Report of the 75th ILA Conference, Sofia

From 26-30 August, I attended the 75th Conference of the International Law Association (ILA), held in Sofia, and organised by the Bulgarian ILA Branch, in my capacity as professor of EMU law at the *Amsterdam Centre for European Governance* (ACELG) at the University of Amsterdam. Since 1980, I have been attending many of these biannual conferences. They bring together practitioners of international public and private law for presentations of the work done in committees devoted to the study and furtherance of specific areas of international law, and for discussions of topical issues. For many years, I have been a member of the ILA's Committee on International Monetary Law (MOCOMILA) which meets twice a year, and always convenes during an ILA Conference. The 2010 ILA Conference was held in The Hague, to commemorate the 100th birthday of the Netherlands Branch. Professor Willem van Genugten, Dr Sarah Nouwen and I were the programme chairs for the 2010 Conference. In the ILA committees and study groups operate on issues as diverse as international securities regulation, international trade law, sovereign insolvency, feminism and international law, reform of the United Nations (UN), international law and sustainable development, rights of indigenous peoples, Islamic law and international law, legal principles relating to climate change, and many other areas of focus.

The welcoming reception on Sunday night and the opening session on Monday morning, and the coffee breaks and lunches, provided opportunities to meet other practitioners of law from across the globe. And to see the Bulgarian Minister of Justice, Dr Diana Kovacheva, a former President of the Bulgarian Branch of Transparency International, and Professor Alexander Yankov, the 88-year old President of the organising committee who took over from Professor Nico Schrijver (Leiden University) as ILA chairman for the next two years. It was an occasion to learn about the affiliation of the current Bulgarian government, a centre-right party called Citizens for European Development of Bulgaria (Bulgarian acronym: GERB, meaning 'coat of arms' in Bulgarian) which has been in power since 2009.

There was no time to attend all other interesting meetings, sometimes because of deplorable overlap (such as between the securities regulation committee and MOCOMILA). In this document, I report on a small selection of the meetings only. The Conference provided an excellent opportunity to discuss latest legal developments in my field and other areas, and to get a glimpse of Sofia, a capital built on the ruins of ancient times and displaying most interesting religious art and historical buildings blending in with Communist and more modern architecture, showing cordial hospitality in a sunny climate.

During the session devoted to Islamic law, the relevant Committee's report on Islamic law and the rule of law was presented. It discusses the meaning of 'the rule of law', its function in the UN and in the Organisation of Islamic Cooperation (OIC), and in countries with a Muslim majority, whether they be secular, like Turkey, theocratic, like Iran, or entertain a different official relationship with Islam. The issue that *Shar'ia* is considered divine-given, and the different approaches to the open or closed system of interpretation of the law are discussed in the Committee's excellent report.

The session devoted to sovereign insolvency continued work presented by the relevant Study Group in The Hague. The study group had been established just prior to the 2008 financial crisis. Reference was made to the six lessons of history, drawn in the relevant section of MOCOMILA's report for the Sofia Conference, written by Lee Buchheit (who has for a long time been an active attorney in the area of sovereign insolvency) and Rosa Lastra (professor of financial law at Queen Mary, University of London):

Lesson 1: Don't Let a Sovereign Debt Problem Become a Banking Sector Problem
Lesson 2: If It Can't Be Avoided, Don't Try
Lesson 3: Keep Track *(of all public liabilities, contingent or acute)*
Lesson 4: Ask for Enough Debt Relief
Lesson 5: Be Ruthlessly Efficient *(don't mess up over a decade, as in the 1980s Latin American defaults)*
Lesson 6: Be Evenhanded *(in treating creditors: only discriminate on clearly acceptable grounds)*

After a historical perspective of the current sovereign debt crisis in the introduction by Jeremiah Pam, this member of the Study Group mentioned the various options for infusing more structure in sovereign debt handling. These range from formal regulation of a sovereign debt crisis through an international treaty (the International Monetary Fund (IMF)'s Sovereign Debt Restructuring Mechanism (SDRM) approach: a formal sovereign insolvency regime in the form of proposed amendments to the IMF's Articles of Agreement) to more contractual forms, such as Collective Action Clauses (CACs): provisions adopted in bond issuance documentation that permit a (super-)majority of creditors to consent to a 'haircut', i.e. a write-down of the debt by the issuer, e.g. through a swap against new bonds at lower face value and against a lower interest rate. CACs will be introduced in bonds issued by all EU Member States as of 2013. This follows the agreement to do so adopted in the 2011 and 2012 versions of the Treaty establishing the European Stability Mechanism (ESM), which conforms to a joint EU approach adopted as early as 2002 following the G10 Working Group Report on Contractual Clauses. During further introductions by Milos Barutciski and Brian Hunt of the sovereign insolvency blog, and questions from the audience, references were made to major case law. The Belgian Court of Appeal's 2000 decision in a vulture fund's case against a

Latin American sovereign, was still relevant for the success of hold-out creditors against insufficiently cooperative sovereigns: *Elliot Associates vs Peru*. (For a summary and analysis see: http://www.law.harvard.edu/programs/about/pifs/llm/sp44.pdf).

