Another Opinion Limiting the Alien Tort Statute

Today, Judge Scheindlin of the United States District Court for the Southern District of New York dismissed a case filed by a class of South Africans against Ford Motor Company and IBM (see here SDNY SAAL. Those companies had been sued under the Alien Tort Statute for allegedly aiding and abetting human rights violations during the Apartheid regime. Put simply, the plaintiffs alleged that Ford and IBM oversaw operations of a subsidiary in South Africa that led to human rights violations in South Africa. Given that the plaintiffs were unable to plead relevant conduct in the United States that would give rise to a violation of customary international law, the case was dismissed. According to Judge Scheindlin, "That these plaintiffs are left without relief in an American court is regrettable. But I am bound to follow *Kiobel II* and *Balintulo*, no matter what my personal view of the law may be."

In addition to this case, the Eleventh Circuit recently dismissed a case against Chiquita for similar reasons.

Besides these two cases, the Fourth Circuit permitted a case to go forward against CACI Premier Technology for alleged abuse and torture occurring at Abu Gharib. See here for a roundup on the Chiquita and CACI cases.

Invitation to Tender: Study on the Law Applicable to Companies

The European Commission has published an invitation to tender relating to a study on the law applicable to companies with the aim of a possible harmonization of conflict of laws rules on the matter. Deadline for submissions is 30 September

2014. More information is available here and here.

Presentation on the Boundaries of European Private International Law on SSRN

The text of the presentation of Veerle Van Den Eeckhout on the international conference "Boundaries of European Private International Law" at Louvain La Neuve, 5/6 June 2014, entitled "The (Boundaries of) the Instrumentalisation of Private International Law by the European Institutions".is now available on ssrn.

The abstract reads as follows:

"Where European institutions (the European legislator or the Court of Justice) get involved in PIL, PIL might (also) be assessed in the light of European objectives. Is PIL, thus, evolving into a policy instrument? Two case-studies could be analysed from this perspective: international labour law (with focus on intra-community cross-border situations) and corporate social responsibility (with focus on environmental pollution outside Europe). What interests can or may PIL serve in these areas at the end of the day, and what should be the limits?"

14th Ernst Rabel Lecture at the Max Planck Institute in Hamburg

On 20 October 2014, Dagmar Coester-Waltjen from the University of Göttingen (Germany) will deliver the 14th Ernst Rabel Lecture at the Max-Planck-Institute

for Comparative and International Private Law in Hamburg. She will discuss "Heaven and Hell – Some Refelctions on International Jurisdiction". More information is available here.

ERA: Annual Conference on European Family Law 2014

On 25 and 26 September 2014 the Academy of European Law (ERA) will host its Annual Conference on European Family. The conference will be dedicated to recent case law and recent developments in cross-border family matters. Particular attention will be placed on the review of the Brussels IIa Regulation as well as cross-border maintenance after the entry info force of the Hague Maintenance Convention.

Further information is available here.

Conference on "Artificial Reproduction and European Family Law"

From October 2 to 4, 2014 the 12th biannual Symposium on European Family Law will take place at the University of Regensburg (Germany). Hosted by Anatol Dutta, Dieter Schwab, Peter Gottwald, Dieter Henrich and Martin Löhnig the

symposium will be dedicated to artificial reproduction. The topic shall be discussed from a comparative and private international law perspective.

The conference language will be German. The conference programme and registration information is available here.

Recent PIL Scholarship

See here for a list of abstracts on SSRN of recent PIL scholarship. Please consider subscribing to and posting PIL scholarship with this eJournal, as it will help create a central location for PIL scholarship.

Call for Papers (Australian International Law Journal)

The Australian International Law Journal, a peer-reviewed law journal published by the International Law Association (Australian Branch), calls for papers of between 6,000 -12,000 words on topics of public or private international law. The deadline for submissions is 12 September, 2014 and accepted submissions will be published in Volume 21 of the Journal.

Casenotes (2,000-3,000 words) and Book Reviews (1,000 words) within the area of public or private international law are also welcomed.

If you are interested in submitting a piece to the Australian International Law Journal, please contact the editors (treasurer@ila.org.au). Guidelines for the authors are to be found here.

