INTERNATIONAL COMMERCIAL LITIGATION

COURSE SYLLABUS

Bucerius Law School – Summer School July 2016

Prof. Dr. Peter Huber
Johannes Gutenberg University, Mainz, Germany
peter.huber@uni-mainz.de
Thank you for having chosen my course on **International Commercial Litigation**.

The course deals with cases where an international commercial transaction has given rise to a legal dispute between the parties and where this dispute is not decided by arbitration. In such a scenario, the parties have to litigate before the domestic court of a State. This raises a number of difficult issues, a selection of which will be dealt with in the course, primarily from a European (EU) and from a US perspective.

One part of the course will be devoted to the issue of international jurisdiction: In which state’s courts can the plaintiff bring his lawsuit against the defendant? What if there are several states that offer a ground of jurisdiction? Why does it matter at all whether a dispute is litigated in one state rather than in another? Can the parties in their contract choose the forum in which future claims will be litigated (forum selection)?

A second part of the course will deal with a selection of specific issues that may arise in international commercial litigation: What if the court which is seized with the lawsuit regards itself as an inappropriate forum (forum non conveniens)? What if the same lawsuit is brought twice, but in different states (lis alibi pendens)? What are the so-called “torpedo claims”? Is it possible to prevent the other party from bringing a lawsuit in a certain state by way of an “antisuit injunction”? Will a judgment from the courts of one state be recognized and enforced in other states?

The course will be conducted in a **seminar format** during which we will discuss specific issues in class. This format requires that students have read the **reading assignments in advance**. A **schedule** is given below.

**Reading Materials**

1) **Textbooks**: The course is primarily based on two textbooks:


The parts of the book which are required readings are indicated accordingly in the syllabus and are made available to the students in pdf format electronically. The books are also available in the library.

2) **Court decisions**: Several court decisions are mentioned in the syllabus as required reading, others as additional reading. (Abbreviated versions of) these court decisions are either contained in the assigned parts of the textbooks or made available electronically.

3) **Statutory texts**: Please read (as assigned) the text of the legal instruments that are mentioned in the syllabus.

**Contact**

If you have any queries, suggestions etc, please do not hesitate to contact me: peter.huber@uni-mainz.de
Important Notice:

This handout and the other materials for the course may be used FOR EDUCATIONAL PURPOSES WITHIN THE COURSE 'INTERNATIONAL COMMERCIAL LITIGATION' ONLY. They may contain mistakes or omissions. They must not be relied on for other uses, for example for legal work in practice. Please do not forward them to other people than the registered students for this course. Thank you.
Topic 1 (Seminars 1 – 3)
Bases of jurisdiction – Getting into Court

This seminar will deal with the different general approaches to jurisdiction in international commercial disputes: In which cases will the courts of a state be competent to hear and to decide a claim brought by the plaintiff against the defendant?

REQUIRED READING:

Underlined parts should be read BEFORE the first two seminars on Tuesday, 12 July.

- *Hartley*: p. 11-16, 59-61, 153-161
- Brussels-I Regulation 1215/2012: Art. 4-8; 17-19; 24-26
- *European Court of Justice*: C-381/08 (Car Trim), Nr. 44-62 (= Hartley, p. 59-61)
- *European Court of Justice*: C-45/13 (Kainz/Pantherwerke), Nr. 11 ff.
- *US Supreme Court*: Daimler AG v. Bauman et.al., 571 US 310 (2014), Syllabus only(!)

ADDITIONAL READING:

- *Born/Rutledge*: p. 129-133, 163-169, 176-180, 190-191, 199-200

SEMINARS 1 and 2 (both on Tuesday 12 July)

1. General introduction

- What is jurisdiction?
  - *Hartley*, p. 11-16, 153-155
• Forum shopping and the trans-Atlantic divide: „As a moth is drawn to the light, so the litigant is drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself, and at no risk of having to pay anything to the other side…“ (Lord Denning, English Court of Appeal, Smith Kline (…).v. Bloch, 1983)
• The distinction between general jurisdiction and specific jurisdiction

