by the Supreme People's Court of the People's Republic of China on April 15, 2015, <https://cgc.law.stanford.edu/guiding-cases/guiding-case-51/>

Singapore court decides on foreign Acts of State

A judgment rendered by the Supreme Court of the Philippines is not an act of state, according to the Singapore Court of Appeal in *re The Republic of the Philippines v Maler Foundation*, [2014] 1 SLR 1389 (CA). During the *exequatur* process, the Philippine decision was subject to, and assessed against, the common rules for recognition and enforcement of foreign judgments. The decision did not qualify as an act of state. Because the decision was not an act of state, it was subject to judicial review by the Singapore judiciary. Specifically, the Philippine decision was not recognized as it purported to seize the property located outside the Philippines for the Republic of the Philippines, and hence lacked *in rem* jurisdiction.

For a discussion, see Tan Yock Lin, *Enforcement/Recognition of Foreign Confiscatory Laws in Singapore*, *Singapore Journal of Legal Studies* (2015) 162

Japanese court refuses to enforce a Chinese judgment on the ground of lack reciprocity

In 25 November 2015, the Tokyo High Court confirmed a decision rendered by the Tokyo District Court that refused to enforce a Chinese judgment on the ground of lack of reciprocity. Having obtained a favorable judgment in China, the plaintiff sought to enforce the judgment in Japan. It should be noted that since 1994 the reciprocal recognition and enforcement of foreign judgments between China and Japan has fallen in a vicious circle of mutual refusal. Indeed, in 1994, Chinese courts took the lead and held that Japanese judgments could not be enforced in China because there was no treaty on reciprocity between the two countries. In 2003, the Osaka High Court retaliated and refused to recognize a

judgment rendered by Chinese court for lack of reciprocity after referring to the Chinese ruling. In the interim, it was not clear whether other Japanese courts would follow the decision of the Osaka High Court. The recent decisions rendered by the Tokyo High Court and District Court make it clear that, as long as Chinese courts do not reconsider their practice, Chinese judgments will not be recognized in Japan. It is worth noting that, in order to reach their conclusion, the Japanese courts not only referred to the Chinese precedents that refused to recognize Japanese judgments on the ground of lack of reciprocity, but also indicated that no single foreign judgment had been recognized by Chinese courts in the absence of a treaty or factual reciprocity.

It should be further highlighted that Chinese courts have adopted very stringent reciprocity requirements. This is because theoretically, even in the absence of a treaty, a Chinese court could enforce a foreign judgment if reciprocity is established.

Some Chinese scholars argue that, in order to establish reciprocity, it is not sufficient to prove that Chinese judgments are likely to be recognized in the rendering State. Instead, it should be established that Chinese judgments have actually been recognized and enforced abroad. However, practice shows a different perspective. For example, in 2011, a Chinese court refused to enforce a Korean judgment for lack of reciprocity despite the fact that in 1999, a Korean court took the first step and decided that reciprocity existed between China and Korea. The Korean court recognized a Chinese judgment with the hope that Chinese judgments would reciprocate and enforce Korean judgments in the future. This was not the case. Regardless of the text of the law, it seems that, in practice, in absence of treaty-based reciprocity, foreign judgments are not likely to be recognized and enforced in China.

The decision of the Tokyo High court can be found here: <http://tendensha.co.jp/saiban/271125hanketsu.pdf> (in Japanese).

Supreme Court of Israel enforces a Russian Judgment

The Supreme Court of Israel, sitting as a Court of Appeal, was called asked decide whether a Russian judgment was enforceable in Israel. The Russian judgment orders the applicant, an Israeli gas company, to pay approximately 5 million Euros to the respondent, a Russian gas company, for violation of contractual obligations. The Court ruled that - despite the absence of a bilateral treaty between the two states - the condition of "reciprocity of enforcement" of foreign judgments, which appears in Article 4 of the Foreign

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Judgment Enforcement Law – 1958, was satisfied. The Court stated that in the past, Russian courts insisted on the existence of a bilateral enforcement treaty as a prerequisite for enforcement of any foreign judgment. By so ruling, the Russian courts adhered to Russian legislation regarding the enforcement of foreign judgments in Russia.

The Israeli Court discerned a recent willingness in Russian jurisprudence to consider enforcement of foreign judgments even in the absence of a bilateral enforcement treaty. However, the Israeli court observed, this new line of reasoning was only sporadically followed by Russian courts. More specifically, the Israeli Court noted that one cannot even cite a single of an Israeli judgment being enforced in Russia based on this new trend. In spite of this, the Israeli Court did not find facts sufficient to prevent enforcement of the Russian judgment in Israel since there exists a “reasonable potential” for an Israeli judgment to be enforced in Russia. Such a potential satisfies the condition of “reciprocity of enforcement,” as stipulated by the Israeli legislation. The Israeli Court further stated that it might change its position regarding the enforcement of Russian judgments in Israel if the legal situation in Russia changes or if it becomes clear that Israeli judgments cannot be enforced in principle in Russia. Finally, the Court noted that the burden of proof regarding the absence of reciprocity of enforcement lies with the party that objects the enforcement of the foreign judgments in Israel. A request for additional review before the Israeli Supreme Court, given the precedential nature of the judgment, was denied. For detailed information see *Appeal Civil 3081/12, Double K Oil Products 1996 Ltd v. Gazprom TransgazUkhta LLC*, 9.9.2014, <http://elyon1.court.gov.il/files/12/810/030/a14/12030810.a14.pdf> and <http://elyon1.court.gov.il/files/14/000/063/s04/14063000.s04.pdf>.

Israeli court lowers the bar for recognition of parenthood in cross-border surrogacy.

On January 28 2014 the Supreme Court of Israel recognized the same-sex spouse of a biological father to be the parent of children born through surrogacy. Prior case law required that a spouse having no biological connection to a child obtain parental rights through adoption. In the aftermath of this case, the spouse of a biological parent can receive a parenthood decree for a biological parent’s child. For more information see HCJ 566/11 Memet-Meged v. Minister of Interior, 28.1.14.

Associations and Events

APEC Workshop on the effective enforcement of business contracts

The Asia Pacific Economic Co-operation (APEC) Workshop on “*The effective enforcement of business contracts and efficient resolution of business disputes through the Hague Choice of Court Agreements Convention*” was held on September 1, 2015 in Cebu, the Philippines. The Workshop was organized by the Department of Justice of Hong Kong, People’s Republic of China, together with the Asia Pacific Regional Office of the Hague Conference on Private International Law (HCCH) and the UNCITRAL Regional Centre for Asia and the Pacific. For more information, see <https://www.hcch.net/en/news-archive/details/?varevent=415>

Doshisha University Symposium on Private International Law in Asia

On December 19, 2015, a one-day international symposium on the theme of private international law in Asian countries was held at Doshisha University, Kyoto (Japan). The symposium was organized by The Research Center of International Transaction and Law (RECITAL) at Doshisha University with the support of the Ministries of Justice and Foreign Affairs of Japan.

More information may be found at: <http://conflictflaws.net/2015/international-symposium-on-private-international-law-in-asia-at-doshisha-university-kyoto/>

Recent Scholarly Work

A number of excellent new studies on Private International Law have been published recently. Among them, we would like to recommend the following.

Shaheer Tarin, “An Analysis of the Influence of Islamic Law on Saudi Arabia’s Arbitration and Dispute Resolution Practices,” in *American Review of International Arbitration*, Vol. 26 (2015). Alejandro Carballo Leyda (ed.), *Asian Conflict of Laws: East and South East Asia*, 2015, Kluwer. Jürgen Basedow & Knut B. Pissler edited the book “*Private International Law in Mainland China, Taiwan and Europe*” (2014). Kaiser Chaudhary published the book “*Pakistani Marriages and the Private International Laws of Germany and England: A Legal Comparison of the Private International Law Approaches of Germany and England Concerning the Assessment of the Validity of Marriages Celebrated in Pakistan*” published by Wolf Legal Publishers (2014). Michael Karayanni published the book “*Conflicts in a Conflict: A Conflict of Laws Case Study on Israel and the Palestinian Territories*” (2014). ■



AMERICAS

Central, South America & Mexico

—Editors: Jeannette Tramhel and Cristián Giménez Corte



There appears to be a re-surge of interest in PIL in the region, as evidenced by a number of events that have been held by individual associations this past year, participation by states in conventions and international fora, and discussions by the Inter-American Juridical Committee of the Organization of American States on the future of PIL in the Americas. As these economies strengthen, the need for enhanced rules in transborder relations is becoming more evident.

