International Law News
ABA Section of International Law
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Perspectives from the Field

Perspectives from the Field: At the Crossroads of Public and Private International Law

This year's ABA Section of International Law Annual Conference held in New York City in April 2018 had the theme, "At the Crossroads: The Fusion of Private and Public International Law." The conference, co-chaired by Birgit Kurtz, Hedwin Salmen-Navarro, Ken Rashbaum, and Deniz Tamer, brought together close to 1,000 legal professionals from fifty-two countries and thirty-nine U.S. states for five days of programming, interactive skills training, committee business meetings, and networking events and receptions.

In more than seventy CLE-programs, speakers explored the relationship between public and private international law, including a wide range of overlapping and emergent areas in which these previously distinct fields are merging and the drivers behind these trends. Major themes included the roles of multinational corporations, globalization, and technology in influencing and shaping the evolution of international law. Insightful presentations by speakers showed the growing desire for comity from public international law to be infused within private international law. Speakers also highlighted how international trade, transboundary networks, and the digital age, from cryptocurrencies to the cloud, are challenging historical notions of state action and responsibility.

Sessions on corporate social responsibility, investor-state arbitration, the digital economy and data privacy, and international trade demonstrated how human rights, which have been largely codified within public international law in treaties among states, are increasingly relevant and growing in prominence within private international law.

Skills-oriented programs for newly admitted through experienced attorneys and interactive exhibits by sponsors provided practical information for attorneys to use in their international legal practice to prepare them for success in today's changing environment. Particular attention was given to the implications across the varied civil and common law jurisdictions and to areas where public and private international law are fusing. Attendees learned how to navigate the evolving landscape of accepted choice-of-law principles and the application of foreign laws within varying jurisdictions. They received valuable dos and don'ts for international investigations, arbitration clauses, procurement, employment structures for global workforces, and cross-border tax planning.

The conference programs and networking events spurred a lively exchange of ideas among diverse lawyers from around the world on how the interplay of public and private international law is transforming the global landscape. The following perspectives from a few speakers reflect a slice of those conversations, and we look forward to continuing the dialogue throughout the year during our Section activities.

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Katrin Hanschitz
Partner, KNOETZL, Vienna, Austria

"Certainly one of the most astonishing aspects of U.S. M&A deals for EU-based lawyers is that an a stounding 94 to 96 percent of all publicly announced mergers over $ 100 million attracted at least one lawsuit, with an average of seven lawsuits per merger in 2013. Si nce the Corwin and in particular the *Trulia* rulings, shareholder lawsuits have dropped very significantly in Delaware. How U.S. federal and state courts are going to deal with the increased merger challenges, including competing lawsuits, that have shifted to them due to the Delaware rulings will be interesting to follow. By contrast, while M&A litigation seems set to remain lucrative for lawyers in the United States, the strict transparency obligations that the EU regulatory framework imposes on merger transactions in the EU and the limited opportunity for shareholders to challenge merger transactions makes merger (class) actions relatively rare in the United Kingdom and on the continent. In recent legislation the EU has further increased the emphasis on advance shareholder review of transactions, with an EU Directive introducing mandatory shareholder approval and increased transparency obligations for all related-party transactions." ❖

Transnational

Jose Martin
Of Counsel, Squire Patton Boggs
Miami, Florida

"As cooperation between countries increases and jurisdictions adopt similar approaches to combating domestic and transnational corruption, are we ensuring sufficient protections for individuals and their due process rights? By emphasizing the importance of corporate cooperation, we risk minimizing the negative impact internal corporate investigations may have on the rights of employees. As companies are encouraged to disclose the results of their internal investigations and identify those individuals involved, we should not lose sight of an employee's right against self-incrimination." ❖

Ronald Machen
Partner, WilmerHale
Washington, D.C.

"Cross-border enforcement has become an area of significant complexity and legal exposure for many players, as well as an area of increased cooperation between nations on enforcement. I expect this trend to continue in the future. It is becoming the rule rather than the exception for cases to span multiple countries, bringing together law enforcement personnel and regulators from numerous countries and jurisdictions. Today, multinationals must be concerned not only about potential exposure under U.S. anti-corruption laws but also about exposure under the laws and regulations of Europe, Asia, and the Americas.

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Just last month, U.S. and French authorities announced the $1 billion resolution of an enforcement action against Société Générale, S.A., and its wholly owned subsidiary for violating the FCPA. This joint action, which will require payment of penalties to both the United States and France, was the first coordinated resolution between the two countries, and appears to have been made possible by the recently enacted "Sapin II" law in France, which strengthened the authority of French law enforcement to pursue such cases. We can be sure, however, that these types of resolutions will become even more commonplace as an increasing number of jurisdictions develop and strengthen their own anti-corruption laws." ❖

Kateryna Gupalo
Partner, Arzinger
Kyiv, Ukraine

"Earlier, until 2014, the fight against corruption in Ukraine could be characterized by the saying 'Fighting corruption in Ukraine is like fishing on the Discovery Channel: catch and release.' In other words, investigations into corruption offences were more like giving the appearance of a fight against corruption both in society and amongst the international community. However, after the Ukrainian Maidan Revolution in 2014, there have been important changes in terms of substantial amendments to the legislation and in the practical approach.

