Email Updates

Readers of this blog will know that our email updates (which allows you to subscribe to receive our new content directly into your inbox) had been broken for a while. The service we used, Feedburner, is no longer operational. We're happy to say that we've now created a new email update subscription service for Conflict of Laws .net. You can **subscribe here** (the link is also permanently in the menu to the right.)

The blog has been updated to the latest software available, and we hope everything is working as it should be. If you spot a problem or bug, just let us know.

The Protection of Privacy in the Aftermath of the CJEU's Judgments – Conference at the Max Planck Institute Luxembourg

On September 29, 2014 the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law will host a conference on 'The Protection of Privacy in the Aftermath of the CJEU's Judgments in *eDate Advertising*, *Digital Rights Ireland* and *Google Spain*'.

Ensuring the effective right to privacy regarding the gathering and processing of personal data has become a key issue both in the internal market and in the international arena. The extent of people's right to control their data, the implications of the "right to be forgotten", the actual impact on national systems of the CJEU's decisions on jurisdiction on the infringement of personality rights, and recent legislation addressing libel tourism are all shaping a new understanding of data protection and the right to privacy, and also have an

impact on other fundamental rights such as freedom of speech.

This Conference will explore these issues to assess the status quo and possible developments in this area of the law which is undergoing significant changes and reforms that are not always easy to reconcile.

Program

14:15 *The CJEU's Decision in Google Spain: An Assessment*

Professor Christopher Kuner, Honorary Fellow of the Centre for European Legal Studies, University of Cambridge, and Honorary Professor at the University of Copenhagen

Dr Cristian Oro Martinez, Max Planck Institute Luxembourg – discussant

15:00 *The CJEU's Decision on the Data Retention Directive*

Professor Martin Nettesheim, University of Tübingen

Dr Georgios Dimitropoulos, Max Planck Institute Luxembourg – discussant

16:30 *The CJEU's Decision in eDate Advertising and Its Implementation by National Courts*

Professor Burkhard Hess, Director, Max Planck Institute Luxembourg

Professor Patrick Kinsch, University of Luxembourg – discussant

17:15 *The 2010 U.S. SPEECH Act and the U.K. Reaction of 2013*

Dr Cristina M. Mariottini, Max Planck Institute Luxembourg

Professor David P. Stewart, Georgetown University – discussant

18:00 *Discussion*

For further information and to register, please click here.

Note: The following day, the Institute will host the first meeting of the ILA Committee on the Protection of Privacy in Private International and Procedural

Law (this latter event is by invitation only).

Kupelyants on Sovereign Debt Restructuring

Hayk Kupelyants from the University of Cambridge as posted a paper on "Police Powers of States in Sovereign Debt Restructurings" on SSRN. The abstract reads as follows:

> *The paper looks at the powers of the States to unilaterally modify their debt obligations in the context of sovereign debt restructurings. Drawing on the national case law on the unilateral modifications of domestic debt, the paper argues that the States entering into sovereign bonds act in private capacity and cannot modify the private obligations in a unilateral manner. To support the argument, paper relies on the case law from the US, the Russian Federation and England. The paper also considers the powers of the State to modify private-to-private debt obligations and the debt entered into by quasi-public entities.*

The full paper is available here.

Latest on Spanish Journals (II)

The last issue of *La Ley. Unión Europea* (July 2014) has also been released this month. Prof. P. de Miguel Asensio (Universidad Complutense of Madrid) is the author of the first contribution, entitled "El tratamiento de datos personales por buscadores de Internet tras la sentencia *Google Spain* del Tribunal de Justicia".

Summary: In the light of the most recent case law of the ECJ, the territorial scope of application of the EU data protection law is discussed, with a special focus on the applicability of EU legislation to Google Inc., as search engine provider. Additionally, the position of the undertaking managing a search engine as data controller, the obligations of the search engine in this respect as well the relationship with the position of the pusblishers of websites are addressed. Finally, the scope of the right of erasure and its consequences on the activities of search engines are also discussed.

Directly related to Prof. de Miguel's paper is Dr. M. López García's "Derecho a la información y derecho al olvido al internet", published a little bit later (under *Tribuna*) in the same issue.

Summary: Internet is major change in society. Everything we do is published in the network. If you're not on the Internet doesn't exist. But it has important legal consequences especially regarding the right to privacy and protection of personal data, specifically the right to control the privacy of each person and decide that we want you to know or want you to forget about us. This problem has a different solution in each country. Common response is required for legal certainty.

The second main article, written by Prof. J. García López (also from the Universidad Complutense, Madrid) and entitled "El acuerdo de asociación transatlántico sobre comercio e inversiones: aproximación desde el Derecho del comercio internacional", focuses on the TTIP:

Summary: The USA and the EU started one year ago their negotiations for the conclusion of the Transatlantic Trade and Investment Partnership (TTIP). In this paper we propose an approach from the point of view of International Trade Law. The TTIP will have to satisfy the conditions of both art XXIV GATT and art V Gats. This will produce the abolition of tariff and non-tariff barriers

for the transatlantic trade, inducing a well-known effect of trade creation. On the other side, third countries like Mexico and Turkey will suffer as a consequence of the trade diversion caused by the rules of origin of the TTIP. To conclude, we will make reference to the new areas of negotiation beyond goods and services.