International Conventions

Mexico: Convention on Choice of Court Enters into Force

On 1 October 2015 the *Hague Convention on Choice of Court Agreements* entered into force for 28 States: Mexico and all Members of the European Union, with the exception of Denmark. This is as a result of the recent approval of the Convention by the European Union and Mexico's earlier accession in 2007. The Convention is intended to provide greater certainty for parties to international commercial contracts by ensuring that 1) a court chosen by the parties must, in principle, hear the case; 2) any other court must

refuse; and 3) the judgment must be recognized and enforced in other Contracting States.

For the full text of the Convention, see: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98>

Costa Rica ratifies four treaties on Private International Law

On 27 July 2015, Costa Rica ratified four international conventions elaborated under the auspices of the Hague Conference on Private International Law, including the *Convention of 25 October 1980 on International Access to Justice* (adopted by Law Nr. 9039), the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (adopted by Law Nr. 9341), and the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (adopted by Law Nr. 9323).

On the same day, Costa Rica also adopted the *Ibero-American Convention on the Use of Videoconference in International Judicial Cooperation*, elaborated under the aegis of the Conference of Minister of Justice of Ibero-American Countries (COMJIB). This Convention establishes the basic rules for judicial hearings and examinations carried out via videoconference in civil, commercial, labour and criminal proceedings. The Convention states that the competent authority of the requesting State will conduct the hearing and the examination of the person located in that State in accordance with its own national law (Article 5); however, it must do so while respecting the laws of both States and the basic rights of due process and legal representation of the person under examination (Article 6). Although this Convention will definitely facilitate international judicial cooperation, the lack of clear conflict of laws rules will require that the Convention be complemented with other applicable law on this matter.

For more information, see http://www.asamblea.go.cr/Legislacion/Resumen_proyecto/2015-2016.pdf

For the full text of Ibero-American Convention, see: <http://www.piaje.org/ES/Docs/COMJIBDocs/Acuerdo%20Videoconferencia%20ES%2026%20Set%20FINAL.pdf>

Brazil ratifies Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents

On 12 June 2015, Brazil adopted the above instrument, better known as the *Apostille Convention*.

For an analysis, see:

<http://www.vfkeduacao.com/convencao-de-haia-e-a-eliminacao-da-exigencia-da-legalizacao-de-documentos-publicos-estrangeiros/>



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National Legislation

Dominican Republic passes new law on PIL

On 15 December 2014, the Dominican Assembly passed Law 544-14 on Private International Law, which covers the three pillars of PIL: jurisdiction, determination of applicable law, and recognition and enforcement of foreign decisions. In regard to the determination of applicable law in matters of tort, the new Dominican law appears to have been significantly influenced by the EU *Regulation on the law applicable to non-contractual obligations* (Rome II).

For the full text, see: <http://ojd.org.do/Normativas/CIVIL%20Y%20COMERCIAL/Leyes/Ley%20544-14%20de%20Derecho%20Internacional%20Privado%20de%20R.D..pdf>

Paraguay: Legislature Passes New Law Applicable to International Contracts

On 15 January 2015, Paraguay promulgated Law No. 5.393, the *Law Applicable to International Contracts*, thereby incorporating into its domestic law both the recently approved *Hague Principles on Choice of Law in International Commercial Contracts* and, for applicable law absent a choice, the *Inter-American Convention on the Law Applicable to International Contracts* (specifically in Articles 11 and 16). By endorsing party autonomy in the choice of law in international contracts, the law is expected to provide greater legal certainty and predictability in contracts concluded between foreign and domestic companies in Paraguay.

The full text of the legislation may be found here: http://www.gacetaoficial.gov.py/uploads/pdf/2009/2009-08-28/gaceta_2670_EDCKIFIDBEKCFIBGKDIJGIKADDACHEFBIIBGCJJJD.pdf

Brazil adopts new Code of Civil Procedure

On 16 March 2015, Brazil adopted a new Code of Civil Procedure. These new rules and regulations on international judicial cooperation and litigation specifically cover jurisdiction, choice of court agreements, international *litispendentia*, service of process, and recognition and enforcement of foreign judicial decisions. The new Code, which will enter into force on 16 March 2016, is expected to enhance and bring Brazil's international civil procedure up to date.

For the full text of the Code, see: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm

For a commentary, see Luciane Klein Vieira y Renata Alvares Gaspar, *Brasil: Habemus nuevo código procesal civil. Sus principales alteraciones en el derecho procesal internacional* <https://cartasblogatorias.com/2015/04/21/brasil-habemus-nuevo-codigo-procesal-civil-sus-principales-alteraciones-en-el-derecho-procesal-internacional/>

Brazil amends Arbitration Law

On 27 July 2015, the *Nova Lei de Arbitragem* Nr. 9307/96, which was—broadly speaking—based on principles of the UNCITRAL *Model Law on International Commercial Arbitration*, was amended by Law Nr. 13129/15. The new amendments are primarily in minor procedural matters and do not change the structure and principles of the Arbitration Law; however, one important change is that now the government (through its public agencies) is expressly authorized to enter into arbitration agreements. This represents a significant shift in legal policy, given that Brazil has never ratified the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Convention) or any Bilateral Investment Treaty (BIT) and this has precluded the government from being subject to the jurisdiction of foreign arbitral tribunals. This change may be indicative of a broader trend, as Brazil appears to be engaged in a process of ratification of international conventions on a variety of matters with a view towards becoming fully integrated into the globalized world.

For the full text of the law, see: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13129.htm

National Case Law

Mexico: INAI rules against Google

On 27 January 2015, the Federal Institute of Access to Information and Data Protection (INAI) began a sanctioning procedure against Google México because it had infringed several provisions of Mexican privacy legislation. The plaintiff sought an erasure of his personal data so that it would not appear on Google search engines that linked him to several websites. Google Mexico argued that it did not provide the search engine service and that the responsible party was Google Inc., a United States entity. Rejecting this argument, the INAI held that Google Mexico was subject to its jurisdiction in Mexico because Google México is legally established in the country and one of the activities in its articles of incorporation is the provision of



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search-engine services. Moreover, Google Mexico had failed to prove that the search engine service had been provided by the American entity.

The full text of the decision may be found here: <http://inicio.ifai.org.mx/pdf/resoluciones/2014/PPD%2094.pdf>

Venezuela: Supreme Tribunal recognizes foreign divorce judgment based on human rights considerations

On 2 June 2015, the Constitutional Chamber of the Supreme Tribunal upheld a lower court decision that recognized a divorce judgement granted by a Spanish court to a Venezuelan couple in Spain, even though the couple had not been separated for five years as required by Venezuelan domestic law in an uncontested divorce. The validity of the foreign decision came into question when it was submitted for recognition and enforcement in Venezuela. The Supreme Tribunal upheld the lower ruling on the basis of the consensual nature of marriage: if persons are free to marry, they should also be free also to terminate that marriage. Citing these human rights principles as enshrined in the *American Convention on Human Rights*, (also known as the *Pact of San José*), the *Universal Declaration of Human Rights* and the Constitution of Venezuela, the Supreme Tribunal disregarded contravening provisions of Venezuelan domestic family law.

