Choice of Law in the American Courts in 2014: Twenty-Eighth Annual Survey

Prof. Symeonides latest survey on choice of law in the American Courts is available on SSRN (to be published later in the American Journal of Comparative Law, vol. 63, 2015-2). The abstract reads as follows:

"This is the Twenty-Eighth Annual Survey of American choice-of-law cases. It was written at the request of the Association of American Law Schools Section on Conflict of Laws and it is intended as a service to fellow teachers of conflicts law, both in and outside the United States.This Survey covers cases decided by American state and federal appellate courts from January 1 to December 31, 2014, and posted on Westlaw by midnight, December 31, 2014. Of the 1,204 cases that meet these parameters, the Survey focuses on those cases that may contribute something new to the development or understanding of conflicts law — and, particularly, choice of law. The following are some of the highlights of the year:
One U.S. Supreme Court decision dealing with general jurisdiction, the second in three years, after a thirty-year silence; Seven cases deciding whether the Alien Tort Statute applies to actions filed by foreign plaintiffs against American defendants alleged to have aided and abetted the commission of international law violations outside the United States; a case involving a cross-border shooting of a Mexican boy by a U.S. Border Patrol agent; and a case arising from the imprisonment of U.S. contractor Alan Gross in Cuba;

Fifty-six court rulings striking down as unconstitutional the prohibition of same-sex marriages in 26 states, one ruling upholding the prohibition in four states, and a Texas case recognizing a California judgment that declared both male partners in a same-sex marriage to be the parents of a child conceived through artificial insemination and carried to term by a surrogate mother;

One more xenophobic statute, the eighth in four years, banning the use of certain foreign laws;

Several tort cases involving conduct-regulation conflicts and applying the law of the state of the tort, rather than the parties' common domicile;

One state supreme court case joining the minority of courts that have rejected the doctrine of severability of choice-of-forum clauses, and several cases involving the interplay of those clauses and choice-of-law clauses;

A California Supreme Court case holding that the Federal Arbitration Act (FAA) did not preempt a California statute that prohibited waivers of "representative actions" filed by employees against employers for violating the state's labor laws, and two cases disagreeing on whether contracting parties may avoid FAA preemption by choosing the "non-federal" part of a state's law;

A New York case recognizing a foreign judgment, even though New York had no jurisdiction over the debtor or his assets; a Pennsylvania case giving full faith and credit to the New York judgment; and a D.C. case refusing to do so — and not only because New York did not have jurisdiction; and

Many other interesting conflicts cases involving products liability, other torts, contracts with and without choice-of-law clauses, insurance contracts, statutes of limitation, marriages by proxy, divorce, marital property, and successions."

Save the date: Workshop on Sovereign Debt in Cambridge

On 25 May 2015 Anne Henow, Hayk Kupelyants, Jens van 't Klooster, Kim Hecker and Marco Meyer from the University of Cambridge will host a one day workshop on "The Ideal of Democracy and the Reality of Sovereign Debt" at Gonville and Caius College in Cambridge.

Here is the call for papers:

> *In the aftermath of the 2008 bank bailouts, sovereign debt has increased to unprecedented levels. As a result, governments saw their policy room curtailed by the demand for credibility and access to international capital markets. In*

Greece and Italy, democratically elected officials stepped down from power with the aim of promoting creditworthiness. The Argentine litigation in the United States again brought attention to substantial sway of bondholders over sovereign states.

As a response, economic and legal debates on sovereign debts have been wide and varied, but they have only rarely addressed the core normative issues involved in issuing, trading, and restructuring sovereign debt. Political philosophers have been slow to respond to issues raised by recent debt crises. One likely reason for the current lack of normative reflection on the increased political importance of financial dynamics is the complexity of international financial markets.

The aim of the workshop is therefore to bring together scholars from philosophy, law, and the social sciences to discuss the consequences of rising sovereign debts for the normative ideals that inform existing parliamentary democracy. The workshop will feature invited contributions by keynote speakers Philip Wood (Law, Allen & Overy) and Gabriel Wollner (Philosophy, Humboldt). Drawing on these diverse perspectives, the workshop will contribute to a new framework for evaluating sovereign indebtedness.

Topics include but are certainly not limited to:

- *Financial markets and democratic sovereignty*
- *Design of sovereign debt contracts and the role of international institutions*
- *The values and dangers of sovereign debt for social welfare*
- *Sustainable public finance and investment*
- *Fair sovereign debt restructuring*
- *Dealing with sovereign debt within the Eurozone*
- *Odious debt*
- *Rights and responsibilities of bondholders*

Keynote speakers:

PHILIP WOOD is an expert in comparative and cross-border financial law and works full-time for the law firm Allen & Overy in the firm's London office. He has written around 18 books, including nine volumes in the series Law and Practice of International Finance published in He held visiting academic

positions at the Universities of Cambridge, Oxford and Queen Mary.