Namely, a new agency for combating corruption was set up at the top level. As just mentioned, the existing system of law enforcement agencies was not effective in combating corruption. Therefore, the establishment of the National Anti-Corruption Bureau of Ukraine, as well as of the Specialized Anti-Corruption Prosecutor's Office, was one of the first tasks for the fight against corruption. Both agencies have the task of investigating corruption cases at the top levels, as well as supporting the state prosecution in court." ❖

Nicholas M. Berg
Partner, Ropes & Gray
Chicago, Illinois

"As foreign regulators dramatically increase their anti-corruption efforts, cross-border enforcement has become the new norm, creating investigations of unprecedented reach and complexity. The scale and impact of these investigations has spurred citizen movements against corruption and overturned regimes. Nowhere has this been more true than in Latin America. The Lava Jato investigation and its progeny have uncovered significant cases of corruption throughout Latin America, and led to the downfall of politicians throughout the regime. I expect enforcement in LatAm and globally to continue to expand over the next several years, as regulators around the globe increase both informal (e.g., via Whatsapp) and formal information sharing mechanisms.

While the U.S. has been, and will likely continue to be, the world leader in investigating and prosecuting corruption, recent actions taken by enforcement authorities in Brazil, the U.K., Switzerland, the Netherlands, Malaysia, and even France show that anti-corruption enforcement has gone global." ❖

Anti-Corruption

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Cassandre Piffeteau
Senior Associate, D'Alverny Avocats
Paris, France

"The European General Data Protection Regulation, known as GDPR, came into force on May 25, 2018. This new regulation has a significant impact on all companies involved in the processing of personal data, including outside the EU. It aims at redressing the balance in favor of individuals. It establishes measures to ensure the protection of natural persons in relation to the processing of personal data, described as a fundamental right. It strengthens the right to bring enforcement actions under the GDPR's own rules on jurisdiction. Processors located outside the EU and conducting business in the EU fall into its territorial scope. GDPR also applies in places where EU Member State law applies by virtue of public international law.

Every lawyer is used to processing sensitive personal information concerning their clients, such as data relating to offences and criminal convictions, billing information, and so on. Although the principle of confidentiality is rooted in the minds of all lawyers as a fundamental principle, it is not certain that all lawyers and law firms have taken the measures of the European reform that requires, beyond principles, to take concrete steps to ensure client data protection. Among your checklist, ask yourself whether you have a data representative in the EU, an IT system to protect the security of your clients' data, and attorney services agreements that provide sufficient information about the collected data, the purposes of this collection, access procedures, and your clients' rights under the GDPR, including the right to be forgotten and the right to data portability." ❖

Hanim Hamzah
Regional Managing Partner, Zicolaw Network
Singapore

"Just as data sharing to some is identity-thievery to others, the EU GDPR can be protection to some but protectionism to others. This underlying concept is true worldwide. Domestic data protection laws have consequences within and beyond the boundaries of individual countries. Knowledge of what can or cannot be done is crucial to innovation and to avoiding extensive penalties for data misuse, mishandling, and breaches. As the only legal network located in all ten countries of the ASEAN region, we are cognizant of the challenges of compliance vis a vis ensuring healthy competition among the world's fastest-growing and most open data markets." ❖

Online Resources

- European Union General Data Protection Regulation (GDPR)
- GDPR: Rules for Businesses, published by the European Commission

Data Privacy and Data Security

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Vera Kanas Grytz
Partner, TozziniFreire Advogados
São Paulo, Brazil

International Trade

"Brazil's view on trade defense measures has suffered a great shift during the past years. From 2011 to 2014, in an agenda led by the Ministry of Industry, Foreign Trade, and Services, trade defense measures were seen as an instrument of industrial policy, with great support to the application of anti-dumping duties.

Since 2015, however, under a policy led by the Ministry of Economy, trade defense instruments began to be seen as protectionist measures in which the application of duties should be limited and tempered by analysis of inflationary impacts, competition concerns, and other public interest issues.

CAMEX, the ministerial and political body that decides on the application of trade remedies and in which both the Ministry of Industry and the Ministry of Economy participate, has now to deal with the challenges posed by the need to analyze these public interest concerns and by the adoption of a position that is contrary to the global trend of increased application of antidumping and other trade remedies." ❖

Jing Zhang
Associate, Mayer Brown
Washington, D.C.

"Companies' global supply chains will be challenged by expansions of U.S. trade remedies." ❖

Holger Bielesz
Partner, Wolf Theiss Rechtsanwalte GmbH & Co KG
Vienna, Austria

State Immunity

"In principle, it cannot be excluded that European Member States could become defendants in U.S. federal courts under the Justice Against Sponsors of Terrorism Act (JASTA). As JASTA extends the scope of the terrorism exception to the jurisdictional immunity of foreign states, this law has generated significant debate. Although the threshold for the exemption from state immunity under the JASTA is fairly high, it is not merely theoretical, in particular when you look at the 9/11 attacks, where a clear link had been established between the perpetrators and Germany, where the so-called 'Hamburg cell' had been identified." ❖

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Ava Borrasso
FCIArb, Ava J. Borrasso, P.A.
Miami, Florida

"No doubt, enforceability of a final award is a key factor for parties selecting international arbitration for commercial disputes. But parties have increasingly recognized the need for interim relief to insure the ultimate award is collectible and to support the arbitration proceeding itself. The decision as to where to pursue that relief depends, in large part, on the nature of the ultimate relief sought, applicable law, and the terms of the underlying arbitral rules or institution.

For example, courts have issued a variety of relief in support of arbitration proceedings, including procuring and preserving evidence, entering injunctive relief, attaching assets or equipment or mandating fulfillment of the terms of an arbitration agreement by compelling arbitration or entering an anti-suit injunction.

Courts continue to support arbitration despite the development and evolution of procedures within the arbitration process itself, like emergency or interim relief ordered by tribunals. While the enforceability of emergency and interim orders is a matter of some dispute among jurisdictions, these orders are becoming more common. Voluntary compliance with such orders appears relatively high given the potential impact noncompliance can have in a pending arbitration. The treatment of these measures in both courts and tribunals will be of interest to practitioners as their use continues to develop." ◆

Arbitration