2. Bases of jurisdiction: The European approach

• Brussels-I Regulation 1215/2012: Art. 4-8; 17-19; 24-26

• General jurisdiction: Art. 4 I

• Special jurisdiction: Art. 7-9
  o Art. 7 Nr. 1: contract: European Court of Justice C-381/08 (Car Trim) (= Hartley, p. 59-61)
  o Art. 7 Nr. 2: tort: European Court of Justice C-45/13 (Kainz/Pantherwerke), Nr. 11 ff.
  o Art. 7 Nr. 5: subsidiaries

• Protection of consumers, employees, insurance policy holders: Art. 10 ff.
  o Example: protection of consumers: Art. 17; Art. 18 I; Art. 18 II; Art. 19

• Exclusive jurisdiction: Art. 24

• Choice of court agreement: Art. 25 [cf. special topic below]

• Submission to jurisdiction: Art. 26
SEMINARY 3 (Wednesday, 13 July, continued on 25 July)


3.1. Historical background and overview

- *Born/Rutledge*, p. 81-91


- “Long-arm statutes” and the “minimum contacts” doctrine - the two types of long-arm statutes

- General jurisdiction and specific jurisdiction: the interrelation between the two

3.2. General jurisdiction

- In particular: general jurisdiction based on physical presence:
  - The rule in a nutshell: *Born/Rutledge*, p. 129 (5.)
  - “Tag” jurisdiction - transient presence – individual defendants
    - [Additional Reading: *US Supreme Court*: Burnham v. Superior Court (= *Hartley*, p. 161-166)]
  - Tag jurisdiction over corporations?
    - *Born/Rutledge*, p. 136-137

- In particular: general jurisdiction based on “doing business”
  - *Born/Rutledge*, p. 116-117
3.3. Specific jurisdiction

- In particular: product liability and tort
  - *Born/Rutledge*, p. 138-140
  - [Additional Reading: *US Supreme Court: Asahi Metal Industry v. Superior Court of California; McIntyre Machinery v. Nicastro* (= *Hartley*, p. 310-321)]

- In particular: contract
  - *Born/Rutledge*, p. 162
  - [Additional Reading: *Afram Export Corp. v. Metallurgiki Halyps, SA* (= *Born/Rutledge*, p. 163-169)]

3.4. Jurisdiction based on corporate affiliations, subsidiaries, agency, alter ego

- *Born/Rutledge*, p. 175-176
- Alter ego
  - [Additional Reading: *Born/Rutledge*, p. 176-180]
- Agency
  - [Additional Reading: *Born/Rutledge*, p. 190-191, 199-200 (points 3., 4.)]
- General jurisdiction?

4. EU and US approaches compared
Topic 2 (~Seminar 4)
Getting out of an Undesirable Court:
forum non conveniens and lis alibi pendens

REQUIRED READING:

- Born/Rutledge: p. 547-552
- Brussels I Regulation 1215/2012: Art. 29-34

ADDITIONAL READING:

- Hartley, p. 234-236
- European Court of Justice, C-406/92 (The Tatry/Maciej Rataj) Nr. 36-47

1. The forum non conveniens doctrine

Should courts have discretion in deciding whether to accept cases over which they have jurisdiction?

- English Law
  
  o Hartley, p. 224-226
  
  o House of Lords, The Spiliada (= Hartley, p. 231-233) [Additional Reading: p. 234-236]

- US Law
  

- Brussels I Regulation 1215/2012: No forum non conveniens doctrine
  
  o European Court of Justice, C-281/02 (Owusu v. Jackson), Nr. 37 et seq. (= Hartley, p. 273-275)
2. Parallel proceedings - *lis alibi pendens*

How should the law react if the same claim is brought by the same parties in different states at the same time? Should a court let both proceedings go forward and risk conflicting judgments? Or should a court prohibit one of the actions from proceeding, and if so, which one? Should it make a difference if one of the claims is for negative declaratory relief (*i.e.* a suit asking the court to declare that the other party does *not* have a valid claim)?

