



COMMENTARIES ON PRIVATE INTERNATIONAL LAW

THE PILIG NEWSLETTER

Notes from the Editor

We are pleased to present the third 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 and Justin Monsenepwo Joost; Asia, by Chi Chung, Yao-Ming Hsu and Bélig Elbalti; the Americas by Cristian Giménez Corte and Jeannette Tramhel (Central and South America), and Freddy Sourgens and Mayra Cavazos Calvillo (North America); Europe, by Massimo Benedettelli, Marina Castellaneta, and Antonio Leandro; and Oceania, by Jeanne Huang. 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, Russian, Italian, French, German, Turkish, Vietnamese, and Chinese.

This third issue of *Commentaries* covers more countries and includes in greater detail recent developments in our field. Each regional section 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. The main developments covered by *Commentaries* occurred during 2016, including only a few developments occurred in late 2015 and early 2017.

In this third issue, *Commentaries* continues to develop a section introduced last year.

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This section is called “**Global Conflict of Laws**,” edited by Cristián Giménez Corte and Javier Toniollo, presents 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.

The comprehensive global approach to PIL provided by *Commentaries*, as it reports new developments on PIL from all the five continents, allows *Commentaries* to make apparent the main current **global trends in PIL**.

Perhaps the most important global development on PIL during last year was the **crisis of supra-national law** and supranational institutions. The paradigmatic symptom of this crisis surfaced in the decision of the United Kingdom to leave the European Union, better known as **Brexit**. Moreover, the decision of the **United States administration to stop the Trans-Pacific Partnership** (TPP) negotiations and to **withdraw from the Paris Agreement** on climate change is another very important indicator of this switch. This crisis of supra-national law has been preceded by the withdrawal by Bolivia (2007), Ecuador (2009), and Venezuela (2012) from international organizations such as the International Centre for Settlement of Investment Disputes (ICSID), and the more recent attempts from South Africa, Burundi, and Gambia to leave the International Criminal Court (ICC). In the same vein, recent decisions by the High Court of Ghana and the Supreme Court of Argentina refuse to enforce judgments from regional supranational courts.

Yet, in a seemingly opposite direction, the bulk **PIL codification** in the EU is produced through supra-national **regulations**, but not through national

legislations. In addition, Canada and the EU signed the **Comprehensive Economic and Trade Agreement (CETA)**, still –unlike the TPP, the CETA seems to better protect national public policies over transnational interest, and it establishes an investment official *court*, instead of ad-hoc *arbitral* tribunals. In the same line, new developments on the application of supranational regulations are being witnessed by African countries parties to the Economic Community of Western African States (ECOWAS).

From a more traditional **inter-national** perspective, the role and importance of **intergovernmental organization (IO)** in the development of PIL is ever-increasing, as demonstrated by the work of the Organization of American States (OAS), the Hague Conference, UNCITRAL, UNIDROIT, the Organization for the Harmonization of Business Law in the Caribbean (OHADAC), and the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA).

Family, as we all know, is an important thing. This is shared by the international community as the newest developments of PIL occurred in family law. This includes new EU regulations on the property of international couples, ratification of the Convention on the Protection of Adults by Latvia and Monaco; and the ratification of the Convention on Parental Responsibility by Norway, Serbia, and Turkey. In addition, Ghana and Kyrgyzstan acceded to the Convention on Intercountry Adoption, and Mauritius and Congo passed new national legislation on international adoption. In this same line, Bolivia, Pakistan and the Philippines acceded to the *Child Abduction Convention*, while Turkey acceded to the *Child Support and Family*

Maintenance Convention. Noteworthy, the Turkish Constitutional Court decided on a leading international child abduction case, and the CJEU rendered an important decision on the execution of maintenance obligations.

The second place in new developments on PIL is for **commercial and investment arbitration**. In this regard, Senegal adopted a new arbitration law, and India passed a new Arbitration and Conciliation Act, while the parliaments of Argentina, Australia, and New Zealand have proposed amendments to their current laws on the matter. In addition, the International Chamber of Commerce (ICC), and arbitral institutions in Sweden and Australia issued new arbitrations rules. Furthermore, the Netherlands, Switzerland, Canada, and Mauritius ratified the Transparency in Treaty-based Investor-State Arbitration. Very importantly, **Phillips Morris** lost two important investment arbitrations battles against Australia and Uruguay.

The **Olympic Games** held in Rio de Janeiro in 2016 has made clear the close relations between PIL and the **lex sportiva**, as case law from Fiji and the Court of Arbitration for Sports (CAS) have shown.

Regarding protection of **assets**, the EU passed a new Account Preservation Order procedure (EAPO), while and the CCJA of the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA) rendered a decision based on the Uniform Act on Simplified Debt Collection Procedures and Enforcement.

As the need for communications among countries continues to grow, so

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does international **procedural law**. The EU passed a new regulation simplifying the legalization of foreign documents. Morocco and Chile acceded to the *Apostille* Convention, Vietnam acceded to the Service Convention, and courts in Canada and the US decided leading cases related to servicing abroad.

Relations between PIL and **human rights** continue to get closer as case law on the human right of access to justice and arbitration (EU), international same sex couples (Italy), rights of **refugees** (Germany) are indicating.

The classical PIL issue on extra-territorial jurisdiction and extra-territorial application of rules and regulations is being debated vividly. Recent UK and CJEU case law seems to *favor* the principle of **extraterritoriality**, while the USSC delivers an opinion on the presumption *against* the extraterritoriality doctrine.

Important issues regarding the **immunity** of foreign states and of international organizations were addressed by different US courts. Of particular relevance was the decision of a US court to uphold the **United Nations** immunities in the cholera case, leaving thousands of victims without a remedy.

There appears to be a new trend on connecting **PIL** and the fight against **terrorism**. A new US act narrows the scope of foreign sovereign immunity in terrorism-related cases, a court in Ontario enforces a US judgment against Iran on this matter, and a US court decided in a case related to the Palestinian Authority and the Palestine Liberation Organization based on the lack of jurisdiction.

China seems to have changed its policy on recognition of foreign judgments, as in a recent case a Chinese court enforced a foreign judgment on the basis of **reciprocity**.

In Latin America and the Caribbean, the *Convention on Private International Law of 1928*, best known as the "**Bustamante Code**" seems to have revived, as the Bahamas has ratified it and Brazil courts are applying it.

The CJEU, the Supreme Court of Brazil, and a Federal Court of Australia decided controversial international **consumer** cases.

Noteworthy, the Supreme Court of Venezuela decided on questions of **conflicting nationalities and PIL**, and in particular regarding the required nationality to run for public office of president Maduro, in away echoing the debate over the nationality of former US president Obama.

To sum up, after a long and triumphant rise, which at a certain moment seemed to be unstoppable, it seems that supra-national law is now undergoing a deep crisis. Nation states are reconsidering the convenience of transferring sovereignty to supranational institutions and claiming it back. The world may be experiencing a rebirth of the more classical international law, reflecting new horizontal cooperation policies among countries, rather than vertical impositions from above. Needless to say, this more horizontal international cooperation scheme would require more assistance from conflict of law rules. In any case, why has supra-national law, somehow, failed? There are, for sure, many causes, but a very important one is the lack of democratic legitimacy of supra-

national law, and perhaps, more generally the feeble legitimacy of international law as a whole.

Can PIL contribute, through its conflict of law methodology, not only to the formal systematization but also to the substantive legitimation of the rules of a global system of law?

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 the PILIG co-chairs, Freddy Sourgens and Kabir Duggal, 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 Sheila Ward, Matthew Gomez, and Mitsue Steiner. And I would like also to express our gratitude to Adriana Chiuchquievich, Emilia Gonzalez Cian y Martin Cammarata, 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

Co-Chairs Notes

We are very pleased to provide you with the third 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>.

During the last academic year PILIG hosted two successful webinars. The first webinar addressed conflict of laws. It took place on September 29, 2016. The webinar featured a leading voice in conflict of laws scholarship, Dean Symeon C. Symeonides of Willamette University College of Law in Salem, Oregon. Dean Symeonides spoke to PILIG members from NYU Law School. Dean Symeonides spoke to PILIG members on the topic of Choice of Law Codifications and Conventions in the Last Fifty Years: What Can We Learn From Them? The webinar addressed the adoption of nearly 200 national codifications and international conventions in the last fifty years. Dean Symeonides compared and appraised the way in which these codifications resolve tort and contract conflicts, respond to some of the fundamental philosophical dilemmas of PIL, such as whether the choice-of-law process should aim for "conflicts justice" or "material justice," struggle to attain the optimum equilibrium between the perpetually-competing needs for legal certainty on the one hand and flexibility on the other; and succumb to ethnocentric protectionist urges, despite lofty internationalist rhetoric.

You can relive the webinar at the following link: <https://www.youtube.com/watch?v=HuLht1eAOb8>.

The second webinar addressed commercial law. The webinar featured one of the world's leading experts in transnational commercial law and commercial law codification, Prof. Dr. Boris Kozolchyk. Prof. Dr. Boris Kozolchyk is the Founding Director & Director of Research at the National Law Center for Inter-American Free Trade and DeConcini Professor of Law at the James E. Rogers College of Law at the University of Arizona.

AFRICA

—Editors Richard Frimpong Oppong & Justin Monsenepwo Joost



In 2016, there has been a vibrant development of private international law (PIL) in the **African French speaking countries**. The increase of regional integration has led to an intensification of cross-border transactions and, thus, to a greater need for PIL rules. In the first place, it appears that international arbitration continues to be a growing matter, as evidenced by the national regulations adopted by some Member States of the Organization for the Harmonization of Business Law in Africa (OHADA), and the ongoing revision of the OHADA Uniform Act on Arbitration Law of 11 March 1999. One further highlight of PIL in African French Speaking countries has been the entry into force of the Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents for the Kingdom of Morocco.

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You can view the webinar at the following link: <https://www.youtube.com/watch?v=AwVei5c2Ms>.

PILIG further again awarded a scholarship prize for scholarship written by junior authors. The committee consisted of Lucas Lixinski (chair), Jacob Jorgensen and Kabir Duggal. Ms. Roxana Banu from the University of Toronto carried away the trophy for her work *A Relational Feminist Approach to Private International Law*. A link to the winning entry can be found at the following link: <http://repository.law.umich.edu/mjgl/vol24/iss1/1/>. A summary of this work is provided in this edition of the newsletter.

Freddy Sourgens and Kabir Duggal
PILIG Co-Chairs



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In addition, the Democratic Republic of the Congo, Ivory Coast, Tunisia, and Rwanda have passed new laws and regulations encompassing provisions related to private international law issues, such as international adoption, international investment, and cross-border insolvency. Last but not least, there were many conferences and publications on the development of international arbitration in the OHADA region on the need for harmonized conflict of laws rules in the OHADA region.

In turn, the PIL scene in **African English speaking countries** remained relatively quiet in 2016. There were no major pieces of legislation dedicated to private international law issues and only a few academic papers on African PIL were published. A few African countries enhanced their engagement with The Hague Conference on Private International Law by becoming parties to the Conference's conventions. There was a steady stream of decided cases on the subject, but none decided any controversial points of law. There were several significant cases decided or litigated in respect of gay rights. Although none of the cases raise a private international law issue, the jurisprudence in these cases may ultimately prove persuasive in future cases with conflict of laws dimensions. In the Botswana case of *Attorney General of Botswana v Thuto Rammoge*, (Civil Appeal No CACGB-128-14, Court of Appeal of the Republic of Botswana, 2016) the refusal of the Minister to allow the registration of the organization, Lesbians, Gays and Bisexuals of Botswana, was held to be unconstitutional as it infringed on the respondent's right to freedom of assembly and association. Also, worth mentioning is a pending case in Kenya challenging the constitutionality of the country's penal laws to the extent that they purport to criminalize private consensual sexual conduct between adult persons of the same-sex. The court has certified the case as involving a "substantial question of law" (*Eric Gitari v Attorney General* [2016] eKLR). A similar constitutional challenge is also pending in Malawi (*The Republic v Mussa Chawisi, The Republic v Mathew Bello, The Republic v Amon Champyuni*, Malawi High Court, 2016). Finally, in June 2016, Seychelles repealed the anti-homosexuality provision in its Penal Code; see Penal Code (Amendment) Act, 2016

International Conventions

Djibouti becomes a new Member of the Permanent Court of Arbitration

Djibouti deposited its instrument of accession to the 1907 Hague Convention for the Pacific Settlement of International Disputes with the Ministry of Foreign Affairs of The Netherlands, the depositary of the Convention, on 17 February 2016. It thereby became a Member State of the PCA, effective 17 April 2016. Djibouti is the 119th Member State of the PCA.

The full text of the announcement may be found here: <https://pca-cpa.org/en/news/new-pca-member-state-djibouti/>.

Ghana accedes to the 1993 Hague Convention on Intercountry Adoption

On 16 September 2016, Ghana 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 and became the 98th Contracting State to the Convention. The Convention entered into force for Ghana on 1 January 2017. It is the first Hague Convention that Ghana has joined.

The full text of the announcement may be found here: <https://www.hcch.net/en/news-archive/details/?varevent=520>.

Hague Conference and Mauritius sign an agreement to modernise intercountry adoption regime in line with the 1993 Hague Convention

On 20 May 2016, the government of Mauritius and the Permanent Bureau of the Hague Conference on Private International Law signed an agreement to assist Mauritius with modernising its intercountry adoption regime in line with the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. Under the Agreement, an Expert will assist the Attorney General's Office with drafting a new intercountry adoption law. They will also advise the Prime Minister's Office on an appropriate structure for a Central Authority, and provide training on the 1993 Hague Convention to the relevant authorities and bodies in Mauritius.

The full text to the announcement may be found here: <https://www.hcch.net/en/news-archive/details/?varevent=487>.

The Apostille Convention enters into force for Morocco

On 14 August 2016, the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (Apostille Convention) entered into force for the Kingdom of Morocco. Morocco acceded to the Apostille Convention on 27 November 2015, and became



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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=513>.

Swaziland accesses the Cape Town Convention

On 17 November 2016, the Kingdom of Swaziland's instrument of accession to the Convention on International Interests in Mobile Equipment was deposited with UNIDROIT. The Convention will enter into force only after the entry into force of a protocol.

Further details about the Convention are available at the <http://www.unidroit.org/depositary-2001capetown-aircraft>.

Côte d'Ivoire Accedes to the Convention on the Limitation Period in the International Sale of Goods

Côte d'Ivoire has deposited its instrument of accession to the Convention, which entered into force for Côte d'Ivoire on 1 September 2016. The Convention, adopted on 12 June 1974, establishes uniform rules governing the period of time within which legal proceedings arising from an international sales contract must be initiated. The Convention was amended by a Protocol adopted in 1980 to harmonize it with the United Nations Convention on Contracts for the International Sale of Goods (CISG).

For detailed information see http://www.uncitral.org/uncitral/en/about/press_releases.html.

Sierra Leona and the Democratic Republic of Congo Access the Convention on International Interests in Mobile Equipment and to the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment

Sierra Leona and the Democratic Republic of Congo instruments of accession to the Convention on International Interests in Mobile Equipment and to the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment were deposited with UNIDROIT. The Convention and the Aircraft Protocol entered into force for the Republic of Sierra Leone on 1 November, and for the Democratic Republic of the Congo on 1 September 2016.

Further details about the Convention and Aircraft Protocol are available at the <http://www.unidroit.org/depositary-2001capetown>.

National Legislation

Ivory Coast implements the OHADA Uniform Act on Insolvency Law

By Decree No. 2016-48 of 10 February 2016, the Republic of Ivory Coast created the National Control Commission of judicial representatives for the implementation of the Uniform Act on Insolvency Law of 10 April 1998 of the Organization for the Harmonization of Business Law in Africa (OHADA)

The full text of the Decree is available here: <http://www.ohada.org/attachments/article/364/2016-48.pdf>.

Democratic Republic of the Congo: Revision of Act No. 87-010 of 1 August 1987 relating to Family Law

On 15 July 2016, the Democratic Republic of the Congo adopted Act No. 16-008 amending Act No. 87-010 of 1 August 1987 relating to Family Law. The new Family Law Act encompasses several provisions in respect of international adoption: Article 651 sets out specific conditions for the adoption of a Congolese child by a foreign national; further, Article 653b provides that the international adoption of a Congolese child may be authorized only for the State with which the Democratic Republic of the Congo is bound by an international Convention on international adoption at the time of the judicial decision. Moreover, Article 923bis provides that the examination of new applications for all international adoptions is suspended until the establishment of the Office for Adoptions.

The full text of the new Act is available here: <http://www.leganet.cd/Legislation/Code%20de%20la%20famille/Loi.15.07.2016.html>.

Rwanda: The National Bank regulates the activities of issuers of electronic money

The Governor of the National Bank of Rwanda has enacted the Regulation No. 08/2016 of 1 December 2016 governing the activities of electronic money issuers. The Regulation includes provisions pertaining to the issue, the redemption, and the transfer of electronic money. It is important to note that Article 16 of the Regulation provides that electronic money issuers must exist as a limited company incorporated under Rwandan law. In case the electronic money issuer is a subsidiary of a foreign parent company, that subsidiary must have an independent management, a board of directors, and a separate accounting system. Nevertheless, the foreign parent company may still be represented in the board of directors of the subsidiary. Furthermore, the financial

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accounts of the subsidiary may be included in the group's consolidated financial accounts.