GABRIEL WOLLNER is assistant professor in philosophy at Humboldt University Berlin. His academic interests are in political philosophy and ethics, and the application of these inquiries to various issues in public policy. His work has appeared in a number of journals, including 'The Journal of Social Philosophy', 'The Journal of Political Philosophy' and 'The Canadian Journal of Philosophy'.

Submission details and deadlines:

The workshop is a one day event for which participants are expected to read the presented papers in advance. Papers can be up 10,000 words in length and presentations will be limited to 10 minutes, followed by a 40 minute discussion. To apply, please send a 500 – 700 word abstract to Jens van 't Klooster (jmv32@cam.ac.uk) before the 15th of February. Accepted presenters will be asked to circulate their paper by the first of May.

Organizers: Anne Henow, Hayk Kupelyants, Jens van 't Klooster, Kim Hecker and Marco Meyer.

We gratefully acknowledge support by the University of Cambridge School of Arts and Humanities, Gonville and Caius College Cambridge and the Cambridge-Groningen 'Trusting Banks' project.

Briggs, Private International Law in English Courts (OUP, 2014)



£195 from OUP

Top of my Christmas conflict of laws wish-list is this new work from Adrian

Briggs, ***Private International Law in English Courts*** (OUP, 2014). The blurb:

> *This book offers a restatement of European and English Private International Law as it applies in the English courts. The author has set out to create a contemporary approach to private international law which is distinguished from the traditional approach of describing private international law through its common law foundations. The author places European Regulations, and related statutory material, at the front and centre of the book, reorganising private international law according to the principles that the law is increasingly European and decreasingly insular. As such the work constitutes an approach to the area which is essential for litigators dealing with questions of private international law influenced by forty years of European legislation. The in-depth discussion will also be valuable to academics specialising in private international law. Written by an academic who is also a practising barrister, this book seeks to highlight the techniques and principles which provide the hidden infrastructure and support mechanisms for the private international law rules of European law, as well as the remaining standing of the common law rules of private international law.*
>
> *The book will be useful to practising lawyers tackling issues of private international law as it now is, after forty years of European legislation, but the in-depth discussion will also be valuable to academic lawyers specialising in private international law. Written by an academic who is also a practising barrister, this book seeks to highlight the techniques and principles which provide the hidden infrastructure and support mechanism for the private international law rules of European law, as well as (albeit second) for the common law rules of private international law.*

If I may offer my own blurb: this is a book that everyone working in private international law (and especially in the UK) will need access to, given both the recognition that the conflict of laws is now primarily a conflict made better or worse by European law, and the importance of Prof Briggs' work to all who study, write or practise in this field. It is available on the OUP website for £195.

Volume on the Role of Consumer ADR and the Administration of Justice

Michael Stürner (University of Konstanz), *Fernando Gascón Inchausti* (Complutense University of Madrid) and *Remo Caponi* (University of Florence) have edited a volume on "The Role of Consumer ADR in the Administration of Justice" (Sellier European Law Publishers, Munich). It sheds light on the Directive on Alternative Dispute Resolution and the Regulation on Online Dispute Resolution – and their likely impact on the administration of justice in consumer matters:

The book jacket reads as follows:

> *The landscape of alternative dispute resolution in consumer cases (CADR) is about to change profoundly. With the advent of Directive 2013/11/EU on Alternative Dispute Resolution (ADR) and Regulation (EU) No 524/2013 on Online Dispute Resolution (ODR) a new way to settle disputes is advocated as a tool to enhance the internal market. The ADR system implemented by these instruments is designed to provide for speedy and low-cost out-ofcourt dispute settlement procedures between consumers and traders arising from the sales of goods and services. However, many questions remain open, namely the impact of the CADR system on the adjudication by state courts. The role CADR can play in the administration of justice is yet to be defined. In the present volume renowned experts of civil procedure and ADR shed light on a newly emerging branch of law.*

More information is available on the publisher's website.

Australian Private International Law for the 21st Century (Hart, 2014)



Australian Private International Law in the 21st Century

A new edited collection, ***Australian Private International Law for the 21st Century: Facing Outwards***, has just been published by Hart/Bloomsbury. Edited by Andrew Dickinson, Mary Keyes and Thomas John, here's the blurb:

> *A nation's prosperity depends not only on the willingness of its businesses to export goods and services, and of its citizens and residents to travel to take advantage of opportunities overseas, but also on the willingness of the businesses and citizens of other nations to cross the nation's borders to do business. Economic expansion, and parallel increases in tourism and immigration, have brought Australians more frequently into contact with the laws and legal systems of other nations. In particular, in recent years, trade with partners in the Asia-Pacific Region has become increasingly important to the nation's future. At the same time, Australian courts are faced with a growing number of disputes involving foreign facts and parties. In recognition of these developments, and the need to ensure that the applicable rules meet the needs both of transacting parties and society, the Attorney-General's Department launched in 2012 a full review of Australian rules of private international law. This collection examines the state and future of Australian private international law against the background of the Attorney-General's review. The contributors approach the topic from a variety of perspectives (judge, policy maker, practitioner, academic) and with practical and theoretical insights as to operation of private international law rules in Australia and other legal systems.*

You can purchase it for the (very competitive) price of £50GBP from the Hart

website, both in paper and digital versions.