For the full text of the decision, see:

<http://historico.tsj.gob.ve/decisiones/scon/junio/178096-693-2615-2015-12-1163.HTML>

For a commentary, see Claudia Madrid Martínez, *Venezuela: los derechos humanos y el reconocimiento de sentencias extranjeras de divorcio*, in <https://cartasblogatorias.com/2015/09/07/venezuela-los-derechos-humanos-y-el-reconocimiento-de-sentencias-extranjeras-de-divorcio/>

Soft Law

OHADAC adopts Principles on International Commercial Contracts

On 22 September 2015, the Organization for the Harmonization of Business Law in the Caribbean (OHADAC), adopted *Principles on International Commercial Contracts*. According to the official commentary, these Principles are considered *soft law* that parties to a contract can incorporate by reference, and as a *model law* that states can adapt and pass into formal domestic legislation. Clearly influenced by the UNIDROIT *Principles of International*

Commercial Contracts, the OHADAC Principles provide general rules for contracts including formation, validity, interpretation, effects, performance, non-performance, and assignment and limitation period.

For the full text of the Principles and more information, see: www.ohadac.com

OAS develops Principles on Privacy and Personal Data Protection

Pursuant to a mandate from the OAS General Assembly, the Inter-American Juridical Committee prepared and, on 26 March 2015, during its 86th regular session, adopted proposed OAS *Principles on Privacy and Personal Data Protection*. These principles, intended as a guide for the preparation and implementation of national legislation, have been submitted to the OAS Permanent Council for consideration by Member States.

For more information, see: http://www.oas.org/en/sla/dil/newsletter_data_protection_IAJC_report_Apr-2015.html

Associations & Events

OAS: On 7 August 2015 during its 87th regular session, the Inter-American Juridical Committee held a "Private International Law Day Seminar" with professors from Argentina and Brazil to discuss current topics of interest and the furtherance of PIL in the Americas. The discussion will continue during the Committee's next session on 4 April 2016 in Washington, D.C.

OAS: The "Caribbean Capacity-Building Workshop on Secured Transactions and Asset-Based Lending" held in Kingston, Jamaica on 10-12 February was the third such event organized under the auspices of the OAS Secured Transactions Project, which was made possible with funding from the Government of Canada. The workshop brought together international experts, local stakeholder groups representing the financial and business sectors, groups promoting financial inclusion for women and MSMEs, and government officials from Jamaica and other Caribbean states at various stages in the reform process. For more information on the OAS Secured Transactions Project, see: http://www.oas.org/en/sla/dil/secured_transactions.asp

OHADAC: During 21-22 September in Pointe-à-Pitre, Guadeloupe, the Organization for the Harmonization of Business Law in the Caribbean held a conference to

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formally present work carried out under the OHADAC Project, namely: 1) Principles for International Commerce Contracts; 2) Arbitration and Conciliation; 3) Model Law on Private International Law; and 4) Model Law of Commercial Companies and also to announce the expected launch of the OHADAC Centre for Arbitration and Conciliation whose headquarters will be in Guadeloupe.

For the full text of these draft instruments, see: <http://www.ohadac.com/textes.html>.

ASADIP: The IX Conference of the American Association of Private International Law (ASADIP) was held 28-31 October in Panama City, Panama. The conference theme was "Access to Justice in Private International Law." For more information, see: <http://www.asadip.org/v2/?p=5365>

ADIPRI: The II Conference of the Chilean Association of Private International Law (ADIPRI) was held 12-13 October in Punta Arenas, Chile. The conference topics of the recently constituted association were "Arbitration" and "Proposals for the Update of the Chilean System of Private International Law."

For more information, see: <http://www.adipri.cl/>

AMEDIP: The XXXVIII Seminar of the Mexican Academy of Private International and Comparative Law (AMEDIP) was held 22-23 October in Mexico City, Federal District, Mexico. The seminar topic was "Current Challenges in Private International Law."

For more information, see: http://www.amedip.org/amedip_mexico/?p=4765

Recent Scholarly Work

Costa Rica: *Private International Law in Costa Rica*, Juan Jose Obando Peralta, Kluwer Law International, 2013. This publication has recently come to our attention.

Uruguay: *Reforma del Derecho Marítimo Uruguayo*, Ed., Fernando Aguirre Ramírez, Montevideo, FCU, 2015. This publication includes a chapter on the private international law aspects of recent reforms to maritime laws (18.803 of 26 August 2011 and 19.246 of 15 August 2014).

Caribbean Countries: *Armonización del Derecho Internacional Privado en el Caribe. L'harmonisation du Droit International Privé dans le Caraïbe – Harmonization of Private International Law in the Caribbean. Estudios y materiales preparatorios y proyecto de Ley Modelo OHADAC de derecho internacional privado de 2014*, Madrid, Iprolex, 20015, 687 pp. ISBN: 978-84-941055-2-4.

North America

—Editors: Shawn Burkley and Mayra Cavazos Calvillo



Just as the final agreement on the text of the Trans-Pacific Partnership promises to engender even greater interaction among cross-border parties, case law in North America reveals how many fundamental issues in Private International Law are still evolving. Jurisdiction, especially *in personam* jurisdiction, continues to be challenged in a variety of contexts— including the especially problematic field of internet based companies that have, by definition, a multinational presence. Technology driven firms are also confronted with a wide range of intra and interstate privacy regimes, creating private causes of action that have deep implications for the international business community. The enforcement of foreign money judgments, whether court mandated or the result of an arbitration proceeding, is an area where courts continue to search for new answers. Perhaps in the recognition that new answers are needed, several notable members of the judiciary have weighed on both procedural matters and the philosophical

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implications of a globalized legal system with recent publications. In sum, North America, with its large economies and deep financial interdependence, is a region where Private International Law's complexities, inconsistencies and challenges remain widely conspicuous.

International Conventions

Trans-Pacific Partnership Accord Reached and Text Released

Final agreement was reached between 12 countries on the Trans-Pacific Partnership on October 5th, 2015 (including the United States, Canada and Mexico). The final text of the trade deal made available for review November 5, 2015. The accord ties together countries that represent roughly 40% of the world's economy, eliminating a wide selection of trade barriers and tariffs. The full text is roughly 6,000 pages long and has engendered resistance from, among others, labor groups in the United States, Mexican exporting firms, and the Canadian Agricultural sector. It is anticipated that final ratification by the North American signatories will take several months. For the full text see:

<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

National Case Law

Canada: Court of Appeal for British Columbia establishes personal jurisdiction over Google

On June 11, 2015 the Court of Appeal for British Columbia rendered a judgment against Google Inc. In the lower court proceeding, plaintiff obtained injunctive relief from defendant Google, prohibiting the company from delivering search results pointing to the defendants' websites – which had been involved in an action for trademark infringements and unlawful appropriation of trade secrets. Google appealed, arguing that the injunction was improperly issued because the court lacked *in personam* jurisdiction. The appellate court held that because Google did business in British Columbia by gathering data through web crawling software, distributing targeted advertising to users, and selling advertising to businesses, there was a sufficiently substantial connection between the company and the province to allow jurisdiction. Therefore, under Canadian law a court can order the blocking of a website globally with the purpose to protect a plaintiff's from irreparable harm in British Columbia.

The full text of the ruling may be found here: <https://s3.amazonaws.com/s3.documentcloud.org/documents/2096794/2015-bcca-265-equustek-solutions-inc-v-google-1.pdf>

Canada: The Supreme Court Rules for Ecuadorian Villagers in Suit against Chevron

The Supreme Court of Canada rendered a decision on September 4, 2015, rendering a foreign money judgment enforceable in Canada, because "the foreign court had a real and substantial connection with the subject matter of the dispute or with the defendant." The underlying lawsuit was initiated in the United States District Court for the Southern District of New York by a group of Ecuadorian villagers against Texaco, Inc. (who later merged with Chevron). The villagers sought legal accountability and financial and environmental reparations due to harms caused by oil drilling in the Lago Agrio region of Ecuador. After having their suit dismissed for *forum non conveniens* in the United States, the villagers filed and won a lawsuit in the Ecuadorian Courts. Chevron refused to recognize the Ecuadorian trial and judgment. As a result, the Villagers brought suit in a Canadian Court to enforce the Ecuadorian judgment, naming as defendants Chevron and Chevron's Canadian subsidiaries. The Canadian Supreme Court stated that in recognizing and enforcing of a foreign award, the only prerequisite is that traditional bases of jurisdiction are satisfied or that the foreign court had a real and substantial connection with the litigants or with the subject matter of the dispute.