The full text of the Regulation can be found here: <http://juriafrique.com/blog/2016/12/01/rwanda-reglement-n-082016-du-01-12-2016-regissant-les-emetteurs-de-monnaie-electronique/>.

Senegal: Adoption of internal laws relating to OHADA arbitration and insolvency law

By Decree No. 2016-1192 of 3 August 2016, the Republic of Senegal designated the national courts having jurisdiction over matters related to the appointment and the disqualification of arbitrators, taking of interim measures, examination of appeals against arbitral awards and the enforcement of awards for the operation of the OHADA Uniform Act on Arbitration Law of 11 March 1999. The full text of the Decree may be found here: <http://www.ohada.com/content/newsletters/3136/senegal-decret%20n-2016-1192-03-aout%202016.pdf>.

Moreover, by Decree No. 2016-570 of 26 April 2016, the Republic of Senegal defined the status of judicial representatives for the implementation of the OHADA Uniform Act on Insolvency Law of 10 April 1998. More specifically, the Decree sets out rules in respect of the access to and the exercise of the activity of judicial representative. It also encompasses provisions regarding the composition and the functioning of the regulatory body of judicial representatives. This Decree is complemented by an Inter-Ministerial Order of 31 May 2016 determining the rate of remuneration of judicial representatives.

The full text of the Decree may be found here: <http://www.ohada.com/content/newsletters/3136/senegal-decret%20n-2016-570-27-avril-2016.pdf>.

Tunisia: New Investment Act

In September 2016, the Tunisian legislature adopted Act n°71-2016 of 30 September 2016 which aims to promote investments in Tunisia - especially foreign investments - by enhancing both the freedom to invest and the investors' protection measures. The new Investment Act entered into force on 1 January 2017 and has repealed and replaced the former Tunisian Investment Incentive Code ("*Code d'Incitations aux Investissements*") enacted by Act n°93-120 of 27 December 1993. The new Investment Act reaffirms the principle of freedom to invest in Tunisia (Article 4). This principle, which was already enshrined in the Former Investment Code, is

now combined with a guarantee of non-discrimination: Under comparable conditions, a foreign investor will not be treated less favorably than a Tunisian investor. For instance, the new Investment Law has removed the scheme of prior approval, which was only applicable to some foreign investors under the Former Investment Code. Moreover, the new Investment Law sets out that both Tunisian and foreign investors will benefit from the same protection as far as possessory and intellectual property rights are concerned. It prohibits expropriation of an investor, unless it is in the public interest and subject to fair and equitable compensation (although the text remains silent on the preliminary nature of this compensation). In addition, the new Investment Law provides foreign investors with some advantages, such as the free transfer of funds abroad and the possibility to recruit foreign management. In respect of the possibility to recruit foreign management, note that the former Investment Code had already granted the possibility to recruit four foreign managers for each business. Under the new Investment Law, any business may have 30% of its management staff composed of foreign managers during the first three years of its incorporation or effective entry into operation, and 10% from the fourth year onwards, under certain conditions.

The full text of the Tunisian new Investment Act is available here: <https://www.droit-afrique.com/uploads/Tunisie-Loi-2016-71-investissement.pdf>.

African Case Law

The OHADA Court of Justice and Arbitration

Created by Article 3(2) of the Treaty on the Harmonization of Business Law in Africa signed in Port Louis on 17 October 1993 (hereinafter referred to as the OHADA Treaty), the Common Court of Justice and Arbitration (hereinafter referred to as CCJA) is the **supranational court of OHADA**. It has four main functions. First, it reviews the drafts of the Uniform Acts. According to Articles 6 and 7 of the OHADA Treaty, the CCJA controls the consistency of the drafts of the Uniform Acts with the OHADA Treaty before the Council of Ministers adopts them. Secondly, the CCJA also plays the role of an arbitration center. As such, it supervises the institutional arbitration pursuant to Articles 21 to 26 of the OHADA Treaty and the

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Arbitration Rules of Procedure of the Common Court of Justice and Arbitration of 11 March 1999. The CCJA does not in itself resolve the disputes. It appoints or confirms the arbitrators, is informed of the conduct of the proceedings, and reviews draft awards. Further, it rules on the disputes which may arise with respect to the recognition and the execution of those awards. Thirdly, the CCJA may be consulted by any Member State, the Council of Ministers, or any national court for the interpretation and the uniform application of the OHADA Treaty, the Regulations, the Uniform Acts, and the Decisions of OHADA (Article 14(1) of the OHADA Treaty). Fourthly, the CCJA is also a court of final appeal (Article 14(3) of the OHADA Treaty). As such, it rules on decisions in civil and commercial matters that are taken by appellate courts of the Member States in all matters pertaining to the application of the Uniform Acts and the Regulations of OHADA. Judgments of the CCJA are directly enforceable in all Member States as if they were judgments of a national court (Article 20 of the OHADA Treaty).

Uniform Acts are defined by Articles 1 and 5 of the OHADA Treaty as acts enacted for the adoption of harmonized rules in the OHADA Member States. They are adopted by the OHADA Council of Ministers following a procedure set out in Articles 6 to 12 of the OHADA Treaty. Under Article 10 of the OHADA Treaty, Uniform Acts are directly applicable in all OHADA Member States. This means that Uniform Acts (i) apply immediately as legislative acts in all OHADA Member States, without needing to be transposed into national law for them to be effective; (ii) confer rights and obligations on individuals, and may therefore be invoked directly before national courts; (iii) override national law ninety days after their adoption by the Council of Ministers. Litigation pertaining to elements of the Uniform Acts is settled in the first instance and on appeal by the courts of the Member States. As of April 2017, there are nine uniform acts in force. These include acts regulating general commercial law, commercial companies and economic interest groups, secured transactions, simplified debt collection procedures and enforcement measures, insolvency, arbitration, accounting, carriage of goods by road, and, most recently, cooperative societies.

OHADA Case Law

Common Court of Justice and Arbitration (CCJA) of OHADA: payment order under the Uniform Act on Simplified Debt Collection Procedures and Enforcement Proceedings

In *Samir Firzli and Soad Firzli v. Dagher Roland Habib and Dagher Roland Bechara*, Mr. and Mrs. Firzli, domiciled in Libanon, requested before the Court of First Instance of Abidjan a payment order against Mr. Dagher Roland Habib and Mr. Dagher Roland Bechara, domiciled in Abidjan (Ivory Coast). By order No. 339 of 29 February 2012, the Court ordered Dagher Roland Habib and Dagher Roland Bechara to pay to Mr. Samir Firzli and Mrs. Soad Firzli the amount due. However, on 5 December 2012, after Mr. Dagher opposed this judgment, the Court of First Instance of Abidjan rendered Judgment No. 2501 which declared the claim for reimbursement of the spouses Firzli unfounded, considering that the procedure for the simplified recovery of debts initiated pursuant to Article 1 of the Uniform Act on Simplified Debt Collection Procedures and Enforcement Proceedings was not applicable to the claim for payment of the claim since there was a serious dispute over the claim. Upon appeal lodged by the spouses Firzli, the Court of Appeal of Abidjan upheld the judgment of the First Instance Court of Abidjan under Appeal No. 625 / CIV 3A. On 1 December 2016, based on Articles 1 and 2 of the Uniform Act on Simplified Debt Collection Procedures and Enforcement Proceedings, the CCJA overturned the judgment of the Court of Appeal of Abidjan, holding that the recovery of a claim that is certain, of a fixed amount and due, may be requested pursuant to the payment order procedure. Moreover, pursuant to Article 2 of the Uniform Act on Simplified Debt Collection Procedures and Enforcement Proceedings, the CCJA reaffirmed that the payment order may be granted when (i) the debt arises from a contract, or (ii) the commitment results from the issuance or acceptance of any negotiable instrument, or a check with no funds or with insufficient funds. See in re *Samir FIRZLI and Soad Firzli v. Dagher Roland Habib and Dagher Roland Bechara*, Reference 165/2016 of 1 December 2016 (Common Court of Justice and Arbitration, 2016).

The full text of the judgment of the CCJA can be found here: http://biblio.ohada.org/pmb/opac_css/doc_num.php?explnum_id=1983.

Common Court of Justice and Arbitration (CCJA): lack of jurisdiction in respect of facts unrelated to OHADA law

In re *Société de Tuyauterie Industrielle et Opérations dite S.T.I.O*

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SARL *v. Mr. Alfred Domec*, the CCJA held that it has no jurisdiction to consider facts that are unrelated to the application of Uniform Acts or Regulations of OHADA. The Société de Tuyauterie Industrielle et Opérations (SITO) SARL, whose headquarter is located in Brazzaville (Republic of Congo), filed an appeal with the CCJA against Judgment N° 002 folio 112 / C010 / 05 of 19 February 2013, claiming that the Court of Appeal of Pointe-Noire had violated Articles 132 and 134 of the Code of Civil Procedure and Articles 2044 and 2015 of the Civil Code of the Republic of Congo. The CCJA held that such an appeal, made in breach of the provisions of Article 28 of the Rules of Procedure of the Common Court of Justice and Arbitration, was unrelated to the application of the Uniform Acts and the Regulations. Therefore, such an appeal fell outside the jurisdiction of the CCJA. See in the matter *Société de Tuyauterie Industrielle et Opérations dite S.T.I.O SARL v. Mr. Alfred Domec*, Reference 034/2016 of 29 February 2016 (Common Court of Justice and Arbitration, 2016). The full text of the judgment can be found here: http://biblio.ohada.org/pmb/opac_css/doc_num.php?explnum_id=1184.

National Case Law

Lagos High Court Refuses Enforcement of a Substantial Judgment of an English court

In *Accessbank Plc v Akingbola* (2015) 5 CLRN 77-103, the bank obtained a substantial judgment from the High Court of England and Wales against the respondent and sought to register it at the Lagos High Court. The judgment debtor challenged the jurisdiction of the Lagos State High Court to register the judgment. The principal basis of the objection was that the original cause of action in the English court related to breach of the judgment debtor's duty in the unlawful purchase of shares as the director of a company – a matter relating to the Company and Allied Matters Act, which was within the exclusive jurisdiction of the Federal High Court of Nigeria. The court upheld the objection of the judgment creditor by holding that only the Federal High Court could entertain claims relating to the enforcement of the said English judgment and register it as a judgment of its own. This was because had the original cause of action been litigated in Nigeria, only the Federal High Court would have had exclusive jurisdiction to entertain the original cause of action.

High Court of Ghana Refuses Enforcement of a Judgment from the Economic Community of West African States (ECOWAS) Court of Justice

In *the Matter of an Application to Enforce the Judgment of the Community Court of Justice of the ECOWAS against the Republic of Ghana and In the Matter of Chude Mba v The Republic of Ghana*, Suit No. HRCM/376/15 (High Court, Ghana, 2016) the High Court of Ghana rejected an application which sought an order from the Court to enforce an \$800,000 award (in damages) and 500,000 Naira (in costs) default judgment obtained from the ECOWAS Court of Justice. The applicant had successfully sued the Government of Ghana for violations of his fundamental human rights. The court rejected the application because, first, neither the Protocol of the ECOWAS Court nor the Treaty establishing ECOWAS has been given the force of law in Ghana by the Parliament of Ghana exercising its powers under article 75(2) of the Constitution of the Republic of Ghana, 1992. Second, the statutory regime for enforcing foreign judgments in Ghana operates on the bases of designation and reciprocity and the ECOWAS Court is not stated as one of the Courts to which the legislation applies. The court did not examine whether the judgment could be enforced at common law.

Tunisian Cour de Cassation on the Indirect Jurisdiction of Foreign Courts

After the adoption of new private international law rules in 1998, it was not clear whether Tunisian courts, dealing with the enforcement of foreign judgments, have to control *inter alia* whether the foreign rendering court had jurisdiction or not. The overwhelming majority of academic opinions have been in favor of a very liberal interpretation limiting the control of the jurisdiction of the foreign court to the only cases to which Tunisian courts claim exclusive jurisdiction as provided for by Article 8 of the 1998 PIL Code. Accordingly, in cases other than those which fall under the exclusive jurisdiction of Tunisian courts, the requirement of the review of the indirect jurisdiction of foreign courts is to be deemed abolished (for more details and critical analyses of the this opinion under Tunisian law, see Béligh Elbalti, *The Jurisdiction of Foreign Courts and the Enforcement of their Judgments in Tunisia - A Need for Reconsideration*, *Journal of Private International Law*, Vol.8 (2,) 2012, 195 s).

With this respect, on January 20, 2016, the Tunisian *Cour de Cassation* rendered a very important decision dealing with issue of the review of the indirect jurisdiction of foreign courts in Tunisia. The case concerned an action on the enforcement of a French Judgment rendered by the Paris



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Court of Appeal ordering the judgment debtor to pay a certain amount of money in a contractual dispute. The judgment debtor challenged the enforcement of the French judgment on the ground that the French court lacked international jurisdiction arguing that the dispute falls under the exclusive jurisdiction of Tunisian courts. The court proceeded by examining the argument of the judgment debtor. It held that cases over which Tunisian courts have exclusive jurisdiction according to Article 8 are limitative and that these cases do not include disputes in contractual matters. It continued by explaining that disputes that do not fall under the exclusive jurisdiction of Tunisian courts are cases subject to their concurrent jurisdiction according to the ordinary rules of international jurisdiction. The court concluded by stating that according to Article 11 PIL Code, the *exequatur* shall not be granted to foreign judicial decisions if *inter alia* the subject matter of the litigation falls within the exclusive jurisdiction of Tunisian courts, which is not the case of the action brought before it and considered that the lower court which admitted the *exequatur* petition correctly applied the law.

For more information see *Infosjuridiques* No. 228/229 November 2016, p. 21 (in Arabic).

Associations and Events

41st Session of the Council of Ministers of OHADA

From 16 to 17 June 2016, the Ministers of Justice and Finance of the seventeen OHADA Member States gathered in Brazzaville (Republic of Congo) for the 41st session of the Council of Ministers of OHADA. The Council reviewed the normative work carried out during the previous year and charted the course for future work. Some of the key decisions included the computerization of the management of the OHADA Trade and Personal Property Credit Register ("*Régistre du Commerce et du Crédit Mobilier*"), the creation of national registers, and the continuation of the revision of the following Uniform Acts: the Uniform Act on the Organization and Harmonization of Companies Accounting in The States Parties to the Treaty on the Harmonization in Africa of Business Law, the Uniform Act on Arbitration law and Commercial Mediation, and the Uniform Act On Simplified Debt Collection Procedures And Enforcement Proceedings. Further, the Permanent Secretary announced the preparation of new Uniform Acts on Conflict of Laws, on the circulation of foreign public documents, on mediation, and on subcontracting agreements.

The minutes of the session are available here: http://oroafrica.org/wp-content/uploads/2016/06/2016_Juin_Compte-rendu-du-Conseil-des-Ministres-de-IOHADA.pdf. For more information, see <http://www.ohada.com/actualite/3198/42e-session-du-conseil-des-ministres-de-l-ohada.html>.

Cooperation Agreement Between OHADA and UNCITRAL

On 26 October 2016, OHADA, the Organization for the Harmonization of Business Law in Africa, represented by its Permanent Secretary, Professor Dorothe Cossi Sossa, and UNCITRAL, the United Nations Commission on International Trade Law, represented by its Secretary General, Mr. Renaud Sorieul, signed a Cooperation Agreement in Brazzaville (Republic of Congo). The ceremony was on the margins of the 42nd session of the Council of Ministers of OHADA. The Agreement aims to enhance cooperation on topics of common interest and to promote the exchange of information and carry out joint actions in view of stimulating international commercial transactions.

For more information, see <http://www.ohada.com/actualite/3197/signature-d-un-accord-de-cooperation-entre-l-ohada-et-l-onu.html>.

ERSUMA: seminar on international secured transactions within the OHADA region

On 5 December 2016, the Higher Regional School of Magistracy (ERSUMA) of OHADA organized in Porto Novo a seminar for judges, lawyers, notaries, court's clerks and bailiffs on the OHADA regulation in respect of international secured transactions. More specifically, the seminar examined the provisions of the revised Uniform Act on Secured Transactions of 15 December 2010.

For more information on the seminar, see: <http://www.ohada.com/actualite/3243/lancement-de-la-session-de-formation-sur-la-constitution-et-le-contentieux-des-suretes-dans-l-espace-ohada-ersuma-porto-novo-05-decembre-2016.html>.

Centre d'Arbitrage du GICAM (CAG)

On 1 December 2016, the Arbitration Center of GICAM (Centre d'Arbitrage du GICAM) organized a conference in Douala (Cameroun) on the subject: "International arbitration and the jurisprudence of the OHADA Common Court of Arbitration and Justice". The conference examined the case law of the Common Court of Justice and Arbitration in respect of international arbitration in the OHADA region.

For more information see <http://www.ohada.com/actualite/3224/conference-sur-le-theme-la-jurisprudence-ccja-en-matiere-d-arbitrage-le-1er-decembre-2016-a-douala.html>.