Latest Issue of RabelsZ: Vol. 78 No 4 (2014)

The latest issue of "Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabel Journal of Comparative and International Private Law" (RabelsZ) has recently been released. It contains the following articles:

McGrath, Colm Peter, and Helmut Koziol: *Is Style of Reasoning a Fundamental Difference Between the Common Law and the Civil Law?*

Renner, Moritz: *Transnationale Wirtschaftsverfassung* (Transnational Economic Constitutionalism)

Since the 1920ies, the concept of the Economic Constitution ("Wirtschaftsverfassung") has been highly influential in German and European legal thinking. The Economic Constitution refers to the mandatory legal rules which shape the relationship of economy and politics within a democratic society. In Europe, these norms have come to be defined on a supranational level. Here, the Four Freedoms and the competition rules of the EU Treaty are the cornerstones of a European Economic Constitution. On the international level, there is no equivalent to such norms. World trade and investment law enshrine free trade, whereas there is an apparent lack of even basic rules of market regulation. The practice of cross-border economic exchange can be described as "private ordering in the shadow of law". Rules from different legal sources are recombined – or even replaced – by private mechanisms of dispute-resolution and standard-setting. The article analyzes this development with a view to the rise of international commercial arbitration and the growing importance of international accounting standards. Both examples show the limited reach of domestic and supranational Economic Constitutions, as they can be employed for

“opting out” of mandatory regulation in cross-border contexts. At the same time, however, the institutions of private ordering described here increasingly develop their own standards of mandatory law, both by referring to existing national, supranational and international norms and by generating new rules of a genuinely transnational character. The article argues that these rules may form the nucleus of an emerging Transnational Economic Constitution ordering the relationship between economy, politics and law on a global level.

Donini, Valentina M.: *Protection of Weaker Parties and Economic Challenges – An Overview of Arab Countries’ Consumer Protection Laws*

Lieder, Jan: *Die Aufrechnung im Internationalen Privat- und Verfahrensrecht* (Set-off in International Private and Procedural Law)

This paper analyses the functions of set-off, illustrates the differences between individual national regimes, introduces and explains Art. 17 of the Rome I Regulation (Rome I) and discusses disputes regarding further topics relating to the private international and procedural law of set-off. The primary function of set-off is the simplification of payment transactions. It facilitates the settlement of mutual claims of two parties against one another in a fast and simple way and reduces transaction costs by rendering unnecessary the execution of two separate payment transactions and by disburdening lawsuits from multiple claims. Given these – and other – functional advantages, no developed legal system can afford to abstain from providing the legal institute of set-off. Nevertheless, there are profound differences between individual legal systems, e. g. in the classification of set-off as a matter of substantive or procedural law, in whether there is a pre-condition of an offsetting statement, and whether the set-off has a retroactive effect back to the moment in which the two claims faced each other for the first time (ex tunc) or whether it just takes effect ex nunc after the issuance of an offsetting statement. European and international academic model rules (DCFR, UNIDROIT) basically follow the German-coined continental approach, with the exception of instead giving a set-off an ex nunc effect to a large extent. The regulation of the conflicts of law by the newly established Art. 17 Rome I is of fundamental importance given the differences between the legal systems. It declares as applicable the law governing the claim against which the right to set-off is asserted and abolishes former disputes about the applicable law. It aims at protecting

the set-off opponent, which is justified since he is confronted with the extinction of his claim and the party who has pleaded the set-off, judicially or extra-judicially, had the choice to file a suit instead. The author argues that all known kinds of unilateral set-offs should be governed by Art. 17 Rome I, and that – irrespective of the scope of Rome I – all kinds of claims, contractual and non-contractual, should be subjected to its Art. 17 (analogously). Since Art. 17 Rome I does not regulate the law applicable to set-off by contract, the general rules of the law of conflicts apply, especially Arts. 3 and 4 Rome I. Furthermore, Art. 17 Rome I does not apply to genuinely procedural aspects of a set-off, so that the lex fori is to be applied. Heavily disputed is the question of the international jurisdiction of a court in respect to procedural set-offs against disputed, non-connected claims. Here, the author argues against international jurisdiction as a prerequisite since the set-off opponent is not deserving of any protection.