The full text of the decision may be found here: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15497/index.do>

United States: Court of Appeals dismisses complaint for lack of personal jurisdiction for a subsidiary of Nike in the Netherlands

On March 04, 2015 the U.S. Court of Appeals for the Ninth Circuit dismissed an appeal to a complaint brought in Oregon for lack of personal jurisdiction and *forum non conveniens*. The plaintiff alleged sex and age discrimination against a Dutch subsidiary of Nike, arguing that the subsidiary's relationship to the state of the parent company were sufficient to uphold an exercise of general personal jurisdiction under U.S. law. Plaintiff's arguments were advanced on a theory of agency and alter ego but the court held that a parent-subsidiary relationship is insufficient, on its own, to justify imputing one entity's contacts with the forum state to another entity for the purpose of establishing personal jurisdiction. In the



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absence of other minimum contacts, the court dismissed plaintiff's appeal.

The full text of the decision may be found here: <http://cdn.ca9.uscourts.gov/datastore/opinions/2015/07/16/13-35251.pdf>

United States: Court of Appeals refuses to expand Argentina's Sovereign Debt Class action

On September 16, 2015, the U.S. Court of Appeals for the Second Circuit overruled the decision of a federal judge regarding stemming Argentina's Sovereign Debt Crisis. The appellate court rejected the rationale for modifying a class of bondholders because the class remains insufficiently ascertainable as implicitly required by F.R.C.P. Rule 23. Specifically, it rejected the lower court's objective criterion of "holding a beneficial interest in a bond series" because it did not establish the definite boundaries of a readily ascertainable class. The court also reiterated the process for calculating damages in large aggregated bondholder cases; requiring consideration of evidence of bonds on the secondary market, an estimate of the volume of those bonds and a calculation of aggregate damages that would roughly reflect the loss to each class. The appellate court remanded the case with an order to make a specific calculation as to which bondholders are entitled to damages and an amount of each award.

The full text of the decision may be found here: http://www.ca2.uscourts.gov/decisions/isysquery/4439790e-869b-468f-9e12-62d3e1b32bd0/2/doc/14-4385_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/4439790e-869b-468f-9e12-62d3e1b32bd0/2/hilite/

United States: Court of Appeals reverses District Court Decision and holds Sovereign Immunity in favour of Argentina's Central Bank

On August 31, 2015 the United States Court of Appeals for the Second Circuit, reversed the judgement of a lower court which stated that Argentina's Central Bank (BCRA) had waived its sovereign immunity under two United States statutory exceptions. Generally, as an instrumentality of the state, Argentina's Central Bank is immune from lawsuits in U.S. Courts under the Foreign Sovereign Immunities Act (FSIA). However, a lower court held that BCRA was not entitled to immunity because it held that BCRA was an *alter ego* of Argentina, which had waived immunity under a bond issuance agreement (Fiscal Agency Agreement or FAA). The appellate court found that BCRA is not an *alter ego* of Argentina because Argentina neither: (1) exercises such

extensive control over BCRA that a principal/agent relationship was created or (2) recognizing BCRA as a separate entity would result in fraud or injustice. Additionally, plaintiffs claimed that BCRA's immunity was waived under 28 U.S.C. § 1605(a)(2) as a result of engaging in commercial activity in the United States. The commercial activity in question was BCRA's use of its Federal Reserve Bank of New York account to purchase dollars, which plaintiffs alleged allowed BCRA to make loans to Argentina. The appellate court ruled that, "BCRA's use of its FRBNY account is too incidental to the gravamen of plaintiff's claim to serve as the basis for waiving BCRA's sovereign immunity under the commercial-activity exception."

The full text of the decision may be found here: <http://caselaw.findlaw.com/us-2nd-circuit/1711960.html>

New York Federal Court Articulates U.S. Test for Validity of International Choice of Law Clauses

Confronted with a question on whether it was proper to compel arbitration where the choice-of-law clause of a contract would be outcome determinative, the United States District Court for the Southern District of New York articulated the following rule in *Int'l Chartering Servs. v. Eagle Bulk Shipping Inc.*, on the presumptive validity of an arbitration clause in an international contract: "A choice-of-law clause in a contract is presumptively valid where the underlying transaction is fundamentally international in character. The presumption of validity will be overcome if application of the choice-of-law clause would be unreasonable under the circumstances." The court went on to state four conditions which would render a choice-of-law clause unreasonable: (1) if the choice-of-law or forum selection clauses were incorporated into the agreement as the result of fraud or "overreaching," (2) if the grave inconvenience or unfairness of the selected forum would effectively deprive a party from his day in court, (3) if the plaintiff would be denied a remedy because the fundamental unfairness of the chosen law, or (4) "if the clauses contravene a strong policy of the forum state. In addition, five factors were outlined which a court should look to in determining if the four conditions have been met: "(1) any choice-of-law provision contained in the contract; (2) the place where the contract was negotiated, issued and signed; the place of performance; (3) the place of performance [of the contract]; (4) the location of the subject matter contract; and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties."

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The full text of the ruling may be found here:

<http://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2012cv03463/395956/82/> as well as 2015 U.S. Dist. LEXIS 137741 (S.D.N.Y. Oct. 8, 2015).

United States Courts Remain Divided on Hague Convention Interpretation Regarding Service by Mail

Noting the continuing debate in Federal Courts on the question of whether service by mail is valid under the Hague Convention, the United States District Court for the Middle District of Florida in *Geopolymer Sinkhole Specialist, Inc. v. Uretek Worldwide Oy* found that if the receiving country does not object to Article 10(a) of the Convention and service by mail is performed in accordance with F.R.C.P 4(f), then service by a United States plaintiff on a foreign defendant via mail is proper. To the contrary, United States District Court for the Eastern District of Pennsylvania in *Graphic Styles/Styles Int'l LLC v. Men's Wear Creations* held that allowing service by mail would be to substitute Convention language for certain policy goals and ultimately invalid.

The full text of the rulings may be found here: <http://law.justia.com/cases/federal/district-courts/florida/flmdce/8:2015cv01690/312888/12/> and here <https://advance.lexis.com/api/permalink/988abe54-ce1e-4171-8fca-585565a8c827?context=1000516> also at 99 F. Supp. 3d 519.

Federal Court Holds That New York Convention Includes A Reciprocity Requirement

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) as adopted in the United States contains a reciprocity requirement according to the United States District Court for the Eastern District of Pennsylvania in *Clientron Corp. v. Devon IT, Inc.*. Therefore, an arbitration award obtained in Taiwan, which is not a signatory to the Convention, is not enforceable in the U.S.

The full text of the rulings may be found here: <http://www.paed.uscourts.gov/documents/opinions/14d0652p.pdf> also at 35 F. Supp. 3d 665.

Illinois Court: State Law Not Preempted by the Federal Arbitration Act with Respect to Recognition of Judgements Confirming Foreign Arbitral Awards

Agreeing with the Second Circuit that the FAA's three year statute of limitations "go[es] only to the enforcement of a foreign arbitral award and not to the enforcement of foreign judgments confirming foreign arbitral awards," the

United States District Court for the Northern District of Illinois ruled in *Nat'l Aluminum Co. v. Peak Chem. Corp.*, that Illinois state law is not pre-empted by Chapter 2 of the FAA and an Indian High Court arbitral award was not time barred under the Illinois Uniform Foreign-Country Money Judgements Recognition Act.

full text of the rulings may be found here: <http://law.justia.com/cases/federal/district-courts/illinois/ilndce/1:2014cv01314/293090/68/> as well as 2015 U.S. Dist. LEXIS 127060 (N.D. Ill. Sept. 23, 2015)

Post Kiobel Presumption Against Extra-territoriality in ATS Actions Sufficient to Deny Apartheid Era Claims Against Ford and IBM

The Court of Appeals for the Second Circuit in *Balintulo v. Ford Motor Co.*, affirmed a lower court decision finding plaintiffs' amended complaints, alleging corporate malfeasance during apartheid-era South Africa by Ford and IBM subsidiaries, futile in light of the Supreme Court's *Kiobel* ruling. *Kiobel* II held that the presumption against extraterritoriality applies to claims under the Alien Tort Statute and therefore make the statute inapplicable to conduct in the territory of another sovereign. Because the entities were subsidiaries of U.S. corporations, the question of whether a U.S. corporation's knowledge of the actions of its international subsidiaries is sufficient to establish liability in the form of complicity or aiding and abetting. In addressing these questions, the court held that

"Knowledge of or complicity in the perpetration of a crime under the law of nations (customary international law)—absent evidence that a defendant purposefully facilitated the commission of that crime—is insufficient to establish a claim of aiding and abetting liability under the ATS..." and "[a]llegations of general corporate supervision are insufficient to rebut the presumption against extraterritoriality and establish aiding and abetting liability under the ATS."