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Centre de Conciliation et d'Arbitrage du Mali (CECAM)

On 28 and 29 September 2016, the Conciliation and Arbitration Center of Mali (Centre de Conciliation et d'Arbitrage du Mali) organized in Bamako (Mali) a conference on the subject : « Arbitration and national courts in the OHADA region ». This conference analyzed the role of national courts in international arbitration as organized by the OHADA Uniform Act on Arbitration Law of 11 March 1999, and the cooperation between domestic jurisdictions and arbitral courts in the OHADA region.

For more information see <http://www.ohada.com/actualite/3145/symposium-arbitrage-et-justice-etatique-dans-l-espace-ohada-bamako-28-et-29-septembre-2016.html>.

Association pour la Promotion de l'Arbitrage en Afrique (APAA)

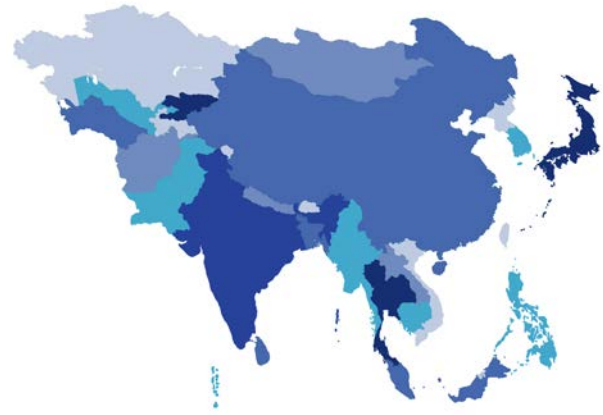
On 14 and 15 January 2016, the Association for the Promotion of Arbitration in Africa (Association pour la Promotion de l'Arbitrage en Afrique) held a colloquium in Lomé on the subject: "The Cooperation between domestic jurisdictions and arbitral courts in the OHADA region".

For more information see <http://www.ohada.com/content/newsletters/2990/rapport.pdf>.

Scholarly Work

The following publications examine interesting issues in African private international law: Pontian N Okoli, *Subject Matter Jurisdiction: The Recognition and Enforcement of English Judgments in Nigeria and the Need for a Universal Standpoint* (2015-2016) 17 Yearbook of Private International Law 507-525; Richard Frimpong Oppong *The High Court of Ghana Declines to Enforce an ECOWAS Court Judgment* (2017) 25 African Journal of International and Comparative Law 127-132; Samson Odetayo, *A Critical Assessment of the Validity and Recognition of Same-Sex Marriage under the Nigerian Legal System* (2016) 24 African Journal of International and Comparative Law 420-438; Marlene Wethmar-Lemmer, *The Vienna Sale Convention and Party Autonomy – Article 6 Revisited* 2016 Journal of South African Law 255; Marlene Wethmar-Lemmer, *Applying the CISG via the Rules of Private International Law: Articles 1(1)(b) and 95 of the CISG – Analysing CISG Advisory Council Opinion 15* 2016 (1) De Jure 58, Francis Lefebvre, *Code pratique OHADA, Traité, actes uniformes et règlements annotés*, Paris, 2016 ; Franck Nicéphore Yougoné, *Arbitrage Commercial International et Développement – Etude du Cas de l'OHADA et du MERCOSUR*, Paris, 2016 ; Dora Hélène Eboa, *Le Capital Social*

ASIA —Editors: Bélig Elbalti, Chi Chung & Yao-Ming Hsu



Private International Law is developing fast in Asia. Last year a record number of international treaties and conventions on PIL have been ratified by various Asian countries, in particular numerous conventions developed under the auspices of The Hague Conference on Private International Law on children and family matters. At the national level, it worth mention the entering into force of the new Vietnamese Civil Code, which includes important PIL provisions; and the amendment of the Indian Arbitration and Conciliation Act. Regarding case law, judicial decisions issued by the supreme

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dans les Sociétés Commerciales, Sarrebruck, 2016 ; Emilia Oneyrna, *The Transformation of Arbitration in Africa – The Role of the Arbitral Institutions*, Alphen aan den Rijn, 2016 ; Emmanuel KAGISYE, *Les conflits de normes dans l'espace OHADA*, Paris, 2016 ; Justin Monsenepwo, *Apport des Instruments de la Conférence de La Haye au droit des affaires dans l'espace OHADA* (2016) 5 Junges Afrikazentrum 1-33 ; Etienne Alla Koffi, *La preuve de la Loi Etrangère en Côte d'Ivoire* (2016) 6 ERSUMA Law Review 273-304; Karel Osiris Coffi DOGUE & Valencia ILOKI ENGAMBA, 'Pratique de Conciliation en matière d'injonction de payer OHADA' (2016) 6 ERSUMA Law Review 30-326 ; Cédric Carol Tsafack Djoumessi, 'La confidentialité dans la procédure arbitrale dans l'espace OHADA' (2016) 6 ERSUMA Law Review 591-598 ; Patrice Samuel A. Badji, 'Les orientations du législateur OHADA dans l'AUSCGIE révisé' (2016) ERSUMA Law Review 9-34 ; Véronique Carol Ngonon, 'Réflexions sur l'espace judiciaire OHADA' (2016) 6 ERSUMA Law Review 197-224 ; Nandjip Moneyang, 'Scolie sur quelques points de formalisme de l'exécution des décisions de justice non répressives en droit OHADA' (2016) ERSUMA Law Review 417-432. ■



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courts of Turkey, Japan, Singapore, and the Philippines have addressed key PIL issues, changing the established jurisprudence of the concerned countries. Remarkably, special international commercial courts are starting to play an increasingly important role in Dubai and Singapore.

International Conventions

Pakistan accesses the 1980 Hague Child Abduction Convention

On 22 December 2016, Pakistan deposited its instrument of accession to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, and thus became the 96th Contracting State to the Convention. The Convention entered into force for Pakistan on 1 March 2017.

For detailed information see <https://www.hcch.net/en/news-archive/details/?varevent=532>.

Turkey ratifies the 1996 and 2007 Hague Conventions

On 7 October 2016, Turkey signed and deposited its instruments of ratification to 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* (1996 Child Protection Convention) and to the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (2007 Child Support Convention). Both Conventions entered into force for Turkey on 1 February 2017.

For more details see <https://www.hcch.net/en/news-archive/details/?varevent=522>.

Azerbaijan accedes to the UN Convention on Contracts for the International Sale of Goods

On 5 September 2016, Azerbaijan acceded to the United Nations Convention on Contracts for the International Sale of Goods (CISG), and thus the country became the eighty-fifth State Party to the Convention. The Convention entered into force for Azerbaijan on 1 June 2017.

For more information see http://www.uncitral.org/uncitral/en/about/press_releases.html.

Kyrgyzstan accedes to the 1993 Hague Convention on Intercountry Adoption

On July 25, 2016 Kyrgyzstan acceded to the Convention on the Protection of Children and Co-operation in Respect

of Intercountry Adoption Convention (Hague Adoption Convention). The Convention entered into force for Kyrgyzstan on 1 November 2016.

For more information <https://www.hcch.net/en/news-archive/details/?varevent=512>.

The Philippines accedes to the 1980 Child Abduction Convention.

On 16 March 2016, the Philippines deposited its instrument of accession to the 1980 Child Abduction Convention. It will become the 94th Contracting State to this Convention.

For more information see <https://www.hcch.net/en/news-archive/details/?varevent=475>.

Viet Nam accesses the Hague Service Convention

On 16 March 2016, Viet Nam deposited its instrument of accession to the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service Convention), for which it will become the 71st Contracting State.

For more information see <https://www.hcch.net/en/news-archive/details/?varevent=475>.

Singapore ratifies The Hague 2005 Choice of Court Convention

On 2 June 2016, Singapore deposited the instrument of ratification to the *Convention of 30 June 2005 on Choice of Court Agreements*. The ratification of the 2005 Convention by Singapore is a landmark. Singapore is the 30th State/REIO (Regional Economic Integration Organization) that ratifies the Convention and the first Asian State to join the Convention. The Convention, which entered into force on 1 October 2015, applies between Singapore and the other Contracting States as from 1 October 2016.

For more information <https://www.hcch.net/en/news-archive/details/?varevent=491>.

National Legislation

New Conflicts rules in the new Vietnamese Civil Code entered into force

On January 1, 2017 the new Civil Code passed by the National Assembly of Vietnam on 24 November 2015 effectively entered into force replacing the old Civil Code of 2005. The new Code contains conflicts of law rules on civil relations involving foreign elements (Part V – Civil Relations Involving Foreign Elements, Articles 663 et s.).

English translation of the new code is available at <http://>

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hethongphapluatvietnam.com/law-no-91-2015-gh13-dated-november-24-2015-the-civil-code.html.

For a commentary see: Tran Thi Thu Phuong, "Vietnam's New Law on the Right of Parties to Choose Applicable Law in Civil Relations Involving Foreign Elements", *Journal of Politics and Law*, Vol. 9 (4), 2016 available at <http://www.ccsenet.org/journal/index.php/jpl/article/view/58708>.

Hong Kong signs agreement with the Mainland China on mutual assistance in taking of evidence in civil and commercial matters

On December 29, 2016, an Agreement on mutual assistance in taking evidence in civil and commercial matters between the Hong Kong Special Administrative Region (HKSAR) and the Mainland China, was signed. The scope of assistance includes: examination of witnesses, obtaining of documents and inspection, photographing, preservation, and custody or seizure of property (Art.6). General expenses incurred in the execution of the requested matter by the requested party are to be borne by the requested party. (art.9.1) The requested party should as far as practicable complete the requested matter within six months from the date of receipt of the letter of request (art.10.1). Any problem arising from the implementation of this Agreement or any amendment to be made to this Arrangement should be resolved through consultations between the Supreme People's Court and the HKSAR Government. (art.11).

The full text of the Arrangement is now available at: <http://www.doj.gov.hk/eng/topical/pdf/mainlandmutual4e.pdf>.

New Indian Arbitration and Conciliation Act

The Indian Arbitration and Conciliation Act, 1996, which was based on the UNCITRAL Model Law, has been amended. The Arbitration and Conciliation (Amendment) Act, 2015 was promulgated by the President of India on December 31, 2015, has proposed extensive changes to the Arbitration Act, in particular attempting at reducing the length of the arbitral process and intervention of state courts in it..

For the full text see of the law <http://www.prsindia.org/uploads/media/Arbitration/Arbitration%20and%20Conciliation%20bill.%202015.pdf>

For an analysis of the new law <http://www.mondaq.com/india/x/494184/Arbitration+Dispute+Resolution/Critical+Analysis+Of+The+Arbitration+And+Conciliation+Amendment+Act+2015>.

National Case Law**Japanese Supreme Court Rules on "The Special Circumstances Theory" and Parallel Proceedings**

On March 10, 2016, the Japanese Supreme Court rendered a very important decision in which it gave some guidance under which Japanese courts, although competent to hear a dispute, could decline jurisdiction on the basis of the so-called "special circumstances theory." According to this theory as adopted by the Supreme Court decision of November 11, 1997 and codified in the new Article 3-9 Civil Procedure Code (CCP), Japanese courts may dismiss without prejudice the whole or a part of an action brought before them when they find that there are special circumstances that would impair the fairness and promptness of the proceeding and equity between the parties.

For a comparison between the Japanese special circumstances theory and *forum non conveniens* as practiced in common law jurisdictions, see Koji Takahashi, "The Jurisdiction of Japanese Courts in a Comparative Context", *Journal of Private International Law*, vol. 11(1), 2015. 103 s. Provisional English translation of the decision is available at http://www.courts.go.jp/app/hanrei_en/detail?id=1450.

Chinese Court Enforces a Foreign Judgment on the Basis of Reciprocity

Can Chinese courts recognize and enforce foreign judgments in the absence of an international treaty on the basis of reciprocity? Some scholars answer affirmatively (provided that it is shown that the courts of the rendering state had already recognized a Chinese judgment (See G Tu, *Private International Law in China* (Springer, 2016) 171). However, it was shown that Chinese courts have never recognized foreign judgments on the ground of reciprocity in the absence of an international treaty. This has been the case even when it was shown to the enforcing court that a Chinese judgment has been recognized and enforced by the courts of the rendering state (B Elbalti, "Reciprocity and the Recognition and Enforcement of Foreign Judgments – A lot of Bark but not much Bite", *Journal of Private International Law*, 2017 (forthcoming)).

However, in an unprecedented reported decision rendered by the end of the last year (December 9, 2016), the Nanjing Intermediate People's Court decided that a judgment rendered by a Singaporean court could be enforced in China based on the principle of reciprocity in the absence of an international treaty between the two countries. The case concerned the enforcement of a judgment rendered by the Singapore High Court against a Chinese textile company. The

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judgment debtor challenged the enforcement of the Singaporean judgment arguing that there were no bilateral treaty between China and Singapore on the matter. However, the court ruled that even in the absence of a treaty, the Republic of Singapore has recognized in 2014 a Chinese judgment, and therefore, a judgment rendered by a Singaporean court which satisfies the conditions laid down by Chinese law can be recognized and enforced in China, based on the principle of reciprocity. It should be noted that even the Nanjing Intermediate People court represents a very important and positive move towards the recognition and enforcement of foreign judgments in China on the basis of reciprocity. Still, such recognition and enforcement are nevertheless subjected to the restrictive condition of the existence of a prior foreign precedent that shows that a Chinese judgment had been given effect by the courts of the rendering state. Accordingly, following a traditional interpretation of the reciprocity requirement in China, it would not be sufficient to prove that Chinese judgments are likely to be recognized and enforced in the rendering state.

For a summary report of judgment is available at <https://asiatoday.com.au/content/chinese-court-recognises-singapore-judgment-based-principle-reciprocity>.

Philippine Supreme Court on the Recognition of Foreign Judgments

It is not always clear whether foreign judgments can be recognized in the Philippines without being reviewed on the merit. According to SEC. 48, Rule 39 (b) a judgment against a person is a presumptive evidence of a right between the parties and that that “the judgment or final order may be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact (emphasis added).” The last part of this provision is particularly alarming since it suggests that foreign judgments can be recognized in the Philippines only after being reviewed on the merits (see *Philsec Investment Corporation v. Court of Appeals*, G.R. No. 103493, June 19, 1997, 274 SCRA 102, 110, where the Court declared that “in this jurisdiction, with respect to actions *in personam*, as distinguished from actions *in rem*, a foreign judgment merely constitutes *prima facie* evidence of the fairness of the claim of a party and, as such, is subject to proof to the contrary”). However, in a recent decision rendered in 2015 (*Bank of the Philippine Islands Securities Corporation v. Edgardo V. Guevara*, G.R. No. 167052, March 11, 2015), the Supreme Court confirm a trend in the Philippine case law that does not allow Philippine courts to delve into the merits of a foreign judgment.

The case concerned the enforcement of an American Judgment rendered by a Texan court ordering the judgment debtor the payment of certain amount of money including interests and other legal fees. With regard the power acknowledged to Philippine courts to review the merits of the case, the court quoting one of its precedents, recalled that “If every judgment of a foreign court were reviewable on the merits, the plaintiff would be forced back on his/her original cause of action, rendering immaterial the previously concluded litigation.” It continued by stating that “the foreign judgment or final order enjoys the disputable presumption of validity. It is the party attacking the foreign judgment or final order that is tasked with the burden of overcoming its presumptive validity. A foreign judgment or final order may only be repelled on grounds external to its merits, particularly, want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.” The court continues refuting the argument according to which the court has to look into the merit of the foreign judgment because the foreign court has committed a clear mistake of law and fact. According to the court a “ Philippine court will not substitute its own interpretation of any provision of the law or rules of procedure of another country, nor review and pronounce its own judgment on the sufficiency of evidence presented before a competent court of another jurisdiction. Any purported mistake petitioner attributes to the U.S. District Court ... would merely constitute an error of judgment in the exercise of its legitimate jurisdiction, which could have been corrected by a timely appeal before the U.S. Court of Appeals.” It is true that it is not always clear how can the presumptive validity of foreign judgment can be challenged before the Philippine courts on the basis of a clear mistake of law or fact without being reviewed as to their merits. But still the directive of the court is clear as it encourages the enforcing courts to limit their control to the external aspects of the foreign judgment.

Text of the judgment is available at <http://www.chanrobles.com/cralaw/2015marchdecisions.php?id=259>.

Turkish Constitutional Court decided on international child abduction case

The Turkish Constitutional Court examined, for the very first time, an allegation of violation of rights protected by the Turkish Constitution in the proceedings before the Turkish courts in relation to the 1980 Hague International Child Abduction Convention. The Court decided by majority that the applicant’s right to respect for family life, which is guaranteed under Art 20 of the Constitution, was violated.

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For more information see <http://conflictoflaws.net/2016/turkish-constitutional-court-on-international-child-abduction/> and http://www.familylaw.co.uk/news_and_comment/.The-Turkish-Constitutional-Court-on-international-parental-child-abduction-judgment-of-Marcus-Frank-Cerny#.V_LeAYjhCM9.