Corneloup, Sabine: *Rechtsermittlung im internationalen Privatrecht der EU: Überlegungen aus Frankreich* (The Application of Foreign Law in European Private International Law: Reflections from a French Perspective)

On 16 January 2014, a symposium of the German Council of Private International
Law took place in honour of the 80th birthday of Hans Jürgen Sonnenberger. This article is based on a presentation given at that symposium. Its purpose is to formulate, as far as the scope of application of the Private International Law of the EU is concerned, proposals for harmonizing the application of foreign law by the national courts of the Member States. First, it provides an overview of the position in France and comes to the conclusion that the French case law is not completely satisfactory. Secondly, regarding the mandatory or facultative nature of conflict-of-law rules, it proposes that a clear distinction should be made between the judge and the parties. Conflict-of-law rules should always be applied ex officio by the judge, whereas the parties should have the possibility in the course of the proceedings to choose the lex fori. The limits of party autonomy are defined according to two different models which both might be appropriate. Regarding the ascertainment of foreign law, the article advocates for better judicial cooperation especially within the European Judicial Network.

WIPO-ILA Seminar on IP and Private International Law

A one day Seminar (starting 1 pm, ending 6pm) on Intellectual Property and Private International Law organized by the World Intellectual Property Organization (WIPO) and the International Law Association (ILA), will be held at the WIPO Headquarters, Geneva, Switzerland, on January 16, 2015. Consecutive panels will address WIPO and Private International Law, the Work of the Hague Conference on Private International Law, preceding Projects (ALI, CLIP, Transparency Project, Japan-Korea Principles Project), the Mission of the ILA Committee on Intellectual Property and Private International Law, and Selected Issues from the ILA Committee Guidelines (jurisdiction, applicable law, recognition of foreign judgments and arbitration). Discussion will follow.

The Seminar is open to the public, and there is no registration fee. Attendees are requested to register online and bring a photo ID. The language of the Seminar will be English.

Click here to see the program.

Opinion 2/13 of the Court (Full Court). Accession of the European Union to the European Convention for the Protection of Human

Rights and Fundamental Freedoms.

On the Compatibility of the draft agreement with the EU and FEU Treaties: a resounding “no”.

The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms

See the whole text here.

Weller in Search of the Future of European Private International Law

Matthias Weller from the EBS Law School in Wiesbaden has posted a paper on “Mutual Trust: In Search of the Future of European Private International Law” on SSRN. The paper is forthcoming in the Journal of Private International Law. The pre-edited version can be downloaded here free of charge.

The abstract reads as follows:

> *What will EU justice policy look like in 2020? – This is the question the European Commission posed at the Assises de la Justice, “a forum to shape the future of EU Justice Policy” held at Brussels on 21-22 November 2013, under*

the leitmotif of "building trust in justice systems in Europe". In its press release of 11 March 2014, the Commission again referred to mutual trust as a cornerstone of judicial co-operation in the EU, and submitted several statements and memoranda with a view to the European Council on 26 and 27 June 2014. And indeed, the European Council confirmed that "the smooth functioning of a true European area of justice with respect for the different legal systems and traditions of the Member States is vital for the EU. In this regard, mutual trust in one another's justice systems should be further enhanced".

This text seeks to establish firmer ground in the search for the future of European private international law as a cornerstone for the implementation of the European Union's vision of judicial co-operation in civil-matters. It unfolds possible meanings and functions of the rather opaque, yet almost omnipresent buzzword of mutual trust in the European policy-making on private international law. In a first step, the potential role of mutual trust in private international law in general will briefly be considered (II.). The main focus, of course, will be on European law (III.). The law of the European Union will be analyzed first on the level of primary law (1.). On this level, firstly, the rather abstract question will be addressed what to trust in (a.). Secondly, and more concretely, the functioning of the fundamental freedoms and their structural repercussions on European choice of law thinking will be considered insofar as it revolves around a mutual "recognition" of legal relationships (b.). On the level of secondary law (2.). it will be considered (a.) the normative system of judicial co-operation in civil matters in light of mutual trust, (b.) the operation of that normative system by the European Court of Justice in recent and telling cases, (c.) challenges for this normative system from European Human Rights as well as (d.) challenges from the Commission's 2014 proposal for reacting to systemic deficiencies in the administration of justice in a Member State. Finally (e.), suggestions will be submitted how these challenges could be integrated into the normative system. The last part (IV.) will sum up insights from the deconstruction of the multifaceted term of "mutual trust".

Regulation (EU) No 1329/2014 – Forms in Matters of Successions

The Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014 establishing the Forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession has been published today.

Click here to access OJ L 359.