Full text of the ruling can be found at: *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 170-71 (2d Cir. 2015), <http://caselaw.findlaw.com/us-2nd-circuit/1709048.html> as well as 796 F.3d 160.

Recent scholarly work:

The Court and the World: American Law and the New Global Realities by Stephen Breyer

This recent publication of Justice Stephen Breyer explores the role of the United States Supreme Court in a globalized

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AMERICAS: North America —continued from page 17

and interconnected world. Justice Breyer first analyzes the relation that national security and public interests have with the fundamental rights of individuals with the power of the executive branch. Further, he emphasizes that international law is currently playing a major role in the solving of domestic disputes than it did before. Therefore, Courts should acquire and be able to apply international legislation and practices into the solving of domestic disputes. Essentially, since commercial, health and environmental affairs are now a concern of the international community in general, and not only of a specific country.

*Stephen Breyer is an Associate Justice of the Supreme Court of the United States who was appointed by President Bill Clinton.

U.S. FJC publishes "Discovery on International Civil Litigation"

Continuing their series on international litigation, the Federal Judicial Center has recently published a text written by Timothy Harkness, Rahim Moloo, Patrick Oh and CharlineYim to assist with cases in which parties seek evidence located abroad or parties to a foreign or international proceeding seek evidence located in the United States. The work includes a summary of "domestic discovery and disclosure rules in several jurisdictions frequently involved in U.S. litigation and explains how those jurisdictions are likely to address requests for assistance with discovery."

The work can be found online at: [http://www.fjc.gov/public/pdf.nsf/lookup/Discovery-in-International-Civil-Litigation.pdf/\\$file/Discovery-in-International-Civil-Litigation.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Discovery-in-International-Civil-Litigation.pdf/$file/Discovery-in-International-Civil-Litigation.pdf)

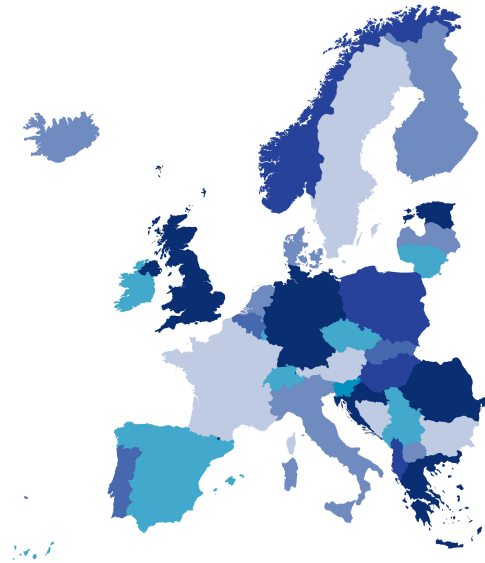
Associations and Events

ASIL Annual Meeting

The American Society of International Law will be having its 110th meeting from March 30 to April 02, 2016 on the theme "Charting New Frontiers in International Law". The early bird registration is open, and for more information please see: <https://www.asil.org/annualmeeting>. ■

EUROPE

—Editors: Massimo Benedettelli, Marina Castellaneta, Antonio Leandro



The European Union's activity in 2015 was focused on the restyling of certain acts in the field of judicial cooperation in civil matters to take account of the effects of the economic crisis on individuals and legal persons. The European institutions have adopted in particular new rules on jurisdiction in the field of cross border insolvency, as well as new rules on small civil claims in order to facilitate the free movement of judgments and execution in another Member State without the need for a declaration of enforceability. The use of standard form and modern communication technology are assuming an important role not only in European Union but also in member States with a trend leading to the use of electronic means to serve documents abroad.

As of domestic judicial decisions, following the ECJ judgment on Schrems case, the Austrian Supreme Court was seized to admit the expected largest privacy class action brought in Europe against Facebook (Ireland Ltd) for suspension of data usage and damages compensation.

European Union

Regulations

European Small Claims Procedure

On 16 December 2016, the European Union adopted

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Regulation (EU) 2015/2421 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure. The reformed Regulation increases the ceiling as regards the value of a claim to EUR 5 000 (now Eur 2000) in order to improve access to an effective and cost-efficient judicial remedy for cross-border disputes. The Regulation shall apply from 14 July 2017. For the full text here http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:JOL_2015_341_R_0001&from=EN

Succession and Wills

As of 17 August 2015, the Regulation (EU) No 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession entirely applies.

The text of the Regulation may be found here: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012R0650&from=EN>

European Insolvency Regulation (Recast)

On 20 May 2015, the European Union adopted the Regulation (EU) No 2015/848 on insolvency proceedings, which recasts the Regulation (EC) No 1346/2000. Novelties consist in: 1) including proceedings excluded (or not clearly covered) by the Regulation No 1346/2000, and 2) providing new rules on jurisdiction, cooperation between proceedings, insolvency of groups, interconnected public insolvency registers. The bulk of the Regulation No 2015/848 will apply from 26 June 2017.

The text of the Regulation may be found here: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015R0848&qid=1450638573635&from=EN>

Matrimonial Property, Registered Partnerships

The EU failed to adopt two Private International Law Regulations in family matters (one regarding the matrimonial property, the other one concerning the property consequences of registered partnerships). On December 2015, the Council uselessly attempted to reach a political agreement. The way is now open to an enhanced cooperation on the same matters. For details click here: <http://www.consilium.europa.eu/en/meetings/jha/2015/12/03-04/>

EU Case law

Applicable law and road traffic accident

On 10 December 2015, the European Court of Justice (ECJ), in Case C-350/14, ruled that Article 4(1) of the Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ('Rome II') must be interpreted as meaning that the law applicable to a non-contractual obligation arising from a road traffic accident in a Member States is the law of the country in which the 'damage' occurs, irrespective of the country in which the event giving rise to the damage occurred, and irrespective of the country or countries in which the 'indirect consequences' of that event occur. As a consequence, the law of the country of the place where the direct damage occurs is the law applicable to legal actions by victim's relatives who reside in another member State and seek compensation for material and non-material damages, because their damages must be classified as 'indirect consequences' of that accident. Full text here: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=172887&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=946434>

Arbitral anti-suit injunctions

On 13 May 2015, in Case C-536/13, the ECJ ruled on the recognition of an arbitral award restraining a party from bringing certain claims before a Lithuanian court, which, absent the arbitration agreement, would have had jurisdiction under the Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (repealed as of 10 January 2015 by the Regulation (EU) No. 1215/2012 of 12 December 2012).

In the ECJ's view, the issue falls outside the Regulation (EC) No 44/2001 due to the arbitration exclusion established in Article 1(2)(d).

After remarking that the earlier case law which defends the jurisdiction of EU Member States' courts from foreign judicial anti-suit injunctions does not concern the relationships between courts and arbitral tribunals, the Court held that the party seeking to challenge the arbitration agreement may contest the recognition and enforcement of the award under the procedural law of the requested Member State and, as the case may be, the 1958 New York Convention.