Singapore Court finds that the Laos-China BIT extends to Macao

On September 29, 2016, the Court of Appeal of Singapore determined in *re Sanum Investments Limited v. Lao People's Democratic Republic* that the bilateral investment treaty (BIT) between China and Laos applies also to Macao, ruling that Sanum Investments could invoke the BIT against Laos for its claim of capital investment benefit losses through unfair taxes. The BIT did "not expressly state whether it would or would not in due course apply to Macao" when the treaty was signed back in 1993, and Macao became a territory of China only in 1999. The Court main line of reasoning was that "because a treaty is binding in respect of the entire territory of a State, the [Moving Treaty Frontier] Rule presumptively provides for the automatic extension of a treaty to a new territory as and when it becomes a part of that State."

For more information see <https://www.asil.org/blogs/singapore-court-reinstates-award-against-laos-finding-laos-china-bit-extends-macao-september>.

For an analysis see <http://kluwerarbitrationblog.com/2016/11/11/sanum-v-laos-the-singapore-court-of-appeal-affirms-tribunals-jurisdiction-under-the-prc-laos-bit-part-ii/>.

Associations & Events

Hague Conference Asia Pacific Week 2016 in Tokyo-Japan

From 27 to 30 June 2016, the Hague Conference on Private International Law organized with the assistance of the Ministry of Foreign Affairs of Japan, Waseda University, The University of Tokyo and Chuo University a number of conferences as part of the the HCCH Asia Pacific Week 2016. On June 27, a Conference celebrating a decade of the 2006 Hague Securities Convention took place at Chuo Law School. The conference, which commemorated the 10th anniversary of the convention's promulgation, brought together academics, lawyers, and stakeholders in the securities field to debate the pros and cons of accession to the Convention from international and Japanese perspectives. On June, 28, a Seminar on the Hague

Conference and Japan took place at the University of Tokyo during which the role of the Hague Conference and its Conventions as well as the Hague Conference's Asia Pacific Regional Office was discussed. Finally, on June 29-30, an Asia Pacific Symposium on the 1980 Hague Convention took place at Waseda University during which problems in the operation of the 1980 Convention was analyzed and addressed. The Symposium was attended by over 200 participants, including judges, government officials, legal practitioners, academics and other experts from the Asia-Pacific Region and other States.

For more information see <https://www.hcch.net/en/news-archive/details/?varevent=505>.

CAPPIL Meeting on the Asian Principal of Private International Law – Doshisha University, Japan

From 12 to 14 December 2016, the Commission on Asian Principles of Private International Law (CAPPIL) held its second meeting under the Chairman of Professor Naoshi Takasugi (Secretary of the CAPPIL). Representatives of different Asian jurisdictions were present and discussed different issues relating to private international law. Discussions of the Commission during this meeting focused on issues relating to civil and commercial matters, including judicial support of international commercial arbitration; recognition and enforcement of foreign judgments in civil and commercial matters; jurisdiction in civil and commercial matters; conflict of laws in tort; conflicts of laws in contract and general rules of private international law.

Scholarly Work

Asian scholars have written excellent studies on PIL matters. Among those, we would like to mention the following: Sai Ramani Garimella & Stenilla Jolly (ed.), *Private International Law – South Asian States' Practice*, (Springer, 2017). Guangjian Tu, *Private International Law in China* (Springer, 2016). Zheng Sophia Tang, Yongping Xiao & Zhengxin Huo, *Conflict of laws in the People's Republic of China* (Elgar Publishing, 2016). Alejandro Carballo Leyda (ed.), *Asian Conflict of laws, East and South East Asia* (Wolter Kluwer Law & Business, 2015). Cheng Minzhu, *The Chinese Law on Conflict of Laws and Its Interpretation by the Supreme Court*, in N. Nord, G. Cerqueira (eds.), *International Sale of Goods - A Private International Law Comparative and Prospective Analysis of Sino- European Relations*, China-EU Law Series 5, Preface Claude Witz, Springer, 2017, pp. ix-xvi..

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Conflict of laws within conflict of laws: the DIFC and the SICC Legal Systems

The Dubai International Financial Center (DIFC) enjoys a quasi autonomous legal regime within the sovereign legal structure of the Emirate of Dubai, within the United Arab Emirates. With the purpose of establishing Dubai as a legal center for international dispute settlements, the Emirate of Dubai granted the DIFC its own laws and courts, which are different and separated from those laws applicable to, and courts with jurisdiction over the general public. The DIFC courts have competence on civil and commercial matters, are composed not only by Dubai judges but also by foreign judges, including judges from UK, Australia and Singapore. The Courts have jurisdiction to enforce its own decisions “if the subject matter of the execution falls within the Center,” but “if the subject matter of execution falls “outside de Center,” a particular of *exequatur* procedure should be follow.

For more information see <http://difccourts.ae/legal-framework/>.

In turn, the Singapore International Commercial Court (SICC) was established, as was the case of the DIFC, to place Singapore as an international dispute settlement hub. The SICC is a formal division within the structure of the Singapore Supreme Court, it “has the jurisdiction to hear and try any action that is international and commercial in nature” submitted by parties to the SICC. The SICC offers parties to avoid common international arbitration problems including the “overformalisation of, delay in, and rising costs of arbitration; concerns about the legitimacy of and ethical issues in arbitration; the lack of consistency of decisions and absence of developed jurisprudence; and the absence of appeals.” The SICC is composed of national and international judges, including judges from UK, USA, Austria, France, Hong Kong and Japan. Interestingly the SICC rules permit that a “party may be represented by a Registered Foreign Lawyer in an offshore case.”

For more information see <http://www.sicc.gov.sg/Home.aspx>

AMERICAS

Central, South America & Mexico

—Editors: Cristián Giménez Corte & Jeannette Tramhel



Interest in Private International Law (PIL) continues to grow in the region, as evidenced by a number of events that have been held by individual associations this past year, participation by states in international conventions, and discussions by the Inter-American Juridical Committee of the Organization of American States on the future of PIL in the Americas. Particularly noteworthy is renewed interest in the Bustamante Code as a result of a Brazilian court case, the question of required nationality to run for public office in Venezuela, and new Principles for Electronic Warehouse Receipts emerging from the OAS.

International Conventions

Bahamas Accedes to Bustamante Code

On 20 July 2016, the Commonwealth of the Bahamas issued a verbal note that, pursuant to article 6 of the *Convention on Private International Law of 1928*, after six months it would deposit an instrument of accession. It did so on 23 January 2017, albeit with reservations, and in accordance with articles 4 and 6, the Convention came into force for The Bahamas within 30 days.

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For more information see: http://www.oas.org/en/sla/dil/newsletter_%20Inter-American_Treaties_Bustamante_Code_Bahamas_Jan-2017.html.

This Convention was adopted by the sixth Pan-American Congress held in Havana, Cuba in 1928. It is better known as the “Bustamante Code”, in honor of the Cuban jurist Antonio Sánchez de Bustamante y Sirven, a Judge of the Permanent Court of International Justice (1922–1944), who was the lead negotiator and whose ideas directly influenced the content of the Code, which unifies into a single corpus the law on a wide range of PIL matters (including civil, commercial, criminal and procedural matters). For an extensive analysis of the *Bustamante Code* see: Samtleben, Jürgen; *Derecho Internacional Privado en América Latina. Teoría y Práctica del Código de Bustamante*, vol. I, Parte General, translated from German by Carlos Bueno-Guzman, Depalma, Buenos Aires, 1983.

Bolivia Accedes to the Hague Convention on Child Abduction

On 13 July 2016, Bolivia deposited an instrument of accession to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. The Convention entered into force for Bolivia on 1 October 2016. This multilateral instrument protects children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return.

For more information see: <https://www.hcch.net/en/news-archive/details/?varevent=506>.

Chile Accedes to Apostille Convention

On 16 December 2015, Chile deposited its instrument of accession to the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* (the “Apostille Convention”), which entered into force for Chile on 30 August 2016.

For more information see: <https://www.hcch.net/en/news-archive/details/?varevent=455>.

To avoid delays and costs associated with legalization of public documents for use abroad, under the *Apostille Convention* Contracting States have reduced the authentication process to a single formality, namely, issuance of a certificate of authentication (apostille) by a competent local authority. This process has been further advanced by

the electronic Apostille Program (e-APP). Chile and Colombia have implemented both an e-Apostille and e-Register; Brazil, which had acceded to the *Apostille Convention* in 2015, is now among those states that have implemented an e-Register, which include Costa Rica, the Dominican Republic, Mexico, Nicaragua, Paraguay, Peru and Uruguay).

UNASUR Centre for the Settlement of Investment Disputes

The member states of the Union of South American Nations (UNASUR), an [intergovernmental regional organization](#) comprising all 12 South American countries, are making progress towards establishment of a Centre for the Settlement of Investment Disputes. The Center would handle settlement of disputes between investors and UNASUR member states. Although this could be seen to fragment the international standards set out under the ICSID Convention, it may enhance the legitimacy of these kinds of transnational arbitration procedures, in particular in a region where three countries (Venezuela, Ecuador and Bolivia) have withdrawn from the ICSID Convention and Brazil has still not ratified it.

For more information see <https://www.iisd.org/itn/2016/08/10/unasur-centre-for-the-settlement-of-investment-disputes-comments-on-the-draft-constitutive-agreement-katia-fach-gomez-catharine-titi/>.

International Decisions

ICSID: Philip Morris vs Uruguay

In an 8 July 2016 decision, an ICSID Tribunal rejected allegations by Philip Morris that through several measures regulating the tobacco industry Uruguay had violated the bilateral investment treaty (BIT) between Switzerland and Uruguay. The Tribunal found that the regulatory measures were based on the Framework Tobacco Control Convention and on the human right to health. Moreover, to determine whether Uruguay regulatory powers constituted a kind of indirect expropriation, “...the control measures must be taken *bona fide* for the purpose of protecting the public welfare, must be non-discriminatory and proportionate” and in the Tribunal’s view, the regulations satisfied these conditions’. For these reasons, not only was the claim dismissed, Philip Morris was required to pay the Respondent’s costs.

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For full text of the decision see: https://medios.presidencia.gub.uy/tav_portal/2016/noticias/NO_U130/award_eng1.pdf

National Case Law

Brazil: Appellate Decision Revives Interest in Bustamante Code

A decision by the Court of Appeals of São Paulo resulted in priority for an unsecured creditor for a \$27M claim over a \$500M ship mortgage against a vessel registered in Liberia but operating within the Brazilian Exclusive Economic Zone. The Court found that in order for a foreign ship mortgage to be valid in the absence of registration in Brazil, there had to be an international treaty between Brazil and the foreign state, in which respect the Court made reference to: (1) the *International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages* (Brussels, 1926) and (2) the *Bustamante Code* (Havana, 1928) (see above). As Liberia was not party to either treaty, the principle could not be applied. As to the argument that under customary international law a ship mortgage is governed by the law of the flag and deemed valid and enforceable wherever the vessel is located, the Court was not satisfied that such custom had been evidenced. As to choice of law arguments applicable to a moveable asset, the Court found that as the vessel had been installed as a platform intended to be operational for 20 years, application of *lex situs* would be more appropriate. The case is under appeal and is worth following for its implications for PIL and secured lending in the international shipping industry.

See “*The FPSO OSX-3 Case*”; *Nordic Trustee ASA v. Banco BTG Pactual S/A*, São Paulo State Appellate Court, 1 June 2016.

For full text of the decisions see:

<https://esaj.tjsp.jus.br/cposg/search.do;jsessionid=EBD0B48CC9DC7FABBF7F9E95BC4148.cposg10?conversationId=&paginaConsulta=1&localPesquisa.cdLocal=-1&cbPesquisa=NUMPROC&tipoNuProcesso=UNIFICADO&numeroDigitoAoUnificado=2153991-40.2015&foroNumeroUnificado=0000&dePesquisaNuUnificado=2153991-40.2015.8.26.0000&dePesquisa=&uuidCaptcha>

Brazil: Superior Court finds - not an ‘international’ Consumer Case

On 5 April 2016, the Superior Court of Justice determined that a lower Brazilian court lacked jurisdiction to decide a

consumer – supplier case, as the case was internal, rather than international in nature. Although at time of the claim the consumer was domiciled in Brazil, at the moment the contract had been concluded in Portugal, both parties were domiciled in Portugal. Thus, the Court concluded that “there was no intention in the mind of neither the consumer nor the supplier to establish a relationship that goes beyond national boundaries.”

For more information see: <https://cartasblogatorias.com/2016/06/29/brasil-la-desproteccion-internacional-del-consumidor-comentarios-al-recurso-especial-no-1-571-616-mt-5-abril-20161/>.

For full text of the decision see: [\[include link\]](#)

Venezuela: Supreme Court decides questions of Venezuelan Nationality

On 27 April 2016, the Constitutional Chamber of the Supreme Court of Justice addressed a classical PIL problem related to applicable law and jurisdiction over a person holding multiple nationalities when it is precisely this very connecting factor, *i.e.* nationality, which is relevant for the determination of the applicable law. The Court found that, in accordance with article 335 of the Constitution of Venezuela, when a person holds multiple nationalities one of which is Venezuelan, the Venezuelan nationality shall prevail. For more information see: <https://cartasblogatorias.com/2016/05/30/venezuela-nacionalidad-multiple-la-resolucion-los-conflictos-nacionalidades/>.

Later, in October 2016, the same Chamber addressed a related issue regarding the nationality of President Nicolas Maduro; it established that the President is exclusively Venezuelan, does not have any other nationality, and therefore completely fulfills the requirements of article e 277 of the Constitution. However, the Chamber also found that in a hypothetical case, if a person holding two nationalities were to run for public office, that person must withdraw the non-Venezuelan nationality to meet those requirements. For more information see: <https://cartasblogatorias.com/2016/05/30/venezuela-nacionalidad-multiple-la-resolucion-los-conflictos-nacionalidades>, For full text of the decision see: <http://www.tsj.gov.ve/>.

Argentina: Appeals Court finds ICSID Award does not require exequatur proceedings

On 18 August 2015, an Appeals Court found that an ICSID arbitral award issued in favor of a foreign nation state (in the instant case, Peru) against an Argentinean investor, does not

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require *exequatur* proceedings established by the national law of the place where execution of the award is sought; the ICSID award need only have met the requirements set out in the ICSID Convention.

For full text of the decision see: http://fallos.diprargentina.com/2016/06/cci-compania-de-concesiones-de_28.html.

Mexico: Court Reflects on Conflict of Law Rules

A Mexican Court decision of September 2015 may impact conflict of laws theory and practice. During the course of deliberations over applicable law in a request to annul a foreign marriage, the Court reflected that when a legal relationship contains elements that are linked to different legal systems, the role of conflict of laws rules is to ensure that the case is resolved on the basis of a single legal system so as to ensure legal certainty for the parties. The court also alluded to the sources of conflict of laws rules as either international, supranational or domestic and that within this hierarchy, in the absence of an international rule, "it is an internal law that is projected to international situations." The Court noted that most PIL rules have been included in the civil codes of states and then proceeded to apply those rules of the local state (Jalisco).

For more information see: <https://cartasblogatorias.com/2016/08/15/mexico-normas-conflicto-jalisco-matrimonio-celebrado-extranjero/>.

Soft Law

Organization of American States (OAS)

OAS: During its 89th regular session, the Inter-American Juridical Committee (IAJC) adopted a resolution on International Protection of Consumers. The resolution recognizes the need for consumer protection in cross-border dealing, including access to dispute resolution, and the importance of preserving the ability of sellers and suppliers to compete in the marketplace so as to provide a wide range of products and services that comply with health and safety standards.

For the full text of the resolution see:

http://www.oas.org/en/sla/iajc/docs/CJI-RES_227_LXXXIX-O-16.pdf.

OAS: During that same session the IAJC also approved Principles for Electronic Warehouse Receipts for Agricultural

Products, which recognize warehouse receipt financing as a way to address the lack of access to credit in the agricultural sector. In this form of asset-based lending, the stored ("warehoused") products are used as collateral, which increases lender confidence in loan recovery and gives producers greater flexibility to delay sale until prices are more favorable, rather than immediately upon harvest.

For the full text of the report and principles see:

http://www.oas.org/en/sla/iajc/docs/CJI-doc_505-16_rev2.pdf.

Associations & Events

OAS: On 4 April 2016 during its 88th regular session, the IAJC held a conversation with PIL experts in Washington, D.C. on "The Future of PIL in the Americas: The Path Forward for the OAS, the CIDIP Process and the Role of the IAJC." During its next session in Rio de Janeiro, the IAJC, together with the American Association of Private International Law (ASADIP) and the University of the State of Rio de Janeiro (UERJ) organized a meeting at the UERJ Law School to continue the dialogue. PIL topics currently under consideration by the IAJC include the law applicable to international contracts and online settlements of disputes in cross-border consumer transactions.

Organization for Harmonization of Business Law in the Caribbean (OHADAC)

OHADAC: On 6 May 2016, the implementing association for the OHADAC Project concluded an Agreement of Cooperation with the Caribbean Court of Justice. Under the Agreement, both institutions will cooperate towards achieving the implementation of a harmonized business law framework in the Caribbean.

For more information see:

<http://www.ohadac.com/actualite/180/acp-legal-signs-an-agreement-of-cooperation-with-the-caribbean-court-of-justice.html>.