Recognition of Russian Personal Status Judgments in Greece: A Case Law Survey

Dr. Apostolos Anthimos has published an article on the *Recognition of Russian personal status judgments in Greece* in the III issue, Vol. II (2014) of the law review **Russian Law Journal.**

Recognition of Russian personal status judgments in Greece: A case Law survey

Russia and Greece have strong historical, cultural, social and financial bonds for centuries. In the aftermath of the 2nd World War, many people of Greek origin were forced to leave Greece for political reasons; they moved to the USSR, where they started a new life. Soon after the dissolution of the Soviet Union, and following supporting Greek legislation for their return to the homeland, a significant number of people decided to resettle in Greece. In order to cope with Greek bureaucracy regarding personal status matters, certain documents and court decisions of USSR (meanwhile Russian) origin had to be recognized in Greece. The present article provides a first glance at the bilateral Convention on judicial assistance in civil and criminal matters signed in 1981 between the Hellenic Republic and the ex-USSR. This ?onvention applies since December 1995 in Greek – Russian civil and criminal matters. The article will focus on Ch. V of the Convention, dealing exclusively with the issue of recognition and enforcement of judgments and authentic instruments in civil matters. At the same time it serves as a survey of reported and unreported Greek case law on the matter.

You can download the article clicking here

German Federal Supreme Court Strengthens Foreign Notaries – A clear Commitment to Substitution of Form?

By Jan Lieder, University of Kiel, and Christoph Ritter, University of Jena

I. Introduction

In a recent decision[1], the German Federal Supreme Court assessed the legal consequences of a foreign notarization with regard to a share transfer of a German limited liability company (LLC). The holding contains the first statements regarding the substitution of form prescribed by sec. 15(3) German Limited Liability Company Act (*GmbHG*) ever since the reform of both this Act and the Swiss Code of Obligations. The lately issued court decision received broad attention both due to its implications for future international M&A transactions involving shares of LLCs, and due to its statements as to a foreign notary's role in the register procedure following a share transfer.

II. Facts and legal history of the case, issue raised on appeal

In the case at hand, a notary from Basel-Stadt (Switzerland) notarized the share transfer of an LLC registered in the Commercial Registry (*Handelsgericht*) of the Local Court of Munich (*Amtsgericht München*). The notary updated the list of shareholders accordingly, and filed the list with the Commercial Registry, which, however, declined to include the updated list in the records of the company. The Higher Regional Court of Munich (*Oberlandesgericht München*) rejected the LLC's and the presumable transferee's appeal. Now, the main issue raised on appeal was whether a foreign notary may file an updated list of shareholders with the Commercial Registry under sec. 40(2) *GmbHG*, or whether, according to sec. 40(1) *GmbHG*, the LLC's directors are solely responsible in such a case.

III. Holding

The highest German court in civil matters reversed the previous judgments and

ordered the Local Court to include the updated list in the records of the company. The decision contains a twofold holding:

(1.) The registration court may not reject a list of shareholders only because it was penned by a foreign notary.

(2.) The amendments due to the *MoMiG*[2] do not prohibit that a notarization prescribed by the *GmbHG* is conducted by a notary of a foreign country, provided that this notarization is equivalent to one under German law.

IV. Interpretation

With the second guiding principle, the Court approves its case law established back in 1981[3]. Thus, the Court finishes, at first glance, the discussion on the *MoMiG*'s effects on substitution of form requirements[4] by upholding the thesis that the equivalence of notarization requires that (a) the foreign notary performs functions in her jurisdiction which are commensurate with those of a German notary with regard to her professional qualification and her legal position, and that (b) the foreign notary, while establishing the relevant deed, has to perform a legal procedure which complies with the fundamental principles of German notarization law. In particular, the German Federal Supreme Court argues that the account of the (German) notary for the list's accuracy shall not be overestimated. Instead, a foreign notary is normally as reliable as a director of the company, who is regularly a layperson, but nevertheless responsible for filing the list of shareholders with the Commercial Registry.

Although this is basically true, sec. 40(2) *GmbHG* requires a notary who has been involved in any change in the person of a shareholder or the extent of their participation to sign the list instead of the directors without undue delay upon the changes becoming effective and to submit the list to the commercial register. Thus, in addition to the Court's thesis of equivalence, it is mandatory for a substitution of sec. 15(3) *GmbHG* that the foreign notary assumes in the deed (an additional) duty to file the updated list of shareholders with the commercial register[5].

