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Éditorial

Édition : Johanna Fournier, Marie Papeil, Alfredo Santos

Chères lectrices, chers lecteurs,

Cette édition de l'*ISDC's Letter* en ce mois de février fait la transition entre 2018 et 2019. Une newsletter plus courte offrant une brève rétrospective des différentes activités de l'année qui vient de s'achever et une prospective pour 2018.

Vous retrouverez les nouvelles juridiques lors de notre prochaine édition, nous vous proposons ici une présentation des différentes activités de l'ISDC réalisées tout au long de 2018. Cette rétrospective est suivie d'une présentation des sujets de recherche de nos boursiers van Calker.

Puis vous trouverez une liste des ouvrages que l'Institut a publiés au cours de l'année 2018. Celle-ci comprend également tous les avis comparatifs que nous avons publiés comme « E-Avis » sur notre site internet l'année passée.

Nous vous proposons en outre un extrait d'une étude de droit comparé sur le droit des registres de navires, touchant non seulement l'un des domaines du droit les moins traités en Suisse, mais aussi impliquant des juridictions relativement rarement examinées dans nos avis comparatifs.

Concernant la bibliothèque, une introduction à la *Knowledge base* du service de référence de l'ISDC vous est proposée. Cette base de données offre une collection des questions posées à notre service de référence ainsi que de leurs réponses.

Enfin, en dernière page, nous accueillons la nouvelle année avec un aperçu des manifestations et publications prévues en 2019.

Très bonne lecture !
Les éditeurs

Rétrospective 2018

Der Bundesrat hat am 29. Juni 2016 die Totalrevision des Bundesgesetzes über das Schweizerische Institut für Rechtsvergleichung (SIRG) in die Vernehmlassung geschickt. Nachdem der Bundesrat am 31. Januar 2018 die Botschaft und den Entwurf zur Totalrevision des SIRG gutgeheissen hatte, wurde das Gesetz im Laufe des Jahres in den beiden Kammern des Parlaments beraten und die Revision wurde mit Schlussabstimmung vom 29. September 2018 mit glänzendem Resultat angenommen. Das revidierte Gesetz wird voraussichtlich Anfang 2020 in Kraft treten.

Forschungsmässig hat das Institut im Jahr 2018 sein Projekt im Bereich Wirtschaft und Menschenrechte zur Unterstützung des nationalen Entscheidfindungsprozesses und der internationalen Debatte fortgeführt. In diesem Rahmen wurden 2018 Gutachten insbesondere zur Umsetzung der europäischen Regelungen erstellt. Zudem organisierte das Institut drei Veranstaltungen im Zusammenhang mit dieser Thematik: einen wissenschaftlichen Austausch zu aktuellen Reformen im Gesellschaftsrecht in Europa und den Einbezug sozialer und gesellschaftlicher Anliegen in diesem Rahmen; eine zusammen mit der Sport Integrity Global Alliance organisierte Tagung zur Lieferkette (*Supply Chain*) im Sport und die Verpflichtung, in diesem Zusammenhang Menschenrechtsaspekte zu berücksichtigen, sowie eine zusammen mit der Société de Législation Comparée in Paris organisierte Tagung zur *Due Diligence* und der (im französischen Recht eingeführten) *devoir de vigilance* von Unternehmen.

Auch das Forschungsprojekt im Bereich Recht und Kommunikation war das Institut 2018 tätig. Im Anschluss an eine 2017 durchgeführte Tagung wurden 2018 Arbeiten an einer Publikation zur rechtlichen Regelung der Blockierung von Internetseiten zur Bekämpfung von Terrorismus begonnen. Dabei werden allgemeine, praktische und rechtliche Aspekte, insbesondere auch im Hinblick auf das erneuerte europäische Regelwerk, diskutiert.

In Ausführung der vom Institutsrat genehmigten Strategie für die wissenschaftlichen Aktivitäten 2015-2020 kombiniert das Projekt „Methoden der Rechtsvergleichung" eine theoretische Reflexion in Anknüpfung an die wissenschaftliche Debatte in diesem Bereich mit praktischen Aspekten, insbesondere aus der Praxis des Instituts.

Im Jahr 2018 wurde der Austausch mit vergleichbaren Institutionen im Ausland gepflegt. Unter anderem verbrachte auch in diesem Jahr Johanna Fournier, Juristin für das deutschsprachige Raum, zwei Wochen an der Law Library of Congress, um den Arbeitsalltag und die Vorgehensweise der Law Library kennenzulernen und um die Partnerschaft zwischen den Instituten zu vertiefen. Zudem wurden Vorbereitungsarbeiten für ein Seminar mit anderen vergleichbaren Institutionen in die Wege geleitet. In dieser Weise sollen Synergien zwischen wissenschaftlicher Arbeit und wissenschaftlichem Diskurs mit der eher auf praktische Bedürfnisse ausgerichteten Gutachtenstätigkeit ausgenutzt werden, das Netzwerk ausgebaut und damit auch die Qualität der Arbeit verbessert werden.