American Association of Private International Law (ASADIP)

held its 10th Conference 10-11 November in Buenos Aires, Argentina, with a focus on "International Contracts." The 11th Conference will take place 9-10 November in Bogota, Colombia to consider "Corporations."

For more information see: <http://www.asadip.org/v2/>.

Chilean Association of Private International Law (ADIPRI)

held its 3rd Conference on 24 November in Santiago, Chile. The conference theme was "New Challenges for Chilean Private International Law in a Globalizing World."

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For more information see: <https://www.facebook.com/ADIPRIChile/>.

Mexican Academy of Private International and Comparative Law (AMEDIP) held its 39th Seminar 18-19 October in Mexico City. Several round table discussions were held on selected topics in international arbitration, alternative dispute resolution, and international family law. For more information see: http://www.amedip.org/convocatoria/2016/programa_2016_seminario_amedip.pdf.

Scholarly Work

Several Latin-American scholars have published insightful studies on PIL during 2016, only a few of which can be mentioned here:

Soto, A., *Temas Estructurales del Derecho Internacional Privado*, 3era ed., Editorial Estudio.
OEA-ASADIP: *Contratos Internacionales*. Ed. Diego P. Fernández Arroyo and José Antonio Moreno Rodríguez (2016).

Filartiga, Ivan, *El Principio Competence-Competence; Análisis Comparativo y su Aplicación en la Legislación de Arbitraje Paraguaya*, (August 29, 2016). SSRN: <https://ssrn.com/abstract=2831780> or <http://dx.doi.org/10.2139/ssrn.2831780>.

Landeró, C., *Recepción de las resoluciones de los tribunales arbitrales ad hoc del artículo 1904 del TLCAN en la práctica jurídica interna de México (segunda parte)*, *Boletín Mexicano de Derecho Comparado* nueva serie, año XLIX, núm. 146, mayo-agosto de 2016, pp. 85-118.

North America

—Editors: Frédéric Gilles Sourgens & Mayra Cavazos Calvillo



Private International Law developments in North America hang under a cloud of uncertainty. With the election and inauguration of Donald J. Trump as President of the United States, United States foreign policy and treaty practice may be at a turning point. Most centrally to this development, the Trump administration at one point worked on a leaked executive order requiring a moratorium on multilateral treaties and a further review of multilateral treaties to which the U.S. currently is a party. Although this multilateral treaty executive order would have exempted a review of trade treaties, many treaties within private international law would have been included within its purview. At the time of this writing, the executive order in question appears to have been withdrawn. Further, after approximately 100 days of the Trump presidency, it appears that the U.S. has resumed a more orthodox course regarding private international law. Nevertheless, there is great uncertainty as to future legislative and treaty developments in North America as a result of the current political situation in the United States. For the leaked executive order on treaties, see: <https://apps.washingtonpost.com/g/documents/world/read-the-trump-administrations-draft-of-the-executive-order-on-treaties/2307/>.

For statement of US private international law treaties awaiting ratification, see: <https://www.state.gov/s/l/c62265.htm>.

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2016 PILIG Prize A Relational Feminist Approach to Private International Law

By Roxana Banu, SJD

A Relational Feminist Approach to Private International Law forges an initial yet long overdue interdisciplinary conversation between feminism – especially relational feminism – and private international law. In this paper I make two interrelated arguments.

First, I argue that relational feminism can break the constant oscillation in private international law theory between state-centric and individualistic perspectives and provide an alternative, relational theory of the self, autonomy, and law. In turn, this would create an important shift in private international law's regulatory function by centering it on the patterns of relationships private international law structures in the transnational realm. I outline the important theoretical and methodological input that relational feminism could bring into private international law, especially in the analysis of transnational surrogacy arrangements, in *A Relational Feminist Approach to Conflict of Laws*, forthcoming in vol. 46 of the Michigan Journal of Gender and Law.

Second, as opposed to simply substituting a new account of the self from outside private international law, I show that a feminist account can build on images of a 'relational individual' that once existed in private international law thought. Relational feminism allows private international law to excavate these lost theoretical



perspectives, as well as to revisit and partly reconstruct its own variations of the relational transnational agent. I recover this lost "relational internationalist" intellectual tradition in private international law's nineteenth century history in my book, *From Conflicts of Sovereignty to Relationships: Recovering Nineteenth Century Relational Internationalist Perspectives in Private International Law*, forthcoming in 2018 with Oxford University Press.

A Relational Feminist Approach to Private International Law focuses on three contributions relational feminism could bring to private international law. First, relational feminism captures feminists' ambivalent rejection of liberalism, hosting both the aspiration for individual empowerment and autonomy and the rejection of individualistic notions of rights. Relational feminism therefore invites skepticism of both individualism and state-centrism in private international law.

Relatedly, relational feminists understand both the importance and the potential oppressiveness of individuals' embeddedness in a web of relationships. This allows them to acknowledge that individuals may sometimes plead for the recognition and preservation of their embeddedness within various relationships and sometimes for ways to reconstruct or escape oppressive relationships. Relational feminists would interpret individuals' claims in private international law in terms of appeals to recognize, transcend or restructure various types of relationships in the transnational realm.

Lastly, because the focus on relationality complicates both the notion of the self, as well as any notion of responsibility, relational feminists openly acknowledge the fluidity and uncertainty of the relational analytical method. Yet they resist a return to formalism or to an alleged neutrality of judicial determinations. Instead, relational feminists would encourage judicial self-consciousness about the uncertainty and contested nature of the values that, directly or indirectly, inform legal determinations in private international law. More importantly, relational feminism encourages an open acknowledgment and discussion about the links that private international law norms and decisions inevitably create between law, relations, and values in the transnational realm.



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International Conventions

United States withdraws from Transpacific Partnership

The United States on January 23, 2017 has withdrawn from the Transpacific Partnership (TPP). TPP is of significance for the entire North American region, as the United States, Mexico, and Canada were all original members. The withdrawal of the United States has serious repercussions for the future viability of TPP. Deprived of its previously leading international proponent, it is likely that further negotiations will be necessary to achieve similar results. The United States will of necessity be one of the leading states needing to incorporate TPP goals by other means. Other states will need to determine whether or not existing commitments made in TPP will continue to be viable without US participation.

As noted in volume 2, issue 2, page 27 of the *Commentaries* there are a number provisions in the TPP that directly address PIL issues including: investor-state dispute settlement, arbitration, and choice of laws.

For the notice of withdrawal, see: <https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific>.

The Potential Renegotiation of NAFTA

During his presidential campaign, President Trump announced his intent to renegotiate NAFTA. The stated purpose of renegotiation was to limit imports into the United States from Mexico, particularly in the manufacturing sector. The stated intent to renegotiate NAFTA led to significant uncertainty in the North American economy. At the time of this writing, it is unclear what position the United States, Mexico, and Canada respectively will take in negotiations and what provisions of NAFTA will be affected. This, too, leads to an uncertain outlook for the development of private international law in North America.

For the most recent statement of President Trump on NAFTA, see: <http://www.freep.com/story/news/politics/2017/04/18/donald-trump-nafta/100614752/>.

Hague Securities Convention (US)

The U.S. deposited its instrument of ratification of the 2006 Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary on December 15, 2016. In light of this date of ratification by the U.S., the Convention entered into force for the U.S. on April 1, 2017. The Convention harmonizes conflict of laws

rules for certain rights in respect of intermediary-held investment securities. In light of growing cross-border transactions in such securities, questions regarding applicable law had significant practical importance. By harmonizing conflicts of law rules, the Convention aspires to address areas of potential practical uncertainty.

For the full text of the Convention, see: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=72>.

For US announcement of ratification and discussion, see: <https://www.state.gov/s/l/c62265.htm>.

Hague Child Support Convention (US)

The U.S. deposited its instrument of ratification of the Hague Child Support Convention on August 30, 2016. In light of this date of ratification by the U.S., the Convention entered into force for the U.S. on January 1, 2017. The Convention supplements existing law established by the Convention on International Recovery of Child Support and Other Forms of Family Maintenance with procedures to streamline international child support disputes.

For the full text of the Convention, see:

<https://www.hcch.net/en/instruments/conventions/full-text/?cid=131>.

For the US announcement of ratification and discussion, see: <https://www.state.gov/s/l/c62265.htm>.

Canada ratified the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration

On 12 December 2016, Canada ratified the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration. Canada is the second State to ratify the Convention, following the ratification by Mauritius on 5 June 2015.

For further information see: <https://www.canada.ca/en/news/archive/2015/03/canada-signs-united-nations-convention-transparency-investor-state-arbitration.html>

National Legislation

U.S. Congress passed the Justice Against Sponsors of Terrorism Act narrowing the scope of foreign sovereign immunity.

On September 28, 2016, Congress voted to override Obama's veto of the Justice Against Sponsors of Terrorism Act (JASTA). JASTA amends the federal judicial code to narrow the scope of foreign sovereign immunity. JASTA authorizes federal courts to exercise personal jurisdiction over any foreign state's support for acts of international

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terrorism against a U.S. national or property. JASTA gives federal courts jurisdiction over a civil claim against a foreign state for physical injury, property or death, occurring outside the U.S. territory, either as a result of an international act of terrorism or by a tort committed by an agent of a foreign state within the scope of their employment.

The full text of the bill may be found here: <https://www.congress.gov/bill/114th-congress/senate-bill/2040/text>

National Case Law

Canadian Supreme Court allows courts to sit extraterritorially

On October 20, 2016, in the case *Endean v British Columbia*, the Canadian Supreme Court held that: "In pan-national [Canadian] class action proceedings over which the superior court has subject-matter and personal jurisdiction, a judge of that court has the discretion to hold a hearing outside his or her territory in conjunction with other judges managing related class actions, provided that the judge will not have to resort to the court's coercive powers in order to convene or conduct the hearing and the hearing is not contrary to the law of the place in which it will be held".

For the full text of the decision see: <https://www.canlii.org/en/ca/scc/doc/2016/2016scc42/2016scc42.html> or *Endean v British Columbia*, 2016 SCC 42

Ontario Court Enforces American Judgments Against Iran

Under the Canadian *State Immunity Act*, foreign states enjoyed immunity of jurisdiction. This privilege includes being sued on a foreign judgment. Nevertheless, in 2012 Canada passed new legislation in order to give victims of terrorism the ability to sue a foreign state that sponsored the terrorism. It also made it easier for foreign judgments against such a state to be enforced in Canada. In the case *Tracy v The Iranian Ministry of Information and Security*, the Superior Court of Ontario considered these new rules and how they applied to a series of American decisions issued against Iran in favour of American victims of terrorist acts which Iran was found to have sponsored. The court found that Iran was not immune from the enforcement proceedings and that the American decisions were enforceable against certain assets of Iran located in Ontario. For detailed information see <http://conflictoflaws.net/2016/ontario-court-enforces-american-judgments-against-iran/>.

Canada: Court of Appeals for Ontario establishes foreign service under Rules of Civil Procedure for Non-Hague Convention service

On June 3, 2016, the Court of Appeals for Ontario ruled that service of process consistent with Canadian Rules of Civil Procedure on a Guatemalan defendant was proper. The party resisting service of process submitted that following Canadian service rules for service of process in Guatemala violated Guatemalan sovereignty and therefore should not be given effect in Canadian courts. The Court of Appeals for Ontario rejected the argument, noting that "The Rules do not purport to legalize service that would be illegal in Guatemala, nor do they purport to declare Ontario is the proper forum for an action. They provide an option as to how service may be effected in a non-Convention state for purposes of an Ontario action. They establish a means of satisfying an Ontario court that foreign defendants have received notice of an Ontario action. As the motion judge noted, the appellants retain their right to challenge the jurisdiction of Ontario's courts over the subject-matter of the action." The Supreme Court of Canada did not permit further appeal on February 23, 2017.

For the full text of the decisions, see: <https://www.canlii.org/en/on/onca/doc/2016/2016onca437/2016onca437.pdf> (Court of Appeals)

<https://www.canlii.org/en/ca/scc-l/doc/2017/2017canlii8581/2017canlii8581.pdf> (Supreme Court)

For further analysis of the decisions, see: <http://www.canadianappeals.com/2017/04/04/no-place-to-hide-service-in-states-that-are-not-signatories-to-the-hague-convention/>.

Canada: Federal Court of Appeal establishes default conflicts rules in transnational copyright litigation

On March 2, 2016, the Federal Court of Appeal remitted a claim alleging copyright infringement and passing off to the Federal Court for re-determination. The claims involve an Indian Punjabi-language newspaper published since 1955, "Ajit Daily". The newspaper began online publication in 2002. Few subscriptions were sold in Canada. The defendants in the matter for appeal in *Sadhu Singh Hamdard Trust* publish a Canadian Punjabi-language newspaper, "Ajit Weekly" since 1993. The *Ajit Weekly* began online publication in 1998. After litigation in the United States, the parties entered into a partial settlement agreement providing for the terms of logo licensing. The settlement maintains the parties respective trademark rights and does not release any prior claims. The parties provided



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insufficient evidence on U.S. law in order to interpret the partial settlement agreement as it related to the claims asserted in the Canadian litigation. The Federal Court of Appeal ruled that under such circumstances, Canadian courts must apply domestic law to the extent it has “no evidence as to the content of foreign law”.

For the full text of the decisions see: <https://www.canlii.org/en/ca/fca/doc/2016/2016fca69/2016fca69.html?resultIndex=1>.

For further analysis of the decision see: <http://www.canadianappeals.com/2016/04/07/missing-the-mark-federal-court-of-appeal-set-aside-dismissal-in-passing-off-and-copyright-case/>

U.S. Supreme Court delivers opinion on the presumption against extraterritoriality doctrine

In 2016, the U.S. Supreme Court was confronted with the question of whether Congress had affirmatively and unmistakably instructed a statute to apply to foreign conduct. On June 20, 2016, the Court decided that in order for a statute to have extraterritorial applicability, there has to be clear indication that Congress intended to do so and, where there is none, the issue is whether the case involves a domestic application of the statute by looking at the statute’s “focus”. The Supreme Court held that the Racketeer Influenced and Corrupt Organizations Act (“RICO”) applies to specific international activity. For example, RICO applies to the prohibition against engaging in monetary transactions in criminally derived property when the defendant is a U.S. person, assassinations of Government officials, hostage taking if either the hostage or the offender is a U.S. national, and the killing of a U.S. citizen. Here, the Court reasoned that Congress gave a clear, affirmative indication that RICO applied to foreign racketeering only to such extent.

The full text of the ruling may be found here: https://www.supremecourt.gov/opinions/15pdf/15-138_5866.pdf as well as *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090

United States: United States Court of Appeals for the District of Columbia Circuit rules that Foreign Sovereign Immunities Act non-commercial tort exception did not apply to cyber-spying

On March 14, 2017, the United States Court of Appeals for the District of Columbia Circuit determined that the non-commercial tort exception did not apply to alleged cyber-

spying by a foreign government. The plaintiff, a U.S. citizen and previously an asylee from Ethiopia, alleged that he was tricked into downloading a computer program infecting his computer with a virus. The virus allegedly permitted the Federal Democratic Republic of Ethiopia to spy on the plaintiff remotely. The plaintiff thereupon commenced tort proceedings against the Federal Democratic Republic of Ethiopia in U.S. courts, alleging that Ethiopia violated Maryland law. The action was dismissed. On appeal, the court clarified that the non-commercial tort exception “abrogates sovereign immunity for a tort occurring entirely in the United States” and that the tort alleged constituted “a transnational tort”. Specifically, the court discussed the jurisdictional exception to foreign sovereign immunity created for non-commercial torts under the FSIA. Given the prevalence of state-related cyber-surveillance, the case is likely to be significant in framing future litigation arising out of similar underlying conduct.

For the full text of the decision, see: [https://www.cadc.uscourts.gov/internet/opinions.nsf/E0C614D73F037CAD852580E3004EE648/\\$file/16-7081-1665840.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/E0C614D73F037CAD852580E3004EE648/$file/16-7081-1665840.pdf).

United States: United States District Court for the District of Columbia rules that Foreign Sovereign Immunities Act permits enforcement of arbitral award even when arbitration claimant fails to abide by procedural steps prior to arbitration including in consent to arbitration

On August 5, 2016, the United States District Court for the District of Columbia ruled that a state consent to arbitration in a multilateral treaty satisfies the arbitration exception to sovereign immunity under the Foreign Sovereign Immunities Act. The case is significant, as the state, Kazakhstan, alleged that the arbitration claimant had failed to follow the procedural steps required under the consent to arbitration to commence arbitration. Specifically, Kazakhstan asserted that the claimant had failed to seek an amicable resolution to the dispute for the period of time required by the consent to arbitration. The District Court rejected the argument. It noted that the consent to arbitration itself was not conditional upon the earlier negotiation period. Consequently, the failure to abide by procedural requirements did not place the suit outside of the consent to arbitration and the arbitration exception to sovereign immunity was deemed applicable by the court.

For the full text of the decision, see: <https://casetext.com/case/stati-v-republic-kazakhstan>.