Apart from that, the decision remains somewhat ambiguous with regard to the issue of substitution as the Court focuses on the question whether a foreign notary may file an updated list of shareholders with the commercial register. As the Court further develops in the reasoning on the first guiding principle, a

foreign notary would have such a right if her notarization is equivalent as described above. However, the standard of review is a rather limited one. In particular, the register court may only reject a list of shareholders that does evidently not comply with the (formal) requirements of sec. 40 *GmbHG*. Following that line, the Court only examined whether the notarization in Basel-Stadt was evidently invalid (which would give the commercial court the right to reject it) but did not explicitly discuss the substantive law question of substitution. Therefore, it remains unsettled whether the notarization had (substantive) legal consequences, *i.e.* resulted in the transfer of the share, apart from giving the foreign notary the right to file a new list of shareholders with the German registry court.

Accordingly, legal commentaries vary from warnings of uncertainty in foreign notarization[6], to overly positive statements recommending share transactions conducted primarily in Switzerland[7]. Bearing in mind the rather limited standard of review, we understand the holding as a cautious inclination towards the recognition of notarization at least in canton Basel-Stadt[8].

V. Conclusion

On the one hand, the German Federal Supreme Court solved an important procedural issue. The registration court is no longer allowed to reject a foreign notary's list of shareholders filed with the commercial register. On the other hand, the Court missed a good opportunity to clarify the substantive legal status of foreign notarizations under the reformed *GmbHG*. Therefore, legal advisers are forced to examine the respective foreign notary regulation in order to make sure that the equivalence requirements are met[9]. Against this background it remains to be seen whether foreign notarization can further serve as a cost-effective alternative to notarization in Germany.

[1] BGH, 17.12.2013 – II ZB 6/13, *BGHZ* 199, p. 270.

[2] Modernization of the Law on Limited Liability Companies and Combating Abuses Act (*Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen – MoMiG*), Federal Law Gazette (*BGBl.*) 2008 I, p. 2026.

[3] BGH, 16.2.1981 – II ZB 8/80, BGHZ 80, p. 76, 78.

[4] For an overview on the discussion, see Walter Bayer, »Übertragung von GmbH-Geschäftsanteilen im Ausland nach der MoMiG-Reform«, GmbH-Rundschau (GmbHR) 2013, p. 897, 911.

[5] For a detailed reasoning, cf. Jan Lieder & Christoph Ritter, »Neues aus Karlsruhe zur Zulässigkeit der Auslandsbeurkundung?«, Monatsschrift für die gesamte notarielle Praxis (notar) 2014, p. 187, 192-193, with further references to the contrary prevailing view.

[6] Recently Klaus J Müller, »Auslandsbeurkundung von Abtretungen deutscher GmbH-Geschäftsanteile in der Schweiz«, Neue Juristische Wochenschrift (NJW) 2014, p. 1994, 1999.

[7] Cf. Axel Jäger, »Beurkundung durch einen ausländischen Notar im GmbH-Recht und Einreichung der Gesellschafterliste«, juris Monatszeitschrift (jM) 2014, p. 241, 243; Christian Mense & Marcus Klie, »Beurkundung durch ausländischen Notar nach Inkrafttreten des MoMiG«, Gesellschafts- und Wirtschaftsrecht (GWR) 2014, p. 83.

[8] Similarly Cornelius Götze & Markus Mörtel, »Zulässigkeit der Einreichung der GmbH-Gesellschafterliste durch einen ausländischen Notar«, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2014, p. 369, 371-372; Mario Leitzen, »Die Zuständigkeit für Einreichung und Korrektur der GmbH-Gesellschafterliste nach den Dezember-Entscheidungen des BGH«, Zeitschrift für die Notarpraxis (ZNotP) 2014, p. 42, 46; Christoph H Seibt, »Anmerkung zum Beschluss des BGH vom 17.12.2013, Az. II ZB 6/13 – Zur Einreichung einer Gesellschafterliste durch einen Notar mit Sitz in der Schweiz«, Entscheidungen zum Wirtschaftsrecht (EWiR) 2014, p. 171, 172.

[9] For an overview on the notary codes of several Swiss cantons, see Klaus J Müller, »Auslandsbeurkundung von Abtretungen deutscher GmbH-Geschäftsanteile in der Schweiz«, Neue Juristische Wochenschrift (NJW) 2014, p. 1994, 1996-1998.