In 2011, the Hong Kong Court of Final Appeal held that there is absolute sovereign immunity in Hong Kong against enforcement of claims on assets of a foreign sovereign, a decision subsequently upheld by the Standing Committee of the National's People's Congress, People's Republic of China, at the request of the Hong Kong court to confirm its reading of Hong Kong's Basic Law. This case concerned enforcement of arbitral awards issued under the International Chamber of Commerce (ICC) rules against the Democratic Republic of Congo. Reference was made to legal writing on the interpretation of the *pari passu* clause:

- Lee C. Buchheit & Jeremiah S. Pam, *The* Pari Passu *Clause in Sovereign Debt Instruments*, 53 Emory L.J. 869 (2004)
- William W. Bratton, Pari Passu *and A Distressed Sovereign's Rational Choices*, Georgetown Law - The Scholarly Commons (2004) (available at http://scholarship.law.georgetown.edu)
- *Analysis of the role, use and meaning of* pari passu *clauses in sovereign debt obligations as a matter of English law*, Financial Markets Law Committee (FMLC) papers, Issue 79, 2005 (http://www.fmlc.org/Pages/papers.aspx)

During the discussion, the US's "exorbitant privilege to borrow in a currency that it prints" and the lessons learned from the Greek sovereign debt handling were mentioned, including the different treatment of lenders and bondholders, the unclear perimeter of preferred creditor status, and the effect of any solution on contracts, notably derivates contracts. More order was needed according to several among the participants. Unfortunately, the timing of the study group, held on the last day, didn't allow me to attend the full session.

According to tradition, MOCOMILA held its closed meeting at the local central bank. The welcome received by the Bulgarian National Bank (BNB) offered an opportunity to discuss topical issues among the members present. Presentations were made by the general counsels of the ECB, the Federal Reserve Bank of New York and the *Bundesbank*, as well as by the former general counsel of the National Bank of Belgium. One of the issues was the litigation concerning crisis measures in the EU, including before the *Bundesverfassungsgericht*, the German Constitutional Court. This Court will decide on the granting of an injunction against the German State in respect of the ratification of the ESM Treaty on 12 September. It will simultaneously rule on the merits of the claim that this Treaty impinges the budget rights of the German Parliament and the sovereignty of Germany. A request for a preliminary ruling by the European Court of Justice has been made by the Irish Supreme Court on the ratification of the ESM Treaty by Ireland, as the legal instrument is alleged to be in conflict with EU law, notably the no bail-out clause of the Treaty on the Functioning of the European Union (TFEU): Case C-370/12 (*Pringle*). Another issue discussed was the rearrangement of

constituencies in the IMF, with Belgium and Netherlands sharing a single constituency if the relevant legal instrument is ratified. This development forms part of larger IMF governance reforms. It does not (yet) lead to a more unified representation of the euro area in the IMF as the combined Benelux constituency comprises non-euro area, and non-EU, members, as well. The LIBOR investigation was discussed, and its consequences – possible civil liability for the banks concerned, if plaintiffs can overcome the combined hurdles of proving *causation* and actual *damages* due to misreporting of rates at which the 16 reporting banks would be able to borrow in the money markets (a hypothetical question). As was the possibility to abandon the structure of a private association, the British Bankers' Association, organising the setting of LIBOR and EURIBOR. There is a precedent in the extinction of NYFOR, New York Funding Rate, as of 12 August 2012. The multitude of references in legal documentation to LIBOR and EURIBOR raises continuity of contracts concerns, not unlike the concerns about continuity when the euro replaced the legacy currencies. The LIBOR scandal is a major integrity issue for banks, even when one gives consideration to the fact that avoiding stigma in the very volatile markets of the Autumn of 2008 may have been a motivation for some to under-report rates. But at several financial institutions, communication between the trading desks and staff responsible for reporting the rates had been the source of misreporting. A final issue discussed was the future banking union in the EU: the progress towards a single EU supervisor, the ECB. The EU seeks to establish banking union by the end of this year but the many issues involved may cause it to start only when a single rulebook for EU banks will take effect, i.e. the implementation of the Basle III rules in the Capital Adequacy Directive (CRD) IV, envisaged for January 2014. In the discussion, US experience was said to be that banking supervision and monetary policy responsibilities can be clearly separated but that macro-prudential supervision, i.e. the financial stability function, may be more at odds with independent monetary policy decision-making.

During the open session of MOCOMILA the same issues were discussed as during the closed session, with Committee members introducing the various segments of the report, including the part devoted to a Japanese court ruling on the (non-)applicability of US sanctions against Iran, and the resolution on attachment of assets of a bank's branch in one jurisdiction for claims against a client held at a financial institution's head office or branch in a different jurisdiction, promoting the view that branches should in this respect be treated as separate.

Professor René Smits 2 September 2012.