AMERICAS: North America —continued from page 24**United States: United States Court of Appeals for the Tenth Circuit rules that serving untranslated Chinese-language notice of arbitration on U.S. company may be grounds for non-enforcement of award**

On July 16, 2016, the United States Court of Appeals for the Tenth Circuit ruled that Chinese award would not be enforced under the New York Convention because the original notice of arbitration was in Chinese and thus not reasonably calculated to give notice of claim to the arbitration respondent. The underlying contract involved the sale of solar energy products between a Chinese seller and a U.S. buyer. The contract formed part of a larger set of transactions, some of which expressly stipulated that correspondence and proceedings would take place in English. Correspondence between the parties under the contract at issue in fact took place in English. The contract's arbitration provision, however, was silent on the language of the proceedings, stipulating merely that the Chinese CIETAC arbitration rules would govern proceedings. After ongoing correspondence seeking to settle the dispute, buyer received a Chinese language document, which turned out to be a notice for arbitration. The buyer did not respond promptly. In fact, the buyer failed to act within the window to appoint an arbitrator under the CIETAC arbitration rules and therefore was unable to do so. The court looked to other agreements between the parties as well as their course of performance and course of dealing to determine that use of Chinese language documents under the circumstances failed to provide adequate notice to the buyer of ongoing arbitration proceedings. The court therefore refused to enforce the subsequent award pursuant to New York Convention article V(1)(b) & (d).

For the full text of the decisions, see: <https://www.ca10.uscourts.gov/opinions/15/15-1256.pdf>.

The U.S. District Court for the Western District of Wisconsin decided that the Copyright Act does not cover domestic authorization of foreign infringement

On November 22, 2016, the District Court for the Western District of Wisconsin held that the Copyright Act does not apply to illicit foreign conduct directed from the U.S. The plaintiff, Datacarrier, S.A., ("Datacarrier") an Ecuadorian software company, provided software to the defendant, WOCCU Services Group, Inc. ("WOCCU"), a Wisconsin corporation that provides financial products and services to credit unions outside of the U.S. Eventually, WOCCU began developing its own software replacing Datacarrier's software.

Datacarrier filed a complaint in Ecuadorian Courts which found some similarities between both softwares. The District Court adjudicated the case acknowledging jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338. Datacarrier claimed that WOCCU authorized from the U.S. acts of direct infringement that took place in foreign states, giving rise a claim under the Copyright Act. On the other hand, WOCCU contended that it could not be liable for conduct that occurred outside the U.S. even though such illegal conduct was directed and authorized from the U.S. The Court followed the reasoning of the Ninth Circuit Court in *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, when it was confronted with a similar question. In *Subafilms*, the Court held that wholly extraterritorial acts are not recognized under the Copyright Act.

For the full text of the decision see: <https://casetext.com/case/datacarrier-sa-v-woccu-servs-grp-inc> or *Datacarrier S.A. v. WOCCU Servs. Grp.*, 2016 U.S. Dist. LEXIS 161698

Section 1782 of Title 28 of the United States Code gives power to District Courts to subpoena records located outside the United States

On August 23, 2016, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's decision holding that "the location of responsive documents and electronically stored information" (to the extent that a physical location can be located) does not establish a bar to discovery under § 1782. This Section allows a federal district court to order any person that resides in such district to give her testimony or to produce documents to use in a proceeding before a foreign or international tribunal. The decision follows a marital dispute taking place in Russia in which the Northern District of Georgia had issued an order compelling a company that was involved with the ex-husband of the complainant to produce some documents located outside the United States.

For the full text of the decisions, see: <http://law.justia.com/cases/federal/appellate-courts/ca11/15-13008/15-13008-2016-08-23.html> or *Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194.

In a dispute between a Hong Kong plaintiff and a Canadian defendant, the U.S. Federal District Court dismissed the claim based on forum non-conveniens. The Federal Circuit Court reversed

On March 14, 2016, the U.S. Court of Appeals for the Federal Circuit reversed a Federal District Court decision

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that dismissed a Hong Kong corporation's claim based on forum non-conveniens. Appellant, Halo Creative & Design, Ltd. ("Halo") is a Hong Kong corporation that designs and sells furniture throughout the United States. Appellee, Comptoir Des Indes, Inc., a Canadian Corporation ("Comptoir"), also designs and sells furniture in the U.S., including Illinois. Halo claimed infringement of some of its U.S. design patents, copyrights and trademark and filed suit before the Northern District of Illinois. Comptoir contended that the Canadian Federal Court was a more adequate forum to resolve the dispute since it had jurisdiction to adjudicate intellectual property rights. The District Court granted Comptoir's motion to dismiss based on the doctrine of forum non-conveniens reasoning that Halo could seek relief in Canada because (1) Hong Kong, the U.S. and Canada are signatories of the Berne Convention and (2) Canada could also apply U.S. laws since the U.S. in some occasions has applied foreign copyright laws. The Federal Circuit reversed and found that Canada was not a proper forum to safeguard U.S. copyright, patent, and trademark laws. The Court based its decision on the fact that there was a lack of evidence showing that there was any action taking place in Canada and that Comptoir failed to show that Canada would provide adequate mechanisms for legal redress. For the full text of the decisions, see <http://law.justia.com/cases/federal/appellate-courts/cafc/15-1375/15-1375-2016-03-14.html> or Halo Creative & Design, Ltd. v. Comptoir Des Indes, Inc., 816 F.3d 1366

U.S. Appellate Court Voids Judgment against Palestine for Lack of Jurisdiction

On August 31, 2016, the Second Circuit Court of Appeals overruled a \$650 million verdict against the Palestinian Authority and the Palestine Liberation Organization for harm suffered by Americans through terrorist attacks in Israel. The Second Circuit found that the District Court had erred in exercising jurisdiction, noting that the attacks had occurred "entirely outside the territorial jurisdiction of the United States". It further found that "the federal courts cannot exercise jurisdiction in a civil case beyond the limits prescribed by the due process clause of the Constitution, no matter how horrendous the underlying attacks or morally compelling the plaintiffs' claims. The district court could not constitutionally exercise either general or specific personal jurisdiction over the defendants in this case. Accordingly, this case must be dismissed."

For further details see <https://www.asil.org/blogs/us-appellate-court-voids-judgment-against-palestine-lack-jurisdiction-august-31-2016>.

Associations and Events

AJIL Unbound Symposium on the Third Restatement of Conflict of Laws

The American Law Institute (ALI) has recently initiated the project of elaborating a new Restatement of Conflict of Laws. In this regard, AJIL Unbound organized in 2016 a Symposium to discuss the directions the Third Restatement of Conflict of Laws might take.

For the valuable contributions to the discussion see <https://www.asil.org/blogs/introduction-symposium-third-restatement-conflict-laws>.

For the current status of the restatement process see <https://www.ali.org/projects/show/conflict-laws/>.

ASIL Annual Meeting

The Annual Meeting of the American Society of International Law was held in Washington, D.C. from 12 to 15 April 2017, on the theme "What International Law Values." For more information see: <https://www.asil.org/event/asil-2017-annual-meeting>.

Recent Scholarly Work

Scholars in USA and Canada have published extensively on PIL issues. We would like to mention in particular the following: Pedro J. Martinez Fraga & C. Ryan Reetz, *Public Purpose in International Law: Rethinking Regulatory Sovereignty in the Global Era*, Cambridge University Press: 2015, Lea Brilmayer, *A General Look at Specific Jurisdiction*, 42 Yale Journal of International Law 1 (2017), https://campuspress.yale.edu/yjil/files/2017/03/A-GENERAL-LOOK-AT-SPECIFIC-JURISDICTION-FINAL_Final-Draft-1a7ptmb.pdf, Stacie I. Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, 73 *Washington and Lee Law Review* 1973 (2016) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2737462, Symeonides, Symeon C., *Choice of Law in the American Courts in 2016: Thirtieth Annual Survey* (February 16, 2017). *American Journal of Comparative Law*, Vol. 65, No. 2, 2017. Available at SSRN: <https://ssrn.com/abstract=2919145>, *New Canadian Textbook on Conflict of Laws*, by Stephen G.A. Pitel and Nicholas S. Rafferty, Irwin Law

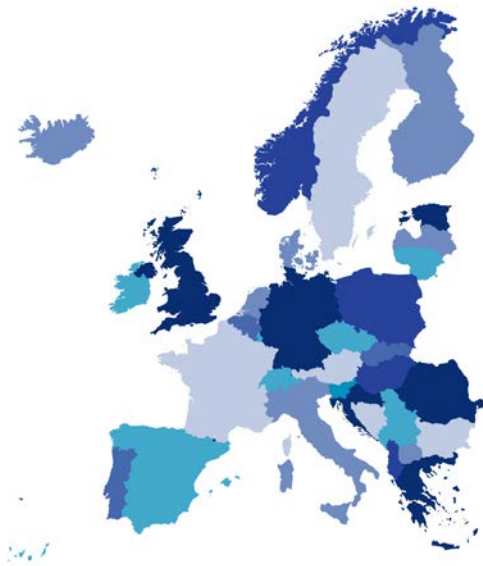
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Ed., 2016, and Zamora Cabot, Francisco Javier, *Access of Victims to Justice and Foreign Conducts: The U.S.S.C. Gives Another Turning of the Screw in the Obb Personenverkeher V. Sachs Case, on Sovereign Immunity* (June 23, 2016). *Revista Electrónica de Estudios Internacionales*, DOI: 10.17103/reei.31.07. Available at SSRN: <https://ssrn.com/abstract=2800997> or <http://dx.doi.org/10.2139/ssrn.2800997>.

EUROPE

—Editors: Massimo Benedettelli, Marina Castellaneta, and Antonio Leandro



The bulk of Private International Law (PIL) developments for the EU Member States relied on the EU activity in the field of the cooperation in civil, commercial and family matters. Regulations concerning matrimonial property regimes, property consequences of registered partnership, cross-border insolvency, freezing order on bank accounts, and simplification in public documents delivery will be implemented between 2017 and 2019. In parallel, the Court of Justice of the European Union keeps addressing requests for preliminary rulings in the same matters so as to strengthen the uniform interpretation of EU PIL and contributing to achieve the *effet utile* of each regulation. Other EU institutions keep their agenda up to date for preparatory works and studies. Future steps obviously need to take into

account the Brexit iter. In the wake of the referendum of 23 June 2016 the UK Government triggered the process to withdraw from the EU according to Article 50 of the Treaty on European Union (TEU). The Brexit process is purportedly to end in 2019, when the United Kingdom will no longer be bound by the EU Law. As a result, all the PIL Regulations will no apply to UK, be the Brexit “hard” or “soft” depending on the final agreement that the UK and the EU will reach in compliance with Article 50 TEU. In addition to the EU PIL, the ongoing sensitivity of the European Court of Human Rights on the interplay between PIL and human rights, the revision of several arbitration rules to make the proceedings under arbitral institutions more expeditious, the updating of some national legal systems designed to face challenges coming from social developments, and, finally, the activated competence of the EU in negotiating and entering into treaties in investment matters, deserve not less attention.

European Union

EU and International Conventions

European Union Trade Agreement with Canada

The EU and Canada trade agreement, known as the Comprehensive Economic and Trade Agreement (CETA), has been published on the EU Official Journal of 14 January 2017, L 11. The Agreement includes provisions on market access for goods, services, investment and government procurement, as well as on intellectual property rights, sanitary and phytosanitary measures, sustainable development, regulatory cooperation, mutual recognition, trade facilitation, cooperation on raw materials, dispute settlement and technical barriers to trade. CETA ensures protection for investments while enshrining the right of governments to regulate in the public interest, including when such regulations affect a foreign investment. The traditional form of investor-state dispute settlement that exists in many trade agreements negotiated by Member States (known as ISDS) has been replaced with a new and improved Investment Court System (ICS). This Agreement shall enter into force on the first day of the second month following the date the Parties exchange written notifications. On 15 February, the European Parliament voted in favour of the provisional application, excluding some Chapters, between the European Union and its Member States and Canada.

The full text of the Agreement and the Annexes may be found here: <http://eur-lex.europa.eu/legal-content/IT/TXT/?uri=OJ:L:2017:011:TOC>.

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EU Regulations

Enhanced Cooperation on Property Regime of International Couples

On 9 June 2016, with Decision (EU) 2016/954, the EU Council authorized 18 Member States (Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain and Sweden) to start an enhanced cooperation in the area of jurisdiction, applicable law and recognition of decisions in matters of matrimonial property regimes and property consequences of registered partnership. The enhanced cooperation has been implemented by the Regulations (EU) 2016/1103 (matrimonial property regimes) and 2016/1104 (property consequences of registered partnerships) of 24 June 2016. Both Regulations are currently into force, but will be applicable from 29 January 2019.

The full text of the Regulation 2016/1103 may be found here: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R1103&qid=1486579258863&from=EN>.

The full text of the Regulation 2016/1104 may be found here: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R1104&qid=1486579007414&from=EN>.

Enhanced Cooperation on the Law Applicable to Divorce and Legal Separation

Estonia has joined the Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (called Rome III Regulation). The Rome III Regulation will apply to Estonia as of 11 February 2018. As a result, the number of participating Member States will amount to seventeen. The European Commission confirmed the Estonia participation by Decision (EU) 2016/1366 of 10 August 2016.

The full text of the Rome III Regulation may be found here:

International Surrogacy Arrangements

The Department "Citizens' Rights and Constitutional Affairs" of the European Parliament adopted, on 30 August 2016, a document on "Regulating International Surrogacy Arrangements – State of Play" (Doc. No. 571.368). The report clarifies the state of play on the effects of surrogacy agreements in the Member States and the private international law problems arising from the above mentioned arrangements, with particular regard to the

issues of private international law concerning the status of children and on the recognition of parenthood. The authors of the document, Amalia Rigon and Céline Chateaus, analyze the European Human Rights Court jurisprudence and the legal issues raised by the surrogacy arrangements. One of the main problems is the refusal of the authorities of Member States to recognize the child's birth certificate. The adoption of a private international law instrument could be a solution to this problem and so the EU could adopt conflicts of law rules concerning civil statutes and rules on mutual recognition of family statutes.

The full text of the report may be found here: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/571368/IPOL_BRI\(2016\)571368_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/571368/IPOL_BRI(2016)571368_EN.pdf).

Towards a Good-bye to the Apostille

The *Apostille* – the long-established method relying on a certificate of legalization of public documents to be presented before foreign jurisdictions – gets obsolete after the adoption of Regulation (EU) 2016/1191 of 6 July 2016, which establishes, for certain public documents, a multilingual form designed to simplify the entire legalization process, thereby facilitating the free movement of EU citizens. Put in a nutshell, the new form needs no legalization (or any other similar formality), translation or certification as evidence of a document's authenticity when the relevant public document (such as administrative documents or notarial acts) is issued by the authorities of a Member State to be presented to the authorities of another Member State. The form is applicable to documents stating births, deaths, names, marriages, divorces, legal separations, marriage annulments, registered partnership and dissolution, legal separation or annulment, parenthood, adoption, domicile, residency, nationality, absence of a criminal record and right to vote. The bulk of the provisions will apply from 16 February 2019.

The full text of the Regulation 2016/1191 may be found here: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R1191&qid=1486629765612&from=EN>.

The European Account Preservation Order

The Regulation (EU) No 655/2014 establishing a European Account Preservation Order procedure ("EAPO") applies as of 18 January 2017. This uniform procedure, which is a type of precautionary measure, allows creditors in cross-border cases to preserve the amount owed by "freezing" debtor's bank accounts. The procedure is available as an alternative to equivalent national measures, which, though, do not

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benefit from the same recognition-friendly regime. The EAPO does not apply to Denmark and United Kingdom. The European e-Justice Portal offers two new functionalities pertaining to it: dynamic (online) forms and communications of the Member States (<https://e-justice.europa.eu/sitenewsshow.do?plang=it&newsId=152>).

The full text of the Regulation may be found here: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0655&from=EN>.

New Rules on Cross-border Insolvency Proceedings.

The Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings will enter into force as of 26 June 2017, replacing the Regulation (EC) No 1346/2000 of 26 May 2000. The new Insolvency Regulation modifies the former one as follows: a) the scope includes non-liquidation proceedings designed to give debtors a «second chance»; b) the jurisdictional framework has been reinforced in terms of certainty and clarity; c) the coordination between several insolvency proceedings opened against the same debtor, as well as the balancing between efficient insolvency administration and protection of local creditors, have been strengthened; d) States are compelled to establish insolvency registers which will be interconnected with each other; e) detailed rules on groups of companies provide for the coordination between multiple insolvency proceedings and/or the opening of a “group coordination proceeding”. Link: The full text of the Regulation may be found here: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848&from=EN>.

Cross-borders Mergers and Divisions

The European Parliament Research Service has presented a study on “Ex-post analysis of the EU framework in the area of cross-border mergers and divisions” (PE no. 593.796). The study by Stephane Reynolds and Amandine Scherrer presents an evaluation of the implementation and effects of the provisions of EU law on cross-border mergers and divisions and, in particular, on EU Directives on the division of public limited liability companies (82/891/EEC) and on cross-border mergers of limited-liability companies (2005/56/EC). The study analyzes the application in the EU Member States, the jurisprudence of the European Court of Justice and the possibility for a further legislative initiative in this field. Link: The full text of the study may be found here: [http://www.europarl.europa.eu/thinktank/it/document.html?reference=EPRS_STU\(2016\)593796](http://www.europarl.europa.eu/thinktank/it/document.html?reference=EPRS_STU(2016)593796).