A comment on the ECJ decision to the aff. C-478/2012, Maletic, is provided by J.I. Paredes Pérez (Centro Europeo del Consumidor en España; University of Alcalá)

Summary: The subject of the controversy of the judgment places us within the territorial scope of protection forums included in Regulation No. 44/2001 for contracts held by consumers in order to assess the assumptions of internationality that justify their application. In this context, the judgment is of great significance, since in the appreciation of the international element of the litigious situation, the Court of Justice of the European Union does not use so much criteria of spatial type, characteristic of private international law as substantive criteria that arise from material logic. In particular, it appreciates the international nature of a consumption contract apparently domestic, taking into account intrinsic aspects of the contractual relationship, as it turns out the root cause of the matter related to connected contracts.

A selection of European case law and some news of juridical -but also of general-interest are delivered in the final part of the journal.

Latest on Spanish Journals (I)

Vol. VII (2014, 2) of the Spanish journal *Arbitraje. Revista de Arbitraje Comercial y de Inversiones* has just been released. The following contributions are to be found therein:

Under the heading *Estudios*

Franco FERRARI: Forum shopping: la necesidad de una definición amplia y neutra

Ana FERNÁNDEZ PÉREZ: Los contenciosos arbitrales contra España al amparo del Tratado sobre la Carta de la Energía y la necesaria defensa del Estado.

As *Varia*

Miguel GÓMEZ JENE: Hacia un estándar internacional de responsabilidad del árbitro

Marco DE BENITO LLOPIS–LLOMBART: El arbitraje y la acción

Simon P. CAMILLERI: Anti–suit injuctions en el régimen de Bruselas I: ¿una cuestión de principios?

Álvaro SORIANO HINOJOSA: El Estado y demás personas jurídicas de Derecho público ante el arbitraje internacional

José Pablo SALA MERCADO: La actualidad de la inversión extranjera en Argentina. Una realidad que despierta inseguridad.

As usual, the issue provides as well with the notice of relevant recently adopted legal texts, case law (sometimes commented) of several jurisdictions, reviews of books and other journals, and of events.

Save the Date: Next Conference of the German Academic Association for International Procedural Law

The next biannual conference of the German Academic Association for International Procedural Law (Wissenschaftliche Vereinigung für Internationales Verfahrensrecht e.V.) will take place from 25 to 28 March 2015 in Luxemburg. It will be hosted by the Max Planck Institute for International, European and Regulatory Procedural Law and will be dedicated to three topics:

- The European Court System
- International Dimensions of European Procedural Law
- International Commercial Arbitration

The conference language will (for the most part) be German. More information is available here.

Colloquium on Collective Redress in Zurich in October 2014

On 3 and 4 October 2014, Tanja Domej from the University of Zurich will host a colloquium on collective redress in Zurich. Speakers from various European jurisdictions and the US will discuss their experiences with existing instruments and possible future developments. The draft programme is available at http://www.rwi.uzh.ch/lehreforschung/alphabetisch/domej/tagungen/ccr.html. The working language will be English.

Attendance is free of charge but registration is required as the number of places is limited. You can register online at http://www.rwi.uzh.ch/lehreforschung/alphabetisch/domej/tagungen/registration.html or via e-mail (lst.domej@rwi.uzh.ch).

New SSRN eJournal on Private International Law

We are pleased to announce a new Legal Scholarship Network (LSN) Subject Matter eJournal – **Transnational Litigation/Arbitration, Private International Law, & Conflict of Laws eJournal**.

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Editors: Donald Earl Childress III, Associate Professor of Law, Pepperdine University School of Law, and Linda Silberman, Martin Lipton Professor of Law, Co-Director, Center for Transnational Litigation, Arbitration, and Commercial Law, New York University School of Law

Description: This eJournal includes working and accepted paper abstracts dealing with private international law, transnational litigation, and arbitration. The topics include private international law (conflict of laws), extraterritoriality, jurisdictional issues, enforcement of foreign judgments and arbitral awards, international commercial arbitration, and investor-state arbitration.

We hope our readers will find this eJournal useful.

Another Alien Tort Statute Case Moving Forward

A few weeks back, the Unite States Court of Appeals for the Fourth Circuit revived an Alien Tort Statute case that was at first dismissed in Kiobel's wake. The four plaintiffs in *Al Shimari v. CACI Premier Technology Inc*. are foreign nationals who allege that they were tortured and otherwise mistreated by American civilian and military personnel while detained at Abu Ghraib prison on Iraq. The plaintiffs allege that employees of CACI—a private, U.S.-based defense contractor— "instigated, directed, participated in, encouraged, and aided and abetted conduct towards detainees that clearly violated the Geneva Conventions, the Army Field Manual, and the laws of the United States." Based on the decision in Kiobel, the district court dismissed all four plaintiffs' ATS claims, concluding that the court "lack[ed] ATS jurisdiction over Plaintiffs' claims because the acts

giving rise to their tort claims occurred exclusively in Iraq, a foreign sovereign."