For the full text see:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=164260&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=230476>



EUROPE —continued from page 19

Service of judicial and extrajudicial documents

The ECJ, on 11 June 2015 (Joined Cases C-226/13, C-245/13, C-247/13 and C-578/13) ruled on Article 1(1) of the Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents). According to the ECJ, legal actions for compensation by applicants, all domiciled in a member States, who purchased bonds from Greece, against the issuing State, fall within the scope of that Regulation in so far as it does not appear that they are manifestly outside the concept of civil or commercial matters. The issue of bonds does not necessarily presuppose the exercise of powers falling outside the scope of the ordinary legal rules applicable to relationships between individuals and the intention of the Greek State was to keep the management of the bonds within a regulatory framework of a civil nature. Therefore Regulation No 1393/2007 is applicable to these cases. For the full text see: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=164953&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=940009>

Maintenance Obligation

On 16 July 2015, in Case C-184/14, the European Court of Justice (ECJ) handed down a judgment concerning Article 3 of the Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation regarding maintenance obligations. The ECJ shed light on the jurisdiction over maintenance claims related to proceedings in matters of parental responsibility. For the full text see: http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=165902&occ=first&dir=&cid=404655

EU and International Conventions

Choice of Court Agreement (Updating).

On 1 October 2015, The Hague Convention of 30 June 2005 on Choice of Court Agreements entered into force for EU Member States (except Denmark) and Mexico. The text of the Convention may be found here: <https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf>

National Reports

International Conventions

Italy: Children Convention enters into force

On 1 January 2016, the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children entered into force.

The text of the Convention may be found here: <https://assets.hcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf>

Austria: Apostille Convention

The Austrian Federal Ministry for Europe, Integration and Foreign Affairs began issuing e-Apostilles on 1 June 2015 as part of the e-APP under the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (Apostille Convention). The applicant may continue to ask for a paper Apostille to be issued. As underlined by The Hague Conference of Private International Law "there are more than 180 Competent Authorities in 23 States operating one or both of components of the e-APP, demonstrating the ever-increasing support for the program".

For details click: <https://www.hcch.net/en/states/authorities/details3/?aid=308>

National Legislation

Spain: New Rules on International Civil Procedure

On 20 August 2015, the Law No 29/15 of 30 July 2015 on international legal cooperation in civil matters entered into force. The Law No 29/15 provides a general framework for the legal cooperation between Spanish and foreign authorities. Full official text of the Law here: <https://www.boe.es/boe/dias/2015/07/31/pdfs/BOE-A-2015-8564.pdf>

Belgium: Law on "vulture funds"

On 21 September 2015 the Belgian law on "vulture funds" entered into force. The "Loi relative à la lutte contre les activités des fonds vauteurs" has been adopted on 12 July 2015. Under the new law if a Belgian judge determines a fund is acting as a "vulture," then it cannot claim more than the discounted price paid for the bonds, rather than their face value.



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For the full text see here <https://www.stibbe.com/en/news/2015/september/bru-fin-act-introducing-measures-to-restrict-vulture-fund-activities>.

Russia: New Rules on Arbitration

On 29 December 2015, new arbitration rules were adopted to bring domestic and international arbitration up to date. In particular, the Federation Law on International Commercial Arbitration (Law No 5338-1) has been extensively revised for better aligning the Russian system with the UNCITRAL Model Law on International Commercial Arbitration, making the recognition of foreign arbitral awards easier, ameliorating the arbitration agreements legal framework and clarifying several crucial topics concerning the arbitral tribunal's jurisdiction. The new provisions will apply from 1 September 2016. For an English version of the amended Law No 5338-1 see: http://www.arbitrations.ru/upload/medialibrary/542/new-ica-law_clean.pdf

National Case Law

United Kingdom: misuse of private information and tort

In *Google v. Vidal-Hall et al.* (27 March 2015, [2015] EWCA Civ. 311), the Court of Appeal addressed the characterization of claims for misuse of private information disputed between three individuals domiciled in England and Google with regard to the so-called "Safari workaround". In particular, by qualifying the claims for misuse of private information as a tort, the lower judge retained jurisdiction and authorized the service out of England. The Court of Appeal upheld this view. For the full text see: <http://www.bailii.org/ew/cases/EWCA/Civ/2015/311.html>

Italy: Enforcement of foreign judgments

The Italian Supreme Court (*Corte di cassazione, Sezioni Unite Civili*), by the judgment No 21946/15, filed on 28 October 2015, held that the *United States District Court for the District of Columbia* No 97-396 judgment cannot be enforced in Italy because it does not respect the principle of international jurisdiction required by Article 64 of the Law No 218/95 on the Reform of the Italian System of Private International Law. The United States Court had granted compensation to the relatives of a US citizen, victim of a terrorist attack in Israel, directed by Iran. The relatives sought the enforcement in Italy against Iranian assets located therein. The Italian Supreme Court has denied the enforcement,

but has excluded immunity from the jurisdiction of a foreign State for actions arising from war crimes and crimes against humanity, including acts of terrorism. For the full text http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/21946_10_2015.pdf

France: forum clauses

On 7 October 2015, the French Supreme Court (*Cour de Cassation, première chambre civile*) handed down the judgment No 1053 on the forum asymmetrical clauses in a contract between a French Resellers and Apple Sales International. For the full text see: https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/1053_7_32739.html

Austria: Facebook Class Action

In November 2015, the Austrian Supreme Court was seized to admit the expected largest privacy class action brought in Europe against Facebook (Ireland Ltd) for suspension of data usage and damages compensation. Both plaintiff and Facebook appealed to the Supreme Court to settle the procedural dispute concerning the admissibility of a class action. The Vienna Court of Appeal had declared jurisdiction in favour of the plaintiff acting as a consumer and not as a "professional". For details click: <http://europe-v-facebook.org/EN/en.html>

Association and Events

- The Hague Academy of International Law will hold its 2016 Summer Courses between July and August. The Private International Law courses are scheduled from 1 to 19 August. Closing date for application: 29 February 2016. To download the program click <https://www.hagueacademy.nl/programmes/summer-courses/summer-programme/>
- The 10th edition of the International Seminar on Private International Law, organized by the Faculty of Law of the Universidad Complutense of Madrid, will be held from 14 to 15 April 2016. For details click: [http://www.ucm.es/derinternacional/noticias/x-seminario-internacional-de-derecho-internacional-privado-\(14-y-15-abril-2016\)](http://www.ucm.es/derinternacional/noticias/x-seminario-internacional-de-derecho-internacional-privado-(14-y-15-abril-2016)) ■

2015 PILIG Prize "The European Private International Law of Employment"

By Dr. Ugljesa Grusic

My submission for the ASIL PILIG Prize 2015 was the manuscript of my monograph "The European Private International Law of Employment", which was published in May 2015 by Cambridge University Press.

"The European Private International Law of Employment" is about the legal regulation of transnational employment relationships in the private international law of the European Union. It provides a descriptive and normative account of this field of law. It outlines the content and application of the relevant rules of the Brussels I Regulation Recast, the Rome Regulations, the Posted Workers Directive and the draft of the Posting of Workers Enforcement Directive, and assesses those rules in the light of the professed objective of protection of employees.

The central argument is that private international law matters in the multilevel system of governance that is the EU. The outcome of individual transnational employment disputes may depend on the competent court, applicable laws and the possibility of recognition and enforcement of judgments abroad. But I look beyond the role of the European private international law of employment in the resolution of



individual disputes and achieving private justice and fairness in individual cases and demonstrate that this field of law also has an important systemic role in coordinating and maintaining the diversity of the Member States' labour law systems, while aiming to contribute to the enforcement of basic principles and rights of EU law and the safeguarding of the objectives and values of EU law from non-EU elements.

The purpose of my work is not to be exclusively an exploration of the theory of private international law. I also assess whether, and to what extent, the European private international law of employment is adequately performing its systemic role. I show that the relevant rules of the Brussels I Recast and the Rome Regulations require some, mainly technical, changes. But the interaction between these instruments and the fundamental economic freedoms guaranteed by

the Treaty on the Functioning of the EU, largely regulated by the Posted Workers Directive, leads to what is often perceived as 'unfair competition' and 'social dumping' in affluent Member States and is therefore a reason for concern. Whether such downward regulatory pressures on the host Member State labour law systems are acceptable goes to the core of the question of what social model is best for Europe. I examine whether, and how, the European private international law of employment can develop into a part of the solution to this problem.