EU and European Case Law

Court of Justice European Union: Maintenance Obligations

On 9 February 2017, in case C-283/16, the CJEU ruled that under Chapter IV of Regulation No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, a maintenance creditor who has obtained an order in one Member State and wishes to enforce it in another EU State may make an application directly to the competent authority of the latter Member State, such as the competent national court. According to the Court, it is not required by the EU rules that the creditor submits the application to that court through the Central Authority of the Member State of enforcement. The full text of the judgment may be found here: <http://curia.europa.eu/juris/document/document.jsf?sessionid=9ea7d0f130d669b6d82500e348bd9661f9844e0d03e9.e34KaxiLc3eQc40LaxqMbN4PahiSe0?text=&docid=187686&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1026977>.

Court of Justice European Union: Cross-border Infringements of Distribution Internet Network

On 21 December 2016, in Case C-618/15, the CJEU ruled under the Brussels I on the jurisdiction over an injunction requested against the infringement of the prohibition on resale outside a selective distribution network resulting from the offers, on websites operated in various Member States, of products covered by that network. When it comes to determine according to Article 5 (3) of the Brussels I Regulation the place where the damage has occurred, the Court requires to regard the territory of the Member State which protects the prohibition on resale by means of the action at issue, a territory on which the claimant alleges to have suffered a reduction in its sales.

The full text of the judgment may be found here: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=186487&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=482838>.

Court of Justice European Union: Cross-border Insolvency Proceedings and Fiscal Claims

On 9 November 2016, in Case C-212/15, the CJEU ruled under the Regulation No 1346/2000 of 26 May 2000 -on insolvency proceedings- on the effects provided for by legislation of a Member State on foreign fiscal claims which have not been pursued by means of insolvency



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proceedings. The Court held that such effects are governed by the *lex concursus* (i.e. the law of the State of the insolvency proceedings) irrespective of whether the claim be public or private. Moreover, the Court clarified which law governs the effects of the insolvency proceedings on enforcement actions brought outside the State of the insolvency proceedings: while the effects on 'lawsuits pending' are put by Article 15 under the law of the State in which the lawsuit is pending, the effects on all other proceedings brought by individual creditors are in any event governed by the *lex concursus*.

The full text of the judgment may be found here: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=185222&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=824154>.

Court of Justice European Union: Transfer of Case and Child Protection

On 27 October 2016, in Case C-428/15, the CJEU ruled under Article 15 of Regulation (EC) No 2201/2003 of 27 November 2003 -concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility- on the transfer of a case from one court to another in the best interest of the child. The Court held that, in order for the court having jurisdiction in a Member State to assess whether a court of another Member State with which the child has a particular connection is better placed, the first court must be satisfied that the transfer of the case is such as to provide genuine and specific added value to the examination of that case, taking into account, inter alia, the rules of procedure applicable in the other State. Besides, the transfer may not be detrimental to the situation of the child. In this regard, the court having jurisdiction must not assess either the effect of the transfer on the right of freedom of movement of persons other than the child, or the reasons why the parent has exercised the right of freedom of movement prior to the court being seized, unless those considerations reveal adversely repercussions on the child.

The full text of the judgment may be found here: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=184896&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=819317>.

Court of Justice European Union: Overriding Mandatory Provisions in Employment Contracts

On 18 October 2016, in Case C-135/15, the CJEU ruled under the Rome I Regulation – Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations – on whether overriding mandatory provisions other than those of the *lex fori* or of the State where the obligations arising out of the employment contract have been, or are to be, performed may be applied. In the Court's view, national courts are precluded from applying such provisions as legal rules, but are permitted to take them into account when assessing the facts of the case which are relevant in the light of the law governing the contract.

The full text of the judgment may be found here: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=184541&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=819317>.

Court of Justice European Union: Cross-border Crimes and Victim Compensation

On 11 October 2016, in Case C-601/14, the CJEU (Grand Chamber) declared that Italian Republic has failed to fulfill its obligations under Article 12(2) of Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims for failing to adopt all the measures necessary to guarantee the existence, in cross-border situations, of a compensation scheme for victims of all violent intentional crimes committed on its territory.

The full text of the judgment may be found here: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=184425&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=439371>.

Court of Justice European Union: Cosmetics Products and Offshore Animal Testing

On 21 September 2016, in Case C-592/14, the CJEU ruled under Article 18 of Regulation (EC) No 1223/2009 -on cosmetic products- that the placing on the European Union market of cosmetic products containing some ingredients that have been tested on animals outside the European Union, in order to market cosmetic products in third countries, may be prohibited if the resulting data is used to prove the safety of those products for the purposes of placing them on the EU market.

The full text of the judgment may be found here: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=183602&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=752355>.



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Court of Justice European Union: Unfair Terms in Online Sales Contracts

On 28 July 2016, in Case C-191/15, the CJEU ruled that the law applicable to the unfairness of terms in general terms and conditions in an action for an injunction is to be determined by Regulation (EC) No 864/2007 of 11 July 2007 -on the law applicable to non-contractual obligations-, while the contractual terms are governed by the law determined by Regulation (EC) No 593/2008 of 17 June 2008 -on the law applicable to contractual obligations-. As for choice-of-law clauses in consumer contracts, the Court drawn from Article 3(1) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts that a term in the general terms and conditions of a seller or supplier which has not been individually negotiated, under which the contract concluded with a consumer in the course of electronic commerce is to be governed by the law of the Member State in which the seller or supplier is established, is unfair in so far as it leads the consumer into error by giving him the impression that only the law of that Member State applies to the contract, without informing him that under Article 6(2) of Regulation No 593/2008 he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term. The full text of the judgment may be found here: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=182286&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=786462>.

European Court of Human Rights: Waiver of Access to Courts and Arbitration

On 1st March 2016, in case *Tabbane v. Switzerland* (application no. 41069/12), the Court evaluated whether the waiver of the right to challenge an award before a court is compatible with the right of access to justice under Article 6 ECHR. After assessing that the claimant expressly and freely both waived his right to challenge the arbitral decision and agreed – by way of reference to the decision of the arbitral tribunal – on choosing the Swiss Law on Private International Law (“LPIL”) as law of the seat, the Court deemed the waiver of the challenge compatible with ECHR. Moreover, the Court stressed that Article 192 LPIL, which governs the consequences of agreeing to waive the right to challenge the award, sticks in turn to ECHR as it reflects the Swiss legislative policy to increase the attractiveness and effectiveness of international arbitration in Switzerland. The full text of the judgment may be found here: [http://hudoc.echr.coe.int/eng - {"itemid":\["001-161870"\]}](http://hudoc.echr.coe.int/eng - {).

National Reports

International Conventions

Latvia: Hague Protection of Adults Convention.

On 15 December 2016, Latvia [signed](#) the Hague Convention of 13 January 2000 on the International Protection of Adults. The full text of the Convention may be found here: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=71>.

Monaco: Hague Protection of Adults Convention.

On 1st July 2016, the Hague Convention of 13 January 2000 on the International Protection of Adults entered into force. The full text of the Convention may be found here: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=71>.

Norway: Child Protection Convention.

On 1st July 2016, the 1996 Hague Convention 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 full text of the Convention may be found here: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>.

Serbia: Child Protection Convention.

On 1st November 2016, the 1996 Hague Convention 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 full text of the Convention may be found here: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>.

The Netherlands: Transparency in Treaty-based Investor-State Arbitration

On 18 May 2016, the Netherlands signed the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (called “Mauritius Convention on Transparency”) at UN headquarters in New York. The full text of the Convention may be found here: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html.

National Legislation

Italy: New Private International Law Rules on Same-sex Couples, Registered Partnerships and Maintenance Obligations.

As of 11 February 2017, the Italian Law on Private International Law (Law 31 May 1995 no 218) includes new

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provisions on jurisdiction and applicable law in matters of same-sex couples and registered partnership which come along with certain overriding mandatory provisions expressly called by that Law. Moreover, same-sex registered partnerships which Italian citizens habitually resident in Italy enter into shall be treated as registered partnerships governed by Italian law. Finally, the law governing the maintenance obligations arising from family relationships in any case is the law designated by the conflict-of-laws rules of the Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

The new provisions may be found here: <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2017-01-27&atto.codiceRedazionale=17G00013&atto.articolo.numero=1&atto.articolo.tipoArticolo=0>.

Switzerland: Foreign Illicit Assets

On 1st July 2017, the Foreign Illicit Assets Act of 18 December 2015 and related ordinances entered into force, thereby making it easier to freeze, confiscate and return illicit assets stashed in Swiss banks by foreign dictators where there is reason to assume that those assets have been acquired through acts of corruption, criminal mismanagement or by other felonies.

The full text of the Act may be found here: <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-25-26/V1605154e.pdf>.

National Case Law

France: Google Tax Quashed

The fiscal measure popularly referred as to the "Google Tax" has been quashed by the French Constitutional Council on 29 December 2016. Initially the measure was conceived of to limit multinational corporations' schemes to pay as little tax as possible in France. The Council found the measure incompatible with the French Constitution.

The full text of the decision may be found here: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2016/2016-744-dc/decision-n-2016-744-dc-du-29-decembre-2016.148423.html>.

Germany: Sunni Child Marriage and Public Policy

On 12 May 2016, the Oberlandesgericht Bamberg (Higher Regional Court, Bavaria) ruled on a divorce claim concerning a 14-year old girl married to a 21-year old man. Despite the marriage being valid under Syrian law, the youth welfare Bavarian local authorities asserted that it was not so under German public policy due to the brides' too low age. On the contrary, the Court deemed the marriage valid, thereby recognizing the effect of the Syrian law and rituals.

The full text of the judgment may be found here:

[http://www.gesetze-bayern.de/\(X\(1\)S\(y4k5weyebkealaoeuyibuub\)\)/Content/Document/Y-300-Z-BECKRS-B-2016-N-09621?hl=true&AspxAutoDetectCookieSupport=1](http://www.gesetze-bayern.de/(X(1)S(y4k5weyebkealaoeuyibuub))/Content/Document/Y-300-Z-BECKRS-B-2016-N-09621?hl=true&AspxAutoDetectCookieSupport=1).

Russia: Investor-to-State Dispute before Russian Courts

On 5 August 2016, the Moscow Commercial Court was seized of a dispute between a Russian businessman and the Republic of Lithuania concerning losses arising out of the nationalization of a private bank. The preliminary issue at stake was the Russian jurisdiction over a claim brought against a sovereign State in a matter purportedly falling under the ISDS methods provided by the Russian-Lithuanian BIT. The claimant relies on the Federal Law No. 297-FZ on the jurisdictional immunities of foreign states and the property of a foreign state in the Russian Federation, which came into force on 16 January 2016 and in the claimant's views accords jurisdiction should the foreign State activity, such as those disputed in the instant case, occur in Russian territory. The Commercial Court dismissed this assertion on 28 October. The claimant filed an appeal, still pending.

Link: The decisions of the Russian Commercial Courts may be found here: <http://www.arbitr.ru/eng/26201.html>.

United Kingdom: Court of Appeal on Choice of Court Agreements

On 4 November 2016, the London Court of Appeal ruled that the competence to adjudicate the Euro 765-million dispute between Goldman Sachs and Novo Banco in matters of recovery claims arising from the failure of the Banco Espírito Santo lies with the Portuguese Courts, thereby overruling an earlier judgment of the High Court of Justice. The Court of Appeal held that the choice of court agreement under which the claimant invoked the English Courts competence did not bind Novo Banco.

Link: The full text of the judgment may be found here: <http://www.bailii.org/ew/cases/EWCA/Civ/2016/1092.html>.



EUROPE —continued from page 32

United Kingdom: High Court of Justice on Environmental Tort Claims

On 27 May 2016, the High Court of Justice ruled on the UK Courts competence over an environment pollution claim brought by some Zambian citizens against Vedanta Resources Plc and its Zambian subsidiary. While the pollution occurred in Zambia, the UK Courts retain competence due to the so-called “foreign direct liability” that UK companies bear under English law when causing damages abroad.

The full text of the judgment may be found here:

[http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/TCC/2016/975.html&query=\(vedanta\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/TCC/2016/975.html&query=(vedanta)).

Arbitration Institutions

Sweden: New SCC Arbitration Rules.

On 1st January 2017, the new arbitration rules and the rules of expedited arbitration of the Stockholm Chamber of Commerce entered into force. Provisions on summary procedure, efficiency and expeditiousness, multi-party/claim, and investment arbitration account for the main novelties.

The full text of the SCC Arbitration Rules may be found here:

http://www.sccinstitute.com/media/159828/final_draft_arbitration-rules-17112016.pdf.

The full text of the SCC Expedited Arbitration Rules may be found here: http://www.sccinstitute.com/media/161463/final_draft_expedited-rules-23112016.pdf.

Associations and Events

Hague Academy of International Law

The Hague Academy of International Law will hold its 2017 Summer Courses between July and August. The Private International Law courses are scheduled from 31 July to 18 August. Closing date for application: 1st March 2017.

The full text of the programme may be found here:

<http://www.hagueacademy.nl/wp-content/uploads/2013/11/PROGRAMME-2017.pdf>.

EUFam's Project Launched

In 2016 the Project 'Planning the future of cross-border families: a path through coordination' (EUFam's) has been launched with the aim to research European Union Private International Law topics of family and successions, as well as disseminate project findings, news, and general information on this matter. The Project hosts a case-law

database freely available for public consultation.

Info may be found here: <http://www.eufams.unimi.it>.

Conferences: 2016 Noteworthy Conferences Addressing PIL Issues

On 10 November 2016, the Academy of European Law (ERA), in co-operation with the European Circuit, the Bar Council and the Hamburgischer Anwaltverein, hosted a conference in London on “The Impact of Brexit on Commercial Dispute Litigation in London”; on 23 September 2016, the *Société de législation comparée* organised a conference on “The application of foreign law under constitutional and treaty-based review”; on 15 September 2016, the University of Milan hosted a seminar on “New Trends in EU Private International Law”; on 16-17 June 2016, the Centre for Business Law and Practice, University of Leeds, and the Centre for Private International Law, the University of Aberdeen organized a conference on “Cross-Border Litigation in Europe”; on 9-10 June 2016, the Spanish Association of Professors of International Law and International Relations (AEPDIRI) organized the international conference “Challenges for the European Union External Action” in the framework of the Jean Monnet Project “EU Law between Universalism and Fragmentation: Exploring the Challenge of Promoting EU Values Beyond its Borders”.

Scholarly Work

Literature: 2016 Noteworthy Scholarly Works

M.E. Ancel, P. Deumier, M. Laazouzi, *Droit des contrats internationaux*, Sirey, 2016; P. Blanco-Morales Limones, F. F. Garau Sobrino, M^a L. Lorenzo Guillén, F. J. Montero Muriel (eds), *Comentario al Reglamento (UE) n° 1215/2012 relativo a la competencia judicial, el reconocimiento y la ejecución de resoluciones judiciales en materia civil y mercantil*, Thomson Reuters-Aranzadi, 2016; M.B Benedettelli, *Five Lay Commandments for the EU Private International Law of Companies*, Yearbook of Private International Law, XVII - 2015/2016, 209; M. Hook, *The Choice of Law Contract*, Hart Publishing, 2016; A. Leandro, *A First Critical Appraisal of The New European Insolvency Regulation*, Il Diritto dell'Unione Europea, 2016, 215; Leible (ed. by), *General Principle of European Private International Law*, Wolters Kluwer, 2016; P. Mankowski, M. F. Müller, J. Schmidt, *EulnsVO 2015. Europäische Insolvenzverordnung 2015. Kommentar*, Beck, 2016; E. Márton, *Violations of Personality Rights through the Internet – Jurisdictional Issues under European Law*, Nomos / Hart Publishing, 2016; G. Moss, I. Fletcher, S. Isaacs (eds), *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings*, 3rd edn, OUP, 2016.

OCEANIA —Editor: Jeanne Huang



The year of 2016 has witnessed significant interplay between private international law in Oceania and that in foreign jurisdictions. The US withdrawal from the TPP has caused Australia and New Zealand to suspend the relevant domestic implementation legislation. The bankruptcy of Hanjin, the world's ninth-largest container shipping company, in Seoul has called the Federal Court of Australia to resolve the difficult intersections between international insolvency law, Australian Corporations Act and Admiralty Act. Courts, arbitration institutions and legislators in Oceania have considered whether and how to catch up with the development of arbitration laws in foreign jurisdictions. *Philip Morris v Australia* helps the further development of global tobacco control legal regime.

International Conventions

The implementation of the TPP remains unclear in Oceania

Australia signed the TPP and tabled its text and accompanying National Interest Analysis in the Parliament in February 2016. The Joint Standing Committee on Treaties released its report in November 2016 recommending that Australia should take binding treaty action to ratify the TPP. However, considering the US withdrawal, in February 2017 the Senate Foreign Affairs, Defence and Trade References Committee recommended that Australia should defer undertaking binding treaty action until the future of the TPP is clarified.

Australia's policy of the TPP can be found here: <http://dfat.gov.au/trade/agreements/tpp/Pages/trans-pacific-partnership-agreement-tpp.aspx>.