Das Institut hat im Jahr 2018 die folgenden Veranstaltungen organisiert, von denen einige Beiträge nun auch als *podcasts* verfügbar sind:

22. März **Journée de formation doctorale 2018** (en collaboration avec la CUSO)
24. Mai **Fixing Societies by Fixing Business? - Comparing Corporate Law Reforms**
15. Juni **Les enjeux juridiques de l'e-sport - The Legal Issues of Esport** (*podcasts*)
28. Juni **Le droit international privé dans le labyrinthe des plateformes digitales** (*podcasts*)
25. September **Quand le droit rencontre la relativité**
22. November **Sustainable Supply Chains in Sports: From Mega-Event Management to Daily Due Diligence** (*podcasts*)

Gleichzeitig hat das Institut auch an anderen Veranstaltungen teilgenommen, welche von unseren Partnern organisiert wurden. Dies geschah teilweise durch Vorträge vonseiten der Mitarbeitenden des Instituts, teilweise durch organisatorische oder finanzielle Unterstützung.

Boursiers

L'Institut favorise les échanges entre les chercheuses et les chercheurs par l'organisation des rencontres informelles. Lors de ces rencontres, elles et ils ont l'occasion de présenter leurs travaux durant une vingtaine de minutes, suivis d'un débat. En 2018, 18 rencontres informelles ont eu lieu (soit le même nombre qu'en 2017). Dix d'entre elles ont été animées par les boursiers van Calker de l'ISDC. Nous vous proposons un aperçu de chaque thématique traitée par ces personnes :

22 février : The Search for a Unitary Legal Framework for Data: Is "Propertization" the Answer? - A Comparative Assessment of the Legal Frameworks of the EU, US, Brazil, India & China
Ioana Stupariu, *PhD student, Central European University, Hungary*

In my research, I look at the current legal regime of data in the EU, US, Brazil, India and China, analyzing the extent to which regulators treat it or could treat it as property. This framework, often called "propertization" (the phenomenon by which data receives a property-like legal treatment), will be scrutinized to verify whether it has the ability to offer a credible starting point for a potential, unitary and comprehensive theoretical legal framework for data. This endeavor stems from the premise that, in the absence of a unitary framework for data, ad-hoc legal treatment and policy making, transplants from other fields of law or allowing for legislative vacuums to exist can create several problems, including forum shopping, unfair competition or abuses of rights. A coherent legal treatment of data would lead to predictability, thus ensuring fewer legal and transaction costs, better protection of rights and freedoms and less difficulties in transposing the treatment to the virtual arena. In my analysis, I look at conceptual notions whose object either clearly qualifies as data by their nature, such as big data, metadata and personal data, or contain data as a part of their object, such as trade secrets or the sui generis database rights present in the EU.

15 mars : Film Screening "CASA SON DUNO"
Vanessa Rüegger, *Professeur associée et chargée de cours, Unidistance et Université de Bâle, Suisse*

The poorhouse in a small village in Switzerland is no longer used. For decades, children and adults from the village – including many from the Yenish community – were forcefully placed therein, often against their will. The film quietly observes the traces of a silenced past. It weaves a fine web, touching upon the inconceivable history of Switzerland's violent exclusion of those unwanted.
Co-Producer, Writer: Vanessa Rüegger; OriginalMusic/Composer, Sound Editor: Rea Dubach; Cinematographer/DP, Co-Producer: Mike Krishnatreya; Editor: Stefan Muggli; Sound Editor: Jonas Cslovjecsek; Publicist: Myriam Gämperli

24 avril : Role of Law in Preservation of Agricultural Land
Sofija Nikolic, *PhD student, University of Belgrade, Serbia*

Agricultural land is a scarce and hardly renewable natural resource. The world's population is increasing, causing ever higher demands for food production, while areas suitable for cultivation have a decreasing tendency due to human and natural factors. The core question is how law can contribute to preserving agricultural land. Due to its specific characteristics, ownership on agricultural land differs from ownership on other immovable properties. One of the possible solutions in order to preserve agricultural land is by imposing positive and negative limitations, both in public and private interest. Research focuses on finding a balance between owners' rights and general interests. Some of the various countries whose systems will be compared are Serbia and Switzerland. The Swiss approach to agricultural land and family farms is a very interesting example of how detailed regulation and limitation of ownership right can contribute to preservation of arable land. Specific regulation on transfer of agricultural land aiming to keep the land within the family and a prescribed number of hectares of arable land that have to be preserved at the cantonal level are some of the various measures applied in order to protect the land and enable sufficient production. This makes the Swiss system highly important for comparative legal research in this field.