- Brussels I Regulation 1215/2012
  - Lis pendens in another Member State: Art. 29-32
    - Strict priority principle
    - Same “object”: the “central issue” doctrine [Additional Reading: *European Court of Justice, C-406/92 (The Tatry/Maciej Rataj)* Nr. 36-47]
  - Lis pendens in Non-Member States: Art. 33, 34
    - New regime in Brussels I Regulation 1215/2012
    - Limited scope: list of bases of jurisdiction
    - Narrow requirements: discretion; prognosis of recognition; exceptions in Art. 33 (3)
  - US approach: *Born/Rutledge*, p. 547-552
- Comparison: EU law and US approach
- Special topic: Negative declaratory relief – the “Italian torpedo” (cf. also below/choice of court agreements)
Topic 3 (~Seminar 5)
Choice of Court Agreements

This seminar will deal with a vital issue within the field of international commercial litigation, i.e. the question of how to deal with choice of court agreements (jurisdiction agreements) that the parties have included into their contract. Should a court that is otherwise not competent to decide a claim accept jurisdiction on the basis of the parties’ agreement? Should other courts (which would otherwise be competent to decide the claim) decline jurisdiction if there is an exclusive jurisdiction agreement for a foreign court? How can one party react if the other party does not comply with the exclusive jurisdiction agreement and sues in another state? The issue will be discussed from the perspective of European law, US law and the Hague Convention on Choice of Court Agreements.

REQUIRED READING:
- Hartley: p. 208-212; 281-284
- Hague Convention on Choice of Court Agreements of 30 June 2005: Art. 1, 3, 5, 6, 8

ADDITIONAL READING:
- Hartley: p. 212-215
- Born/Rutledge: p. 468-471
- Schulz, Yearbook of Private International Law 7 (2005) p. 1-16

1) European approach

- Brussels I Regulation 1215/2012: Art. 25, 19

- Special topic: lis pendens and the protection of choice of court agreements (Hartley, p. 281-284)
  - The old regime: the “Italian torpedo”
  - The new regime in Art. 31(2) Brussels I Regulation
2) **US-Approach**

- U.S. Supreme Court: M/S Bremen.. v. Zapata Off-Shore (= *Hartley*, p. 208-212)
- Differing approaches in State Courts
  - [Additional Reading: Born/Rutledge, p. 468-471]
- Protection of Consumers
  - [Additional Reading: Carnival Cruise Lines v. Shute (= *Hartley*, p. 212-215)]

3) **Hague Convention on Choice of Court Agreements of 30 June 2005**

- Text of the Convention: Art. 1, 3, 5, 6, 8
Topic 4 (~Seminar 5)
Antisuit injunctions

This seminar deals with the issue whether so-called anti-suit injunctions should be permitted in international commercial litigation. An anti-suit injunction is brought by one party with the objective of preventing the other party from bringing an action in a foreign state. The issue will be discussed from the perspective of English, European and US law. Specific regard will be given to the question of whether anti-suit injunctions may be used in order to protect arbitration agreements.

REQUIRED READING:

- Hartley: p. 244-248, 251-253, 277-279
- Born/Rutledge: p. 567-569

1) English approach

- Hartley, p. 244-248
- Obligation-based antisuit injunctions (Hartley, p. 251-253, § 2.2.4)
- Antisuit injunctions based on an “oppressive and vexatious”-test: England as the natural forum; injunction must not deprive plaintiff in the foreign proceedings of legitimate advantages available in the foreign forum

2) European approach:

- European Court of Justice, Judgment of 27 April 2004, C-159/02 (Turner v. Grovit) (= Hartley, p. 277-279)

3) US approach

- Born/Rutledge, p. 567-569
Topic 5 (Seminar 6)
Recognition and Enforcement of Foreign Judgments

When will a judgment from one state be recognized and enforced in another state? Can or should the "recognizing" state examine whether the courts of the judgment state had jurisdiction over the matter ("jurisdictional filter"), and if so, which standards should it apply?

REQUIRED READING:

- Born/Rutledge, p. 1079-1085
- Brussels I Regulation 1215/2012: Art. 36, 39, 45, 46
- Hague Convention on Choice of Court Agreements 2005: Art. 8

- European approach: Art. 36, 39, 45, 46 Brussels I Regulation 1215/2012
- US-approach: Born/Rutledge, p. 1079-1083
- Other approaches: Born/Rutledge, p. 1084-1085
- Hague Convention on Choice of Court Agreements 2005: Art. 8

Topic 6 (Seminar 6)
General revision