The Fourth Circuit reversed, adopting a narrow read of the *Kiobel* decision. As noted before on this site, the Supreme Court in *Kiobel* said that "even where [ATS] claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." Reading this directive, the Fourth Circuit:

"observe[d] that the Supreme Court used the phrase 'relevant conduct' to frame its 'touch and concern' inquiry, . . . [and] broadly stated that the 'claims,' rather than the alleged tortious conduct, must touch and concern United States territory with sufficient force. [This] suggest][s] that [lower] courts must consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action, [when assessing whether the presumption is overcome]."

"The Court's choice of such broad terminology," according to the Circuit, "was not happenstance." The "clear implication" is that "courts should not assume that the presumption categorically bars cases that manifest a close connection to United States territory. Under the 'touch and concern' language, a fact-based analysis is required in such cases to determine whether courts may exercise jurisdiction over certain ATS claims."

In this case, the plaintiffs' claims allege acts of torture committed by United States citizens who were employed by an American corporation which has corporate headquarters located in Virginia. These employees were hired in the United States; the contract was concluded in the United States; and CACI invoiced the U.S. government in the United States. Finally, the plaintiffs allege that CACI's managers located in the United States were aware of reports of misconduct abroad, attempted to "cover up" the misconduct, and "implicitly, if not expressly, encouraged" it.

These facts dictated a different result that *Kiobel*, even if the tortious acts occurred abroad, so the case was remanded to the District Court for further proceedings on the merits. Like *Doe v. Nestle* in the Ninth Circuit, and other cases discussed on this site, the ATS is far from dead.

Once Again: German Federal Supreme Court Refers Question on Art. 15(1) lit. c) Brussels I to the CJEU

On 15 May 2014 the German Federal Supreme Court has – once again – referred a question relating to Art. 15(1) lit. c) to the Court of Justice of the European Union (Court order of 15 May 2014, III ZR 255/12). Here is an (unofficial) translation:

> *May the consumer in accordance with Art. 16(1) Brussels I-Regulation sue in the state where he is domiciled if the contract that is the immediate basis for the claim was not concluded under the conditions set out in Art. 15(1) lit. c) Brussels I Regulation, but serves to ensure the economic success of another contract concluded between the same parties under the conditions set out in Art. 15(1) lit. c) Brussels I-Regulation?*

The question arises in a case based on the following facts: the claimant, a consumer domiciled in Germany, entered into a contract with the defendant, a Spanish real estate agency. On the basis of this contract the defendant arranged the conclusion of an option contract between the claimant and a German construction company relating to the purchase of a yet to be built apartment in a Spanish holiday complex. This option contract eventually led to the conclusion of a sales contract between the consumer and the construction company. After payment of the first two installments under the sales contract, the construction company ran into financial difficulties. This, in turn, jeopardized the completion of the holiday complex. The defendant, therefore, turned to the claimant and offered to look into the matter. The claimant happily accepted – and travelled to Spain to sign a contract to that effect with the defendant. In the following months the claimant made several payments to the defendant under the second contract.

Then the relationship fell apart. The claimant cancelled the second contract and filed a law suit in Germany asking the defendant to refund all payments made under that contract.

The court of first and second instance declined to hear the case for lack of jurisdiction arguing that the Spanish real estate agency – regarding the second contract and the service offered under that contract – had not directed its activities towards Germany. The Federal Supreme Court, however, was not so sure and decided to refer the above question to the CJEU. How the CJEU will decide, remains to be seen. Chances are that the highest European court will continue its extremely consumer-friendly interpretation of Art. 15(1) lit. c) (cf. CJEU, C-190/11 – Mühlleitner, CJEU, C-218-12, Emrek) and allow consumers to sue at home even if only an economically related, but not the immediate contract was concluded under the conditions set out in Art. 15(1) lit. c) Brussels I-Regulation. A narrow interpretation, however, would rather argue against application of Art. 15 et seq Brussels I-Regulation: Art. 15(1) lit. c) makes clear that the contract in dispute must fall into the scope of the professional's directed activities *("In matters relating to a contract concluded by a … consumer … jurisdiction shall be determined by this Section … if … (c) … the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.")*

The irony of the case, however, is that the question referred to the CJEU by the German Federal Supreme court does not actually arise in the case at bar: according to the court's (undisputed) statement of facts the defendant, i.e. the Spanish real estate agency, turned to the consumer and offered his help when the German construction company ran into difficulties. The court doesn't say how the defendant turned to the claimant and how he offered his help. But there is little doubt that the consumer was sitting at home in Germany and was actively approached by the defendant. Therefore, the defendant clearly directed his activities towards the consumers habitual residence. And the contract that was eventually concluded clearly fell into the scope of these activities since it was the direct result of the defendant's efforts. That the consumer eventually travelled to Spain to conclude the contract doesn't hinder application of Art. 15 et seq Brussels I Regulation (cf. CJEU, C-190/11, Mühlleitner).

But why keep things simple?