17 mai : Mécanismes de coopération internationale pour la restauration d'avoirs
Marwa Youssef, *Doctorante en Droit Pénal, Faculté de droit, Université d'Alexandrie, Égypte*

On 7 October 2000, the legal basis for the cooperation in criminal matters between Egypt and Switzerland was established bilaterally through a mutual legal assistance treaty. However, on 20 December 2017, the Federal Council decided to terminate mutual legal assistance procedures between Switzerland and Egypt. Switzerland's cooperation began in 2011 within a half hour of Mubarak's fall, being the first state to freeze the former president's assets, but ended with the termination of mutual legal assistance at the end of 2017. What will happen beyond the closure decision? One of the reasons for its termination is the Egyptian reconciliation agreements with certain individuals listed in the blocking order issued by Switzerland. The research analyzes the reconciliation agreements in the light of the decision no 16 of 2015, which authorized the reconciliation procedures in the crimes set forth in Part IV of the second book in the Egyptian Penal Code concerning misappropriation of public funds, aggression and treachery.

22 mai : The impact of the Indian Decentralisation Policies on Indigenous Governance Institutions
Chiara Correndo, PhD student, Università degli Studi di Torino, Italy

The research project is built on the fieldwork activity I conducted in Jharkhand, India, in the district of West Singhbhum, in March and April 2017. In those months, I had the opportunity to investigate the impact of the Panchayati Raj policies on the traditional social, administrative and judicial tribal (Adivasi) structures in West Singhbhum, which falls within the constitutional Fifth Schedule. Namely, I compared the objectives and provisions enshrined in the 1996 Panchayat (Extension to Scheduled Areas) Act (PESA), with the following Jharkhand Panchayat Raj Act (JPRA), and the social consequences of their implementation. The findings of this comparison are twofold. On the one hand, PESA and, most of all, JPRA, imposing a top-down model of decentralisation in which the role of the traditional village assembly was considerably downsized, did not completely fulfill the expectations tribal people harbored in them. Instead, because of some (more or less intentional) structural flaws, they paved the way for further exploitation and deprived indigenous communities of the crucial protection ensured by traditional assemblies. Thus, one should critically interpret the adoption of these strategic reforms on the part of the State, which managed to penetrate areas politically impervious as the indigenous ones. On the other hand, the research opens up to a gender dimension: in fact, these reforms have triggered a micro-revolution first of all in terms of perception (and self-perception) of the role of women in the villages and the potential inherent in the dynamics of aggregation. This aspect is still being investigated through the adoption of intersectional lenses.

24 juillet : Good Faith in Long-term Relational Supply Contracts in the Context of Hardship: An International Perspective
Peng Guo, *PhD Candidate, University of New South Wales, Australia*

In my thesis, I argue that in the context of hardship, the parties to a long-term relational supply contract have a duty to renegotiate the contract unless there is a 'compelling reason' not to do so. Where renegotiations fail, the judges or arbitrators have the power to adapt the contract on the basis of good faith and the relational nature and characteristics of the contract. If there is a complete breakdown of the ongoing contract relationship, an adaptation to the contract will cause one or the adaptation will rewrite the contract, the judges or arbitrators have the power to terminate it. Also, the parties' duty to renegotiate the contract and the power of courts or arbitral tribunals to adapt and terminate the contract should be limited to international long-term relational contracts, and in particular, in international long-term relational supply contracts.

21 août : Privacy Protection in an Era of Big Data and Location Technologies
Laura Garcia Vargas, *PhD student, University of Ottawa, Canada*

Technologies using location data are an essential part of our lives as individuals, citizens, and consumers. Every day we interact with devices and services requiring access to information about where we are (e.g. mobile services, map applications, GPS enabled vehicles, and location beacons). Even more, the sources producing and collecting location data continue to increase, and their technological capacities continue to improve, allowing companies to gather highly detailed geographical information. These technological capacities combined with business models based on big data analytics create serious social

and legal concerns. One of these concerns is to ensure the protection of location privacy. In the big data context, private organizations utilize location data to analyze and predict behaviours and patterns. This processing of the data creates benefits for individuals and society. For instance, it provides directions to get faster from A to B, and mobility data for urban planning. However, it also threatens privacy as it makes it easier for companies to intrude on the lives of citizens and consumers, and enhances their ability to exercise control over people and groups. This research project provides an overview of the importance of location privacy, and the limits of how it is protected. It starts by explaining the relevance of location privacy. It then introduces some of the regulations aimed at protecting location data in different legal systems. Finally, in light of the present (and future) technological developments, the project concludes by highlighting some limitations of the current legal protections.

20 septembre : Social Interests in Investment Arbitration: A discourse analysis
Kusum Dhanania, *PhD student, Institute of International and Development Studies (IHEID), Swiss*

The international investment law regime operates by means of a system built on the basis of investment arbitral awards. As a result, its legal normative development is controlled by the awards rather than by nation-states as in other areas of international law. The arbitral tribunals that render these awards are composed of a small identifiable community of persons. An international regime built on a system of awards emerging from disputes between nation states and other stakeholders would inevitably suffer from a legitimacy deficit were it not for the fact that the discourse of international investment law is multivalent. Therefore, the norm development for this regime has to be inclusive of this diversity of realities, interests and actors in order to be legitimate. This thesis will first identify the constituents of this multivalence: the local stakeholder communities in investor projects and the diversity of scholars in the international context. Thereafter, it will devise a mechanism for including multivalence into the *de facto* norm-formulating function (investment arbitration). In this, public participation could play a significant role as a conduit for the inclusion of multivalence in investment arbitration.