The third theme underlying my work is the exploration of the impact of the 'Europeanisation' of private international law on traditional perceptions and rules in this field of law in individual Member States. I use English law as a case study for the analysis. I demonstrate that the European private international law of employment is fundamentally reshaping English conflict of laws by its special protective rules of jurisdiction, the principle of mutual recognition and the country of origin, and by almost completely merging the traditionally perceived contractual, statutory and tortious claims into one claim for choice-of-law purposes.

OCEANIA —Editor: Emma Wanchap



2015 in the Oceania region was dominated by discussions of Trans-Pacific Partnership Agreement, or TPP and those who live in this region, particularly in Australia, will know that the media was caught up with this agreement and its terms. Although the media focus was on the TPP, there were other significant developments for the operation of private international law in the High Court of Australia and by way of seemingly small, but operationally significant legislative amendments.

2015 also saw the publication of a new edition of the seminal textbook, *Private International Law in Australia*, as well as a database out of the University of Auckland dedicated to New Zealand scholarship on private international law.

International Conventions

Australia and New Zealand join the TPP

In October 2015, with the culmination of months of negotiation, the Trans-Pacific Partnership Agreement (TPP) was agreed between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and the United. A full and detailed analysis of this agreement and its hundreds of pages is beyond the scope of this newsletter, however there are provisions in the TPP dealing, unsurprisingly, with investor-state dispute settlement, arbitration, choice of laws among other relevant PIL issues.

For full text of the TPP see: <https://www.ag.gov.au/About/CommitteesandCouncils/Law-Crime-and-Community-Safety-Council/Pages/default.aspx>

For recent public academic commentary on the implications of the TPP on Australia and the region see: <https://theconversation.com/au/topics/trans-pacific-partnership>

National Legislation

Australia amends International Arbitration Act

Amendments to the *International Arbitration Act 1974* (Cth) (IAA) were made in October 2015, aligning Australian law with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY Convention), the UNCITRAL Model Law among other international arbitration practice and norms. The *Civil Law and Justice (Omnibus Amendments) Act 2015* (Cth) (Act) came into force in on 13 October 2015, making these amendments to parts of the IAA. The effect of this seemingly small change in legislation is to ensure that arbitral awards that are made in states not party to the NY Convention can be enforced in Australia. Prior to these amendments, only arbitral awards made in a NY Convention state party could be enforced in Australia. The Act can be found here: <https://www.comlaw.gov.au/Details/C2015A00132/Download>

National Case Law

Australian court decides on immunity of jurisdiction and execution

December 2015, the High Court of Australia, in *Firebird Global Master Fund II Ltd v Republic of Nauru*, dismissed (aside from varying an order made by the lower court) an appeal of a decision by the Court of Appeal of the Supreme Court of New South Wales (NSWCA) regarding enforcement of foreign judgments and sovereign immunities. The High Court varied orders of the NSWCA to show that that court had jurisdiction to register the foreign judgment. It upheld that Nauru was not immune to Australian courts' jurisdiction registration of foreign judgments, however was immune from execution against its property (which was held in an Australian bank and this property – money – was not held for commercial purposes).

The full judgment can be found here: <http://www.austlii.edu.au/au/cases/cth/HCA/2015/43.html> and here: <http://www.austlii.edu.au/au/cases/cth/HCA/2015/53.html>



OCEANIA —continued from page 23

Australian court construes the Foreign Judgments Act

In October 2015, the High Court of Australia handed down its decision in *PT Bayan Resources TBK v BCBC Singapore Pte Ltd*. This decision considered whether the Supreme Court of Western Australia (SCWA) has the power to issue a freezing order under a prospective foreign judgment, registrable by that court under the *Foreign Judgments Act 1991 (Cth) (Act)*. The High Court found that the SCWA has inherent power to issue such an order and there is no inconsistency with the Act.

The full judgment can be found here: <http://www.austlii.edu.au/au/cases/cth/HCA/2015/36.html>

Australian court enforces domestic arbitral decision based on international law.

The Supreme Court of Victoria, in *Cameron Australasia Pty Ltd v AED Oil Limited*, delivered a judgment refusing to set aside a domestic arbitral award. Of note in this judgment is the court's reliance on international jurisprudence regarding the UNCITRAL Model Law on International Commercial Arbitration, including case law from Hong Kong and Singapore. This case evidences that Australian courts continue to encourage and adopt a consistent approach to both domestic and international arbitration, at least as it relates to commercial dispute resolution.

The full judgment can be found here: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSC/2015/163.html?stem=0&synonyms=0&query=cameron%20australasia>

Government Consultations

Australian governmental committee on PIL

The 2015 newsletter reported on the Australian government consultations on private international law. Since last year, there have been changes made to the committee responsible for overseeing the consultations process. Still chaired by the Attorney-General's Department, it is now called the Law, Crime and Community Safety Council and has a broader mandate than its predecessor given it has subsumed two committees to become a broader council. Since the change, the Council has not progressed the private international law consultations agenda.

For further information see: <https://www.ag.gov.au/About/CommitteesandCouncils/Law-Crime-and-Community-Safety-Council/Pages/default.aspx>

For further commentary see: http://www.internationalaffairs.org.au/australian_outlook/who-you-gonna-call-why-we-need-private-international-law/

Associations and Events

Centre for International Commercial Arbitration Annual Meeting

The annual Australian Centre for International Commercial Arbitration was held in Perth, Australia in November 2015. The conference provided Australian perspectives to the 'amazing world of arbitration', the theme for 2015 and topics touched on regional cases on investor-state arbitration, disputes at the intersection of internet governance and international trade among others.

For the full program and contributors see: <http://acica.org.au/assets/media/Events/2015/ACICA-Conference-Perth-2015.pdf>

Australian and New Zealand Society of International Law Conference

Australia and New Zealand: The Australian and New Zealand Society of International Law held its 23rd annual conference in July 2015 in Wellington, which included a number of panels on issues related to private international law (as well as public international law issues).

For the full program and conference contributors see: <http://anzsil.org.au/Resources/Documents/2015%20ANZSIL%20Program%20WEB.pdf>

Recent Scholarly Work

The third edition of the seminal textbook, *Private International Law in Australia*, authored by Mortensen, R; Garnett, R; Keyes, was released in 2015. A review of this edition was published in the Australian journal, *Law Institute Journal*.

The University of Auckland has established the first electronic database dedicated to New Zealand scholarship on private international law. According to the database website, the content on the basis of two main criteria: -whether the publication was produced by a New Zealand researcher and/or-whether the publication addresses issues relevant to New Zealand conflict of laws/PIL. See: <http://www.conflictz.auckland.ac.nz/> ■



GLOBAL CONFLICT OF LAWS

—Editors: Cristián Giménez Corte & Javier Toniollo



Commentaries on Private International Law is proud to introduce this new section of the newsletter. As the readers of *Commentaries* know, we present information on new developments

on PIL related to all five continents. However, in our research, the editors encountered many new developments that were difficult to classify under any regional category. As a result, we decided to classify them under a new category: Global Conflict of Laws. The aim of this new section is to present developments that are not necessarily linked to one particular region or country, but that are truly transnational or global. Under the heading Global Conflict of Laws, we include information on rules, regulations, judicial and quasi-judicial decisions that are global in their origin and global in their effect. In other words, rules and regulations that are not produced by national law-making processes and do not have a determined territorial scope of application.

Global Conflict of Laws issues includes, of course: international commercial arbitration, international investment arbitration, and international sport arbitration. They also include transnational principles or rules issued by intergovernmental organizations such as Unidroit, non-governmental "formulating agencies" such as the International Chamber of Commerce, and international treaties adopted by international organizations such as the United Nations.

Global Conflict of Laws is of the opinion that PIL, as a science, can offer tools and techniques to solve problems of coordination and legitimation of different legal sources and authorities, even when such sources are not State laws and such authorities are not State courts.

Last but not least, we would like to express our gratitude to Adriana Chiuchquievich, Carola Filippon, Lucia Chignolli, and Javier Reinick, for their assistance in the research and edition of the new section "Global Conflict of Laws."