The TPP was signed by New Zealand in February 2016. The Trans-Pacific Partnership Agreement Amendment Bill was introduced to the House of Representative in May 2016. The Bill was passed on 15 November and received Royal Assent on 21 November. In March 2017, New Zealand agreed with other remaining TPP members that their senior trade officials would consider next steps for the TPP in the coming months.

New Zealand's policy of the TPP can be found here: <https://www.tpp.mfat.govt.nz/>.

International Tribunals

Australia won Philip Morris v Australia on the jurisdiction ground

Philip Morris Asia Limited, a company incorporated in Hong Kong, brought an arbitration against Australia alleging that Australia's enactment and enforcement of the Tobacco Plain Packaging Act 2011 and the implementing regulations known as Tobacco Plain Packaging Regulations 2011 expropriated its ability to use certain intellectual property. The arbitration was commenced pursuant to the Australia-Hong Kong Bilateral Investment Treaty (BIT). In December 2015, a PCA *ad hoc* investment tribunal issued its Interim Award on Jurisdiction and Admissibility. The tribunal held that the claims were inadmissible because Philip Morris abused its right by changing its corporate structure mainly to gain the protection of the BIT when it foresaw its dispute with Australia.

The full award can be found here: <https://www.pcacases.com/web/view/5>.

National/State Legislation

New South Wales enacts harmonised rules for service of an originating process and other documents outside of Australia

The Uniform Rules Committee in the State of New South Wales Australia approved the Uniform Civil Procedure (Amendment No 83) Rule 2016 to amend the Civil Procedure Act 2005. The Rules regulates service outside of Australia with or without leave. It does not apply to service in New Zealand of documents for or in certain trans-Tasman proceedings.

The Uniform Civil Procedure Rule 2016 can be found here: <http://www.legislation.nsw.gov.au/regulations/2016-755.pdf>.

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Australia considers amending the International Arbitration Act 1974 (the IAA)

In March 2017, the Civil Law and Justice Legislation Amendment Bill was introduced into Australian Senate. This is an omnibus bill that proposes to amend the IAA as well as other Australian legislation. It intends to define “competent court” in the IAA, clarify the evidence requirements for enforcement of an arbitral award, modernize arbitrator’s powers to award costs, and clarify the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration in Australia. The Civil Law and Justice Legislation Amendment Bill can be found here: http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s1057.

New Zealand considers amending the Arbitration Act 1996 (the Act)

In March 2017, the Arbitration Amendment Bill was introduced to the New Zealand Parliament to amend the Act. The Bill intends to recognize the binding effect of arbitration clauses in trust deeds, to extend the presumption of confidentiality in arbitration to a rebuttable presumption of confidentiality in related court proceedings under the Act, to clarify the grounds for setting aside an arbitral award, and to specify the consequence of failing to raise a timely objection to an arbitral tribunal’s jurisdiction. The Arbitration Amendment Bill can be found here: <http://www.nzlii.org/nz/legis/bill/aab2017227/aab2017227.html>.

National Case Law

Australian court recognizes and enforces a UAE DIFC monetary judgment

In March 2016, the Supreme Court of New South Wales recognized and enforced a judgment issued by the Dubai International Financial Center Court (DIFC). It is the first time that an Australian court recognized and enforced a UAE monetary judgment. The DIFC signed a Memorandum of Understanding with the Supreme Court of New South Wales in 2013 and with the Federal Court of Australia in 2014. The full judgment can be found here:

<https://www.caselaw.nsw.gov.au/decision/56eb8b6de4b0e71e17f50695>.

For the special nature of the DIFC court see the Asia Section

Australian court applies Australian Consumer Law (ACL) to a contract even if its proper law is a foreign law

March 2016 in *Australian Competition and Consumer Commission v Valve Corporation*, FCA applied ACL to Valve, an online business incorporated in the US that had no staff and real estate in Australia and hosted its website outside of Australia. The FCA held that the proper law of the contracts between Valve and its Australian consumers was the law of Washington State in the US, but Subsection 67 (b) of the ACL was extended to the contracts regardless of the proper law. Moreover, the Court distinguished the common-law cause of action approach and the application of ACL statutory test for where the conduct took place, and found that Valve was either conducting or carrying on business in Australia. The full judgment can be found here: <https://jade.io/j/?a=outline&id=459877>.

Fiji Court determines the conditions for application for leave to appeal to the Supreme Court to be consistent with English case law-

Rugby is the most popular sport in Fiji. In 2016, the Supreme Court of Fiji handed down a judgment about the sole and exclusive sponsorship of the Fijian provincial rugby tournament and the Fiji 7’s Team, which won the Gold Medal for men’s sevens rugby at the 2016 Olympic Games. The Court found that this case is of great interest to the public but is not a matter of great public importance according to English case law. But it allowed the application for leave to appeal because this case raises “far-reaching questions of law”.

The full judgment can be found here:

<http://www.pacilii.org/fj/cases/FJSC/2016/40.html>.

Australian courts determine indemnity costs of unsuccessful challenges to enforcement of a foreign arbitral award

In two separate cases decided in 2016, FCA considered whether to follow the Hong Kong approach, where a party is entitled to its costs of responding to the challenge on an indemnity basis by default if the other party unsuccessfully challenges the enforcement of a foreign arbitral award in the absence of special circumstances. The first case, *Ye v Zheng* (No 5), was handed down in July. The Court found that the respondent had never made an attempt to agitate any legitimate ground to resist enforcement, so awarded the applicant its costs on a full and complete indemnity basis. Although that “powerful considerations” might support the Hong Kong approach, the Court stated that it was both



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unnecessary and inappropriate to decide this question in this case. The second case is *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* (No 2) decided in September. The Court applied the law of the forum, Australian law, to determine whether the indemnity costs should be awarded. The Court held that an order for indemnity costs would be justified where an unsuccessful challenge was found not to have reasonable prospects of success, whether or not the unsuccessful party knew or ought to have known this at the outset. This should be determined case by case rather than setting up a default rule. Essentially the Court rejected the Hong Kong approach.

The full judgments can be found here: <https://jade.io/?a=outline&id=485995> and <https://jade.io/article/494844?at.hl=Sino+Dragon+Trading+Ltd+v+Noble+Resources+International+Pte+Ltd>.

Australian court recognizes foreign rehabilitation proceedings

In November 2016, the FCA recognized the rehabilitation proceedings of the Seoul Central District Court for Hanjin Shipping Co., Ltd in *Tai-Soo Suk v Hanjin Shipping Co Ltd*. This judgment is made according to the UNCITRAL Model Law on Cross-Border Insolvency, which is given force in Australia by the Cross-Border Insolvency Act (CBIA). The FCA recognized the Seoul proceedings as “foreign main proceedings” and the custodian of Hanjin appointed by the Korean Court as a “foreign representative” for the purposes of the CBIA. Accordingly, the Court stays any enforcement of recovery action against the Hanjin’s properties in Australia except with the written consent of Hanjin or until further order of the Court.

The full judgment can be found here: <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2016/2016fca1404>.

Arbitration Institutions

The Australian Centre for International Commercial Arbitration (ACICA) revises its arbitration rules

ACICA is the major arbitration institution in Australia. The new ACICA *Arbitration Rules incorporating the Emergency Arbitrator Provisions* and the *Expedited Arbitration Rules* came into effect in January 2016. As the first revision since 2011, the new rules contain innovations in the areas of expedited procedure, conduct of legal representation, consolidation and joinder, law of arbitration agreement and overriding objective.

The new rules can be found here: <https://acica.org.au/acica-rules-2016/>.

Associations and Events

Australian and New Zealand Society of International Law organized its 24th Conference in Canberra in June 2016. The theme of the conference is “International Law of the Everyday: Fieldwork, Friction and Fairness.”

More information of the conference can be found here: <http://anzsil.org.au/event-2120456>.

Recent Scholarly Work

Scholars in Oceania have published extensively on the topic of private international law in 2016. Typical examples include Thomas Schultz & Jason Mitchenson, *Navigating Sovereignty and Transnational Commercial Law: the Use of Comity by Australian Courts*, 12 *Journal of Private International Law* 344-378 (2016); and KJ Keith, *New Zealand Family Law and International Law - A Comment with Some Questions*, 47 *Victoria University of Wellington Law Review* 5-18 (2016), and Miranda Forsyth, *The Challenges of Legal Pluralism in the Cook Island and Beyond: An Insight from Hunt and Tupou & Ors v Miguel*, *Cook Island Court of Appeal*, 19 February 2016, 2 *Journal of South Pacific Law* 27-43 (2016). ■

GLOBAL CONFLICT OF LAWS

—Editors: Cristián Giménez Corte & Javier Toniollo



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 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 a national law-making process and do not have a determined territorial scope of application.

Global Conflict of Laws issues include, of course, international commercial arbitration, international investment arbitration, and international sports 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 issues included also decisions rendered by national or regional courts that may have a global impact.

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.

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Transnational Principles and Soft Law

UNCITRAL adopts Model Law on Secured Transactions

On July 1, 2016, the United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on Secured Transactions. The main purpose of the Model Law is to try to fill the gaps created by the multiplicity of different regimes on secured transactions around the world. In order to do this, UNCITRAL set up common rules and basic security standards applicable to all sort of transactions. It also provides a publicly accessible Registry, in which notices of security interests can be registered to protect third parties’ rights and to provide an objective basis to determine the priority of a security interest over the rights of competing claimants. As a Model Law, its enactment depends on the States’ willingness to co-operate with the international community and coordinate solutions towards the achievement of transparency in cross-border transactions. According to the official commentary, this Model Law is based on the United Nations Convention on the Assignment of Receivables in International Trade, the UNCITRAL Legislative Guide on Secured Transactions, the Supplement on Security Interests in Intellectual Property and the UNCITRAL Guide on the Implementation of a Security Rights Registry. For the treatment of security interests in insolvency, the Model Law relies on the recommendations of the UNCITRAL Legislative Guide on Secured Transactions and the UNCITRAL Legislative Guide on Insolvency Law.

For more information, visit: <http://www.unis.unvienna.org/unis/en/pressrels/2016/unisl233.html>.

UNCITRAL adopts a text on Online Dispute Resolution (ODR)

On July 2016, UNCITRAL adopted *Technical Notes on Online Dispute Resolution* in response to the online cross-border transactions’ growth. The purpose of this *soft law* instrument is to assist and provide buyers and sellers with legal tools that allow them to resolve their disputes in a simple, fast, flexible and secure manner, without the need of physical presence at a meeting or hearing.

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For more information, visit: <http://www.unis.unvienna.org/unis/en/pressrels/2016/unisl235.html>.

ASADIP adopts Principles regarding the Right of Transnational Access to Justice

On November 2016, the American Association of Private International Law (ASADIP, in Spanish) adopted a set of *Principles* which the main purpose is to make effective the human right of access to justice at the transnational level. According to this soft law document, the aim of these principles is to improve the legal and natural persons right to access to justice in cross-borders disputes, by establishing theoretical and procedural guidelines and basics standards inspired and enshrined in international human rights texts and in common and shared rules set out in modern national constitutions.

The novelty of these "Principles regarding the Right of Transnational Access to Justice" might be summarized as follows: a) compilation and systematization of the general principles applicable to cross-borders disputes; b) establishment of inter-jurisdictional cooperation as an international obligation of states, with a view to guaranteeing people's right to access to justice in an expeditious, effective, equitable, and timely manner; c) granting judges with enough powers as to intervene and decide cases taking into account the particularities of each case.

For the full text of the Principles and more information, see: <http://www.asadip.org/v2/wp-content/uploads/2016/10/TRANSJUS-texto-final.pdf>.

The International Chamber of Commerce amends Rules on Arbitration to improve transparency and efficiency

On November 4, 2016, the International Chamber of Commerce (ICC) amended its Rules of arbitration in order to improve transparency and efficiency within the arbitral process. This modification has entered into force since March 1st, 2017. According to the official statement, the Rules are applicable to the disputes that involve less than \$2 million; however, it offers the possibility to opt-in for higher disputes. With the goal of making the process more expeditious, the ICC decided that there are no longer Terms of Reference and the tribunal has the discretion to decide the case on documents only, with no hearing, no requests to produce documents and no examination of witnesses.

For more information, see: <https://www.asil.org/blogs/international-chamber-commerce-modifies-rules-improve-transparency-and-efficiency-november-4>.

Transnational Case Law

2016 Rio de Janeiro Olympic Games, Sports Arbitration, and Lex Sportiva

During the last Olympic Games, the ad hoc Division of Court of Arbitration for Sports (CAS) seated in Rio and heard a number of cases involving athletes from all over the world. The jurisdiction of the ad hoc division is based on individual arbitration agreements. All participants, -including athletes, coaches, officials and sports federations, have to sign as a condition of their participation in the Games, an agreement conferring exclusive jurisdiction on the CAS panels for disputes arising in connection with the Games. The CAS has competence to hear cases related to team selection, national eligibility, fulfillment of registration requirements, application and interpretation of competition rules, advertising, and athlete misconduct, including doping. During the Rio Games, a record of 28 cases were heard, including 16 cases related to the status and eligibility of Russian athletes. Moreover, an ad hoc Anti-doping division was established for the first time at this Olympics, dealing with doping related matters arising at the Games as a first-instance court.

For a full account on the structure and functions of the CAS and its jurisprudence see <http://www.tas-cas.org>.

The Court of Arbitration for Sport (CAS)

Article 61 of the Olympic Charter states that "any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the [CAS], in accordance with the Code of Sports-Related Arbitration. Most International Federations have already recognized the jurisdiction of CAS for the arbitration of some disputes and all signatories to the World Anti-Doping Code have recognized the jurisdiction of CAS for doping rules violation matters. Because the CAS is a Swiss arbitration organization, its decisions may be appealed before the Federal Supreme Court of Switzerland. However, the Swiss Court will not often consider the merits of the dispute and will limit to resolve whether procedural requirements were met or whether the award was compatible with public policy.

CJEU: EU regulation on animal testing ban applies outside the EU.

On September 21, 2016, the Court of Justice of the European Union decided that "Article 18(1)(b) of Regulation

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GLOBAL CONFLICT OF LAWS —continued from page 38

(EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products must be interpreted as meaning that it may prohibit the placing on the European Union market of cosmetic products containing some ingredients that have been tested on animals outside the European Union, in order to market cosmetic products in third countries, if the resulting data is used to prove the safety of those products for the purposes of placing them on the EU market."

For the full decision see <http://curia.europa.eu/juris/document/document.jsf?text=&docid=183602&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=121869>.

United Nations: U.S. Court Upholds United Nations' Immunity in Cholera Suit

On August 18, 2016, the US Second Circuit Court of Appeals in New York upheld the United Nations' immunity from a damage claim filed on behalf of 5,000 cholera victims who asserted that the UN was responsible for an epidemic of the cholera disease in Haiti. The Appeals Court affirmed a lower court's January 2015 dismissal of a lawsuit brought in the worst outbreak of cholera in recent history. The UN, as defendant, successfully alleged that it enjoyed immunity under a 1946 Convention on the Privileges and Immunities of the UN, and therefore could not be brought before national judges.

This decision came shortly after the UN deputy spokesman referred to the United Nations' "own involvement" in the introduction of cholera to Haiti.

For the full text see <http://law.justia.com/cases/federal/appellate-courts/ca2/15-455/15-455-2016-08-18.html>.

Associations and Events

UNCITRAL and Arbitration

On the occasion of the celebration of the 50th Anniversary of the creation of the United Nations Commission on International Trade Law (UNCITRAL), the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry held, on November 17th, 2016, an international professional conference named "UNCITRAL and Arbitration".

The workshop brought together renowned foreign and domestic experts who developed different topics related to the field of International Arbitration, such as international trade, international finances and international arbitration itself.

For more information about this multifaceted activity, visit: <http://www.mkik.hu/en/magyar-kereskedelmi-es-iparkamara/uncitral-and-arbitration-15414>.

Scholarly Work

We would like to mention the following studies that approach PIL from a global perspective:

Van Loon, J. H. A., "The Global Horizon of Private International Law (Volume 380)", in: Collected Courses of the Hague Academy of International Law, The Hague Academy of International Law.

Encyclopedia of Private International Law, Edward Elgar, 2017.

Gilles Cuniberti, Conflict of Laws: A Comparative Approach. Text and Cases, Edward Elgar, 2017.

Gimenez-Corte, Cristián, *La Función Del Derecho Internacional Privado En La Era De La Globalización: Un Manifiesto Jurídico* (The Function of Private International Law in the Era of Globalization: A Legal Manifesto) (December 3, 2016).

Papeles del Centro de Investigaciones, FCJyS, UNL, 2016.

Available at SSRN: <https://ssrn.com/abstract=2943103>.

Horatia Muir Watt, *Conflicts of laws unbounded: the case for a legal-pluralist revival*, *Transnational Legal Theory* Vol. 7, Iss. 3, 2016.

Whytock, Christopher A. (2016) "Conflict of Laws, Global Governance, and Transnational Legal Order," *UC Irvine Journal of International, Transnational and Comparative Law*: Vol. 1, 117. Available at: <http://scholarship.law.uci.edu/ucijil/vol1/iss1/6>. ■