13 novembre : The Contribution of Due Diligence in the Field of Corporate Accountability with Respect to the Protection of Human Rights and the Environment. An International and Comparative Law Study
Paul Mougeolle, *Ph.D. Candidate, University of Potsdam and Paris Nanterre, Deutschland and France*

What is due diligence? Why did it become such a modern and widely used legal concept in the field of business, human rights and environmental protection even though it already existed before? My Ph.D. thesis examines these questions in order to contribute to the understanding of the still enigmatic concept of due diligence, since its ubiquity might have ground-breaking consequences in this area. The attention of the legal debate is very much captured by the concept of "human rights due diligence" (HRDD) since its introduction by the UN-Guiding Principles in 2011. However, the idea of HRDD does not seem to be truly new. Indeed, the English Court decision in *Chandler v. Cape* shows for example that parent companies must prevent the possible harms of their subsidiaries in some situations given their "duty of care". Accordingly, if pre-existing due diligence and other similar norms already allow for the objectives of HRDD to be achieved, what is the genuinely innovative contribution of HRDD? This question remains very relevant given the lack of transposition of HRDD in hard-law. Consequently, an exhaustive exploration of due diligence in domestic law needs to be undertaken. In addition, due diligence is extensively recognized in international public law. The Committee on Economic, Social and Cultural Rights in its General Comment no. 24 even relied on it – although, implicitly – to construe from prevailing law an (extraterritorial) obligation for States to foresee adequate duties for (transnational) corporations such as HRDD given their possible harmful impacts. Given the influence of due diligence in environmental protection, this State duty might be extended to environmental matters. These observations suggest that if corporations are not subjected to human rights and environmental due diligence and other similar obligations in domestic law, States might be held liable because of the disregard of their own due diligence. This study therefore takes a comparative approach to clarify the influence of pre-existing due diligence and other similar norms as well as the ongoing debate that aims to understand to what extent new corporate duties such as the HRDD must be integrated into hard-law.

22 novembre : Reliance of Third-Party Certifiers on Human Rights and Other 'Public Law Defences' in Tort Litigation
Jan de Bruyne, *Post-doctoral researcher, Ghent University, Belgium*

Third-party certifiers such as credit rating agencies (financial sector), classification societies (maritime sector) and notified bodies (medical sector) issue certificates attesting that a certified item complies with certain standards or meets (legal) requirements. Although the provision of this certificate constitutes the performance under the agreement with the entity requesting the certification services, the information included in this attestation can and will also be used by persons with whom certifiers do not have any contractual relationship or even by the public at large. One can think of investors relying on credit ratings, cargo-owners requiring a class certificate before contracting with a ship-owner or consumers buying a particular medical device covered by a certificate (e.g. CE label). As such, third parties using certificates need to be sure that they are accurate and reliable. A certifier has to be trustworthy and apply the appropriate level of care in performing its functions for the certification mechanism to work. Several recent scandals, however, show that certificates do not always correspond with the 'true' or 'real' value of the certified item. Some famous examples are inaccurate credit ratings that contributed to the 2008 financial crisis, the sinking of the *Erika* and the *Prestige* and the position of classification societies or the involvement of a notified body in the certification of the defective *PIP* breast implants. Third parties might thus incur losses or suffer injuries, despite the issuance of a certificate attesting that an item complied with the applicable norms. Against this background, it is no surprise that individuals or organisations have already filed lawsuits against third-party certifiers alleging that the certificates they relied upon were incorrect or flawed. However, imposing liability upon third-party certifiers is by no means straightforward. In addition to proving the necessary elements for a liability claim to be successful (e.g. duty of care, a certifier's wrongful act or causation), third-party certifiers might also rely on human rights or 'public law defences' to refute liability. Examples are freedom of speech protection for certificates or immunity from jurisdiction.

Publications

En 2018, deux nouveaux volumes ont été publiés dans notre collection ainsi que le volume XIX du Yearbook of Private International Law :

Volume / Band 85
Andrea Bonomi / Krista Nadakavukaren Schefer (éds)

US Litigation Today: Still a Threat For European Businesses or Just a Paper Tiger? Conference proceedings from the 29th Journée de droit International privé of 23 June 2017

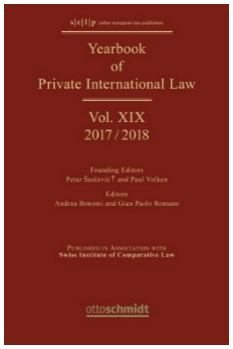
The Swiss Institute of Comparative Law and the Center of Comparative, European and International Law of the Lausanne School of the Lausanne School of Law organized a conference in June 2017 to probe the current realities of US litigation for foreign companies. The contributions in this volume were authored by the speakers of this event. The chapters discuss the law as of the end of 2017, with only limited updates of the developments since then.