Transnational Principles and Soft Law

The Hague Conference on PIL approves the Principles on Choice of Law in International Commercial Contracts

On March 19, 2015, the Hague Conference on PIL adopted the **Principles on Choice of Law in International Commercial Contracts**, which "do not constitute a formally binding instrument," and thus may be considered a of sort of hybrid legal device in-between a collection of principles, a piece of soft law, a model law, a code of best practices, or even a model contract. As stated in the official commentary, the "overarching aim of the Principles is to reinforce party autonomy" in a wide and flexible way, allowing the parties to a contract to choose domestic law, international law, and even transnational "rules of law."

The Principles apply to international commercial or professional contracts, excluding consumer and employment contracts. In turn, the Principles adopt an "objective" criterion of internationality, and at the same time a "presumption" of internationality, establishing that "a contract is international unless each party has its establishment in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State."

It should be noted that the Principles expressly uphold the application of *overriding mandatory rules and public policy (ordre public) by national courts, and also by international arbitrators*. It is notable that UNCITRAL has endorsed The Principles. For more details see: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=13>

UNGA adopts resolution on Basic Principles on Sovereign Debt Restructuring Processes

On September 10, 2015, the United Nations General Assembly (UNGA) adopted a resolution on "Basic Principles on Sovereign Debt Restructuring Processes."

In the context of sovereign debt litigation between investment funds and developed countries, UNGA stressed the need for a set of principles for the management and resolution of financial crises that balance the obligations of sovereign debtors and their creditors. UNGA recalled that states have a right to restructure debt, negotiations

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between creditors and debtors should be carried out in good faith, and that transparency and impartiality should be ensured. In addition, the resolution establishes principles of non-discrimination and equitable treatment for creditors. In particular, the resolution establishes the principle of immunity of jurisdiction and execution of sovereign states before foreign domestic courts (Principle 6). Also contemplated is an incipient principle of determining a "majority" of creditors, which would be required for the approval of restructuring agreements, thus mirroring national bankruptcy processes.

For the full text of the resolution: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/319

International Treaties

United Nations adopts Convention on Transparency in Treaty-Based Investor-State Arbitration

On December 10, 2014, the United Nations adopted the "Convention on Transparency in Treaty-Based Investor-State Arbitration" (Resolution N° 69/116). The Convention is a legal instrument by which parties to investment treaties express their consent to apply the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. The rules consist of a set of procedures for making information publicly available in investor-State arbitrations that arise under investment treaties.

A key goal of the Convention is to make itself applicable to parties of investor-State arbitration, even if the arbitration was not initiated under the UNCITRAL Arbitration Rules. That is, before the Convention enters into force, the Rules on Transparency are only applicable under the UNCITRAL Arbitration Rules.

In a way, the Convention utilizes a classical PIL technique: the *renvoi*, mandating the application of the Rules on Transparency. As Article 2.1 reads: "The UNCITRAL Rules on Transparency shall apply to any investor-State arbitration..." By doing this, the *renvoi* technique not only makes formally applicable the Rules on Transparency, but also infuses them with the full force of law, not only by making them mandatory, but also by transforming a mere private set of voluntary "rules" into an official and formal source of law: a treaty.

Interestingly, Article 1.1 states that the "Convention applies to arbitration between an investor and a State or a

regional economic integration organization." This would require a supranational organization with legal personality to enter into treaties, which are hierarchically superior to national law.

In turn, articles 7 and 8 of the Transparency Rules includes a number of very interesting conflicts of law rules as they establish criteria to solve conflicts between different sources of law, of different natures and different hierarchies. That is, conflict between "rules", between "rules" and "treaties", and between "rules" and "laws."

From a substantive point of view, the Convention takes a very important step forward towards the openness and, yes, transparency of arbitration. Arbitration procedures have been long criticized because, unlike ordinary judicial proceedings, they are not public. The Convention introduces very interesting tools in this regard, making arbitration documents publicly available, allowing presentations by third parties, and even making hearings open to the public. It does this while trying to find a balance with the confidentiality principles, which are proper to arbitration proceedings. It appears that the push for the openness of arbitration procedures has been based on human right principles – specifically by those judicial principles enshrined in the Universal Declaration of Human Rights.

Full text of the Convention: <https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf>

The Hague Convention on Choice of Court Agreements is finally coming into force

The Hague Convention of 30 June 2005 on Choice of Court Agreements is an important international instrument finally came into force on October 1, 2015. Eight years ago, Mexico ratified the Convention, but stood alone, until June 11, 2015, when the European Union also ratified the Convention.

The main goal of the Convention is to provide a reciprocal regime with respect to exclusive choice of court agreements in civil or commercial matters, offering greater certainty to parties that their choice of forum will be respected. Moreover, it also helps ensure that any judgment will be enforceable in other jurisdictions – at least between Mexico and the members of the European Union (except Denmark).

The Convention contains three basic rules: 1. The chosen court must hear the case (except in limited circumstances (Art. 5); 2. Any court not chosen must, in principle, decline

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to hear the case (Art. 6); 3. Any judgment rendered by the chosen court must be recognized and enforced in other Contracting States, except where certain grounds for refusal apply (Arts. 8 and 9).

Similar to the Hague Principles (but contrary to the UNCITRAL Model Law on International Commercial Arbitration) the Convention adopts an “objective” criterion of internationality. At the same time a presumption of internationality is established, meaning that a case is “international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.”

See full text of the Convention here:

<https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf>

Trans-Pacific Partnership Accord Reached and Text Released

A final agreement was reached between 12 countries on the Trans-Pacific Partnership (TPP) on October 5, 2015. The accord ties together countries that represent roughly 40% of the world’s economy, eliminating a wide variety of trade barriers and tariffs and establishing an investor-state dispute settlement mechanism. However, the TPP also includes contentious regulations such as in the areas of agriculture, intellectual property, services, investment, the environment, health and employment. As a result the agreement has generated criticism and opposition from these sectors. A full and detailed analysis of this agreement and its roughly 6,000 pages is beyond the scope of this publication but there are many provisions in the TPP that directly address PIL issues including: investor-state dispute settlement, arbitration, and choice of laws.

In particular, the treaty grants foreign investors that believe that governmental regulations contravene the TPP the right to sue governments in arbitral tribunals under the ICSID or UNCITRAL arbitrations rules (Article 9.18).

Those tribunals shall apply the following law:

Article 9.24: Governing Law:

“1. Subject to paragraph 3, when a claim is submitted under Article 9.18... (Submission of a Claim to Arbitration) ... the tribunal shall decide the issues in

dispute in accordance with this Agreement and applicable rules of international law.

2. Subject to paragraph 3 and the other provisions of this Section, when a claim is submitted under Article 9.18.1... (Submission of a Claim to Arbitration), ... the tribunal shall apply:

- (a) the rules of law applicable to the pertinent investment authorisation or specified in the pertinent investment authorisation or investment agreement, or as the disputing parties may agree otherwise; or
- (b) if, in the pertinent investment agreement the rules of law have not been specified or otherwise agreed:
 - (i) the law of the respondent, including its rules on the conflict of laws; and
 - (ii) such rules of international law as may be applicable.”

Interestingly, Para 3 of this articles establishes that “A decision of the Commission on the interpretation of a provision of this Agreement under Article 27.2.2(f) (Functions of the Commission) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.”

For the full text of the TPP see:

<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

Recent Scholarly Work

ICC launches Study on developing neutral legal standards for international contracts

On 15 October 2015, the International Chamber of Commerce presented the Study on “Developing Neutral Legal Standards for International Contracts” in a Conference held in Rome, under the slogan “Towards a Transnational Approach for Choice of Law Clauses.” The study is aimed at international lawyers, showing the importance of national legal standards for international commercial contracts to avoid problems that arise when each party tries to impose its own national law and national jurisdiction. The study shows that parties to international contracts are able to choose the transnational *lex mercatoria* and the *Unidroit Principles* as the applicable law to the contract and that the jurisprudence of national courts generally refuses to set aside arbitral awards that result from the application of *lex mercatoria* or transnational principles.

For the full text of the study see <http://store.iccwbo.org/content/uploaded/pdf/Developing%20neutral%20legal%20standards%20for%20Int%20contracts.pdf> ■