Volume / Band 86
Ilaria Pretelli (éd)

Conflict of laws in the maze of digital platforms / Le droit international privé dans le labyrinthe des plateformes digitales

Since its creation in the early 1990s, the World Wide Web has intensified its role and skills at too speedy pace for any sober reflection in human sciences. The exponential rise of tech oligopolies is also a consequence of the "statelessness" of the platform economy, a circumstance that explains the great interest of the subject for lawyers and the choice of this topic for the 30th day conference in Private International Law of the Swiss Institute of Comparative Law, held on June 28th, 2018. The disruptive potential of the platform economy challenges traditional approaches based on the bilateral legal relationship and its geographical location. It is worth asking whether the basic principles of private international law can be adapted to the immateriality of the digital space, whether a new revolution in the theory of private international law can be expected, or whether private international law is an inapt tool for platform governance and the only promising way is that of a multilateral and harmonising approach. Collecting the proceedings of the conference, the 86th volume of our red series aims to contribute, through a multidisciplinary analysis, to the collective effort to build a legal theory adapted to digital platforms. By presenting the first national and supranational responses to the challenges of the platform economy - still disordered and sometimes contradictory - the book attempts to synthesise the main trends in the legal developments that are forthcoming in various legal fields, with a focus on the need to protecting weak parties (workers, consumers, small and medium businesses).

Vol. XIX - 2017/2018
Andrea Bonomi, Gian Paolo Romano (éds), Ilaria Pretelli (associate editor)



Yearbook of Private International Law

Le volume XIX du Yearbook revisite des questions classiques du droit international privé telles que le *forum non conveniens* et les clauses d'exception ou encore les dispositions impératives étrangères. Il présente des contributions traitant de problèmes spécifiques et techniques, comme la maternité de substitution, la loi applicable au droit de recours en matière d'assurance responsabilité, celui de la reconnaissance des dommages punitifs dans l'UE ou celui de la faillite internationale dans le secteur bancaire. Une section spéciale est consacrée aux nouveaux règlements européens sur les régimes matrimoniaux et les effets patrimoniaux des partenariats enregistrés, une autre aux biens culturels. La section des rapports nationaux traite des développements récents en Hongrie, Nouvelle-Zélande, Mongolie, Russie et Turquie. Deux articles sur la maternité de substitution internationale complète également ce volume. Enfin, la section sur les Nouveautés de la Haye traite des travaux en cours de la Convention de La Haye sur les jugements.

Série de publication électronique d'avis de droit

L'Institut poste régulièrement des avis de droit sous la **Série de publication électronique d'avis de droit de l'ISDC** (**E-Avis ISDC**). Les avis mis en ligne sont ainsi numérotés progressivement et publiés avec une page de couverture qui contient toutes les informations nécessaires y compris pour la citation et reprend les éléments de la ligne graphique de l'Institut. Ils sont accessibles en ligne : https://www.isdc.ch/fr/services/informations-juridiques-en-ligne

Avis mis en ligne en 2018

2018-01 Legal Opinion on the Regulation of Audit and Supervision of Audit
European Union, France, Germany

2018-02 La preuve de la qualité d'héritier et la vocation successorale de l'enfant naturel
Mali

2018-03 Affichage et port des signes et symboles religieux
Allemagne, Angleterre, Autriche, Belgique, France, Italie, Suède

2018-04 Regulation of Credit Information Companies
Belgium, Canada (Ontario), France, Germany, Sweden, United Kingdom

2018-05 L'accès aux contenus de messageries électroniques et réseaux sociaux stockés à l'étranger dans le cadre d'enquêtes pénales
Droits de l'Union européenne et du Conseil de l'Europe, Allemagne, Autriche, Belgique, États-Unis, France, Irlande, Italie

2018-06 Kurzgutachten über Restschuldbefreiungs-verfahren
Frankreich, Schweden

2018-07 Kurzgutachten zum Stand des § 1502 Dodd-Frank Gesetzes
USA

2018-08 Terrorismusprävention I
Deutschland, Frankreich, Italien, Österreich und Vereinigtes Königreich

2018-09 Terrorismusprävention II
Deutschland, Frankreich, Italien, Österreich und Vereinigtes Königreich

2018-10 Die Umsetzung der Richtlinie 2014/95/EU (CSR-Richtlinie) in verschiedenen Mitgliedstaaten der EU
Belgien, Dänemark, Deutschland, Finnland, Frankreich, Italien, Niederlande, Österreich, Schweden, Spanien, Vereinigtes Königreich

2018-11 Kurzgutachten zum Stand des § 1504 Dodd-Frank Gesetzes
USA

2018-13 Mariage forcé
Nations unies, Conseil de l'Europe, Union européenne, Allemagne, Autriche, Belgique, Danemark, Espagne, France, Italie, Norvège, Pays-Bas, Royaume-Uni, Suède

2018-14 Access to Remedy: Study commissioned by the FDFA with a view to fulfilling Postulate 14.3663; Étude élaborée conjointement avec le Centre suisse de compétence pour les droits humains (CSDH)
Denmark, Germany, the UK, France, the Netherlands, Canada, USA

2018-15 Legal Opinion on Maritime Registration
Euromar/Portugal, Germany, Hong Kong, Liberia, Luxemburg, Marshall Islands, Sweden, Antigua & Barbuda

2018-17 The Establishment on non-profit Legal Entities
Belgium, Czech Republic, Spain

2018-18 The Swiss Gold Sector and Related Risks of Human Rights
UAE, South Africa, India

2018-19 Datenportabilität sowie Regelungen betreffend Wiederverwendung von Daten
EU, Deutschland, Frankreich, Schweden, Japan, USA

2018-20 Street Harassment
Argentina, Austria, Belgium, Denmark, France, Germany, Italy, the Netherlands, Norway, Peru, Portugal, Sweden, United Kingdom, USA

Étude de droit comparé

L'ISDC rédige plusieurs grandes études de droit comparé par année. Nous avons ici sélectionné un extrait d'une étude sur les registres de navires de 2018. Elle compare la législation de huit juridictions différentes, dont quelques-unes sont relativement rarement traitées à l'Institut et, qui plus est, dans un domaine du droit peu connu en Suisse : le droit maritime. L'étude a été finalisée en avril 2018, les informations contenues sont à jour à cette date.

Maritime Registration

Recherches effectuées par les conseillères et conseillers juridiques de l'Institut – **État avril 2018**

Even before Hugo Grotius penned "*Mare Liberum*", international law had regarded the regulation of the world's oceans its core focus. The principle of freedom of the high seas that was crystallized out of the expansionist ambitions of the 17th century maritime powers remains one of the most enduring and accepted rules of international law. Nevertheless, freedom from sovereignty over the high seas does not mean that vessels on the high seas are free from legal obligations. Every vessel, in fact, is subject to the laws and regulations of international law and to those of its own sovereign: the "flag state". Having a flag state is a legal requirement under international law, and therefore an obligation as well as a privilege. To receive a flag, the owners of a vessel must register it with the designated authorities. It is the authorities of each host government that can place conditions on the registration, use, and retention of a flag. As a vessel's ownership has become separated from its flag-nationality, the differences in regulation become key considerations in the choice of flag state. The study conducted by the ISDC examined the conditions of maritime registration in different flag states. Whereas significant overlap in the applicable rules of the various jurisdictions existed, there were a few differences in approach for some aspects of flagging. Significant differences, surprisingly, were not evident even as between flags from jurisdictions regarded as having "flags of convenience" and traditional maritime states' flags. In fact, given the similarity of legal rules, one is left to presume that the main difference among registries rests with the administrative practices and the rigor of rule enforcement associated with the different jurisdictions. The most valuable lessons of the study for states reconsidering their flagging requirements may lie in traditional registries' establishment of offshore registration options. Secondary registries allow for vessel owners to hire non-nationals even while staying subject to the traditionally rigorous standards of their well-regarded supervisory administrators.

Allemagne – Deutschland

Die Registrierung von Schiffen richtet sich in Deutschland nach der Schiffsregisterordnung und dem Flaggenrechtsgesetz. Für die Einflaggung bedarf es der Eintragung in das Schiffsregister. Bei den Schiffsregistern wird zwischen Binnen- und Seeschiffsregistern unterschieden, welche getrennt voneinander geführt werden. In das Binnenschiffsregister werden die zur Schifffahrt auf Flüssen und sonstigen Binnengewässern bestimmten Schiffe (Binnenschiffe) eingetragen, in das Seeschiffsregister hingegen werden Seeschiffe, das heisst Kauffahrteischiffe und andere zur Seefahrt bestimmte Schiffe eingetragen, die nach dem Flaggenrechtsgesetz die Bundesflagge zu führen haben oder die diese führen dürfen. Das Schiff ist in der Regel in das Schiffsregister seines Heimathafens oder seines Heimatortes einzutragen. Im Rahmen der Seeschiffsregister wird zwischen dem nationalen Seeschiffsregister, das von den Amtsgerichten geführt wird und auch als „Erstregister" bezeichnet wird, und dem Internationalen Seeschiffsregister unterschieden, welches auch „Zweitregister" genannt wird. Die Eintragung in das Erstregister ist Pflicht, die Eintragung in das Internationale Seeschiffsregister dagegen freiwillig. Das freiwillige Internationale Seeschiffsregister wird nicht von den Amtsgerichten geführt, sondern vom Bundesamt für Schifffahrt und Hydrographie als Flaggenbehörde. In das Register können Kauffahrteischiffe eingetragen werden, die zur Führung der Bundesflagge berechtigt sind und die im internationalen Verkehr betrieben werden. Voraussetzung für die Eintragung ist ein Antrag des Eigentümers. Mit dem Internationalen Seeschiffsregister wird versucht, Reedern Anreize für eine Ausflaggung zu nehmen, zum Beispiel indem mit der Eintragung der Abschluss von Arbeitsverträgen mit ausländischen Seeleuten erleichtert wird. So können diese dann gemäss den Regelungen ihrer jeweiligen Herkunftsländer entlohnt werden.

EUROMAR/Portugal

The Portuguese "Conventional register" is the regular domestic register of ships. It is managed by the maritime authorities' offices (*Capitanias* or *Delegações Marítimas*) existing in each Portuguese port. The ship's homeport is the port where the office that registered the ship is located. The second Portuguese register is the *Registo Internacional de Navios da Madeira* (MAR), an international ship register created in 1989. As MAR is located at Funchal, Madeira, the home port of MAR-registered

vessels is Madeira. Yet, from the technical point of view, ships registered at MAR are subject to the same maritime legislation applied to the ships registered in the Conventional register. The vessels registered in the MAR fly the Portuguese flag and are subject to Portuguese law, except when the parties have used the option to subject a mortgage to a foreign law. Due to the international competition in the commercial shipping sector becoming more intense, a sharp reduction of the costs of maritime freight developed, leaving to operators smaller margins of profitability. For this reason, different solutions were being explored, *inter alia*, the development of the so-called "flags of convenience", and the creation of special ship registers. Regarding the MAR, the first piece of important legislation is *Decreto-Lei 96/89* ("the Decree"). According to the Preamble of the Decree, the creation of a second register, proposing lower tariffs and offering conditions similar to the ones obtainable in the most competitive jurisdictions, allows both that ships registered in the main domestic ship register may switch to the second register, and that new ship-owners may be attracted to the second register. The Decree concludes, in view of the difficulties caused by the high competition, the lower levels of profitability, the special characteristics of the commercial naval activity, and the recourse by some Portuguese ship-owners to flags of convenience, it became necessary to constitute a second ships register in Portugal, Madeira. The Decree maintains that the new register in Madeira must characterize by its high quality standards. For so doing, it must stand on line with the standards of those registers internationally recognized as being quality registers. Therefore, one of the pivotal axes of the new Portuguese register must be the adoption of effective systems for monitoring the ships. Vessels registered with MAR may be owned by a company set up and registered in the Madeira offshore zone, or set up or registered somewhere else. From the organic point of view, the MAR is a dependence of the Portuguese Ministries of justice and of public works, transport and housing. It is competent to register all acts and contracts involving ships subjects to it, and to control the requirements of security, as dictated by the international treaties.

Marshall Islands

The Republic of the Marshall Islands (RMI) Maritime Act 1990, as amended (October 2016 version), is the main legislative instrument governing the registration and operation of vessels flying the RMI flag. It includes chapters on the relevant administrative structures, vessel safety, liability, environmental protection, and maritime worker protection as well as the regulations relating to offering an RMI flag to a vessel. Together with the relevant Maritime Regulations, the Maritime Act Chapter 2 (Documentation and identification of vessels), Part I (Vessel Registration) sets forth most of the information upon which the following assessment is based. According to the Maritime Act, the authority responsible for maritime registration is the Maritime Administrator. It is the Administrator's duty to oversee that vessels fulfil the legal requirements as to seaworthiness and the labor conditions for crews. The Maritime Administrator has designated a private company in the United States to be its designee, however. For most types of legal disputes, RMI courts have jurisdiction, although arbitration is also permissible for commercial disputes. Given the historical ties RMI has with the United States, there is also a provision in the Maritime Act to incorporate US common law on maritime issues.

Suède – Sweden

One of the first ship registers in the world, the Swedish Register of Ships dates back to 1870. Today, ship registration is regulated mainly in Chapter 2 of the Swedish Maritime Code (*Sjölag (1994:1009)*). The basic requirement laid down in the Chapter's first provision states that all *Swedish ships* (*skepp*) must be registered in the ship section of the Vessel Register (*Fartygsregistret*), kept by the Swedish Transport Agency (*Transportstyrelsen*). The present system of registration of vessels came into force on 1 January 1976. Further important modifications were introduced as a consequence of the European Court of Justice's *Factortame* cases, which held that Member States whose national legislation contravened European Union law – such as strict nationality rules for registration of ships on a national registry – could be liable to private persons injured by such legislation. These amendments, allowing under certain conditions the registration of ships owned by EU citizens, took effect on 1 July 1997 and are the most recent substantial amendments to the legal framework governing registration. An organizational change was introduced on 1 December 2001, whereby the previous three registers for ships, ships under construction (a ship is a vessel having a hull exceeding 24 meters), and boats were united as three parts of one Register of Vessels (*Fartygsregistret)*. This register was then moved from the Stockholm District Court to the Swedish Transport Agency (*Transportstyrelsen*), thus operating as part of an administrative rather than a judicial authority. The Register is public and practically all documents filed with the register or issued by the register are public. Rules on fees for ship registration as well as other ship related fees are laid down in Transport Agency's Regulation on Fees (*Transportstyrelsens föreskrifter om avgifter TSFS 2016:105*). The fees are set based on the principle that they should cover the Agency's actual costs for the measure taken or for the service provided. The fees are therefore regularly adjusted in order to comply with this principle.

Bibliothèque

La *Knowledge base* du service de référence de l'ISDC

Depuis 2005, l'Institut suisse de droit comparé a mis en place une base de connaissances recensant les 15'000 requêtes adressées physiquement et virtuellement au service de référence de la bibliothèque. Cette base disponible en interne fait l'objet en 2019 d'un développement sous la forme d'un service de questions / réponses. Une sélection des demandes les plus actuelles, fréquentes et pertinentes est en train d'être mise en ligne.

En 2018, 1'145 requêtes ont été adressés sur place (40 %) et à distance (60 %) par les utilisateurs. Voici un florilège des questions posées :

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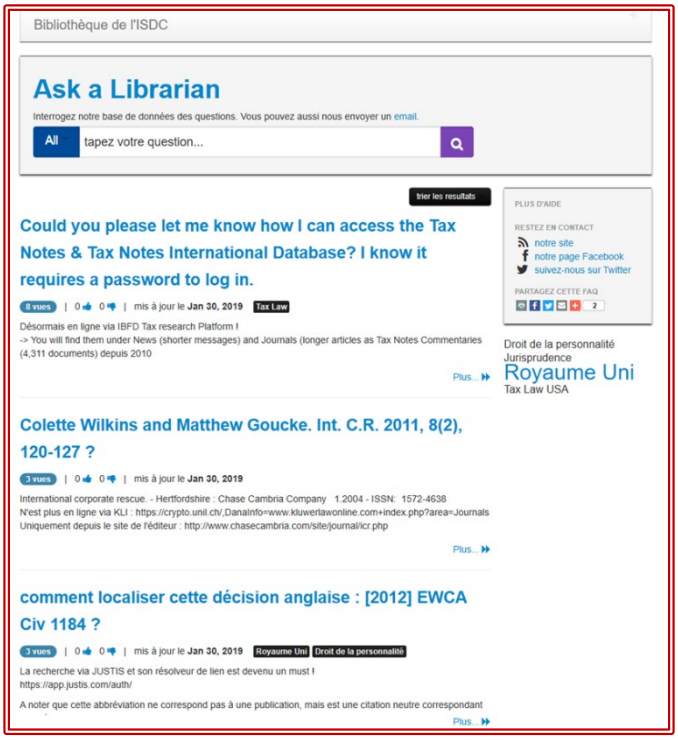
- Où puis-je trouver ce rapport suisse présenté au congrès international de Droit comparé de Pescara en 1970 ?
- Pourriez-vous m'indiquer si vous possédez de la doctrine sur la répudiation (*Talaq*) en Tunisie ?
- Où puis-je consulter la référence suivante: Schiller, « Restraints of Trade in Classical Roman Law » in Mnemosyna Pappulias (1934) ?
- À quelle revue renvoie l'abbréviation suivante : Dawson v Wearmouth, What's in a name? A child by any other name is surely just as sweet? [1999] CFLQ 423 ?
- Possédez-vous ce numéro de 2015 du Journal officiel de la République de Côte d'Ivoire ?



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Prospective 2019

Evénements déjà planifiés

06.02.2019 Événement	**Harcèlement de rue** (en collaboration avec la Ville de Lausanne)
23.05.2019 Symposium	**Journée de DIP : Les mesures provisoires en droit international privé et en arbitrage international**

En cours de planification

Colloque	**Human Rights Due Diligence in France**
Colloque	**Comparative Family Law**
Colloque	**Vergleichendes Religionsrecht**
Colloque	**Comparative Migration Law**
Colloque	**Le droit coutumier comparé : Perspectives nationales et internationales**
Événement	**Le droit & …**
Événement	**AirBnB**
Formation	**Journée doctorale** (en collaboration avec la CUSO)
Workshop	**Comparative Law Institutions**

Nouveau collaborateur juridique !

Dr. iur. ZHENG Jun

The ISCD welcomes our new legal advisor Dr. ZHENG Jun, who jointed our legal team on 3 January 2019. Dr. ZHENG is responsible for providing legal advice on Asian jurisdictions, including but not limited to China, Taiwan region, Japan, South Korea, Vietnam etc. After receiving his bachelor and master's degree in law in China and doctoral degree in law in Switzerland, Dr. ZHENG started his career as a legal advisor/lawyer at an international law firm in Shanghai, where he remained for three years. The scope of legal services provided by the ISDC can now extend to five continents and most jurisdictions worldwide.

Publications prévues

Volume 87	**The Legal Framework for Countering Terrorist and Violent Extremist Content Online**
Volume 88	**Cohérence droit international privé**
Volume 89	**Mesures provisionnelles – Actes DIP 2019**
Volume XX	**Yearbook of Private International Law 2018-2019**

Et tout au long de l'année : des visites d'étudiants encadrés par leurs professeurs, des Rencontres informelles et des délégations suisses et étrangères qui viendront visiter l'Institut suisse de droit comparé.

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