Private International Law in the 20th century

In December 2012, the Institute of Private International and Foreign Private Law of the University of Cologne hosted a symposium to commemorate the 100th birthday of *Gerhard Kegel* and the 80th birthday of *Alexander Lüderitz*. The invited speakers, *Klaus Schurig* (University of Passau), *Karsten Otte* (University of Mannheim), and *Haimo Schack* (University of Kiel) focused on the development of methods of private international law in the 20th century, which has been strongly influenced by the works of both academics, on how these methods may be used to explain conflict-of-laws problems in the 21st century and how they can serve as the fundament of modern methodology of private international law.

The essays by the symposium's speakers have now been published under the title 'Internationales Privatrecht im 20. Jahrhundert: Der Einfluss von *Gerhard Kegel* und *Alexander Lüderitz* auf das Kollisionsrecht', edited by *Heinz-Peter Mansel*. In addition to these essays, which include thoughts on *Kegel's 'Interessenlehre'* as well as a comprehensive discussion of the *renvoi* doctrine, the book contains a short introduction to the works of *Kegel* and *Lüderitz*, synopses of the oral discussions that followed the talks at the symposium, and complete bibliographies of both *Kegel* and *Lüderitz*.

Recent Case Law of the ECtHR in Family Law Matters

The ERA (Trier) proposes a conference on recent case law of the ECtHR in family law matters, in Strasbourg, 18-19 February 2015.

Participants will have the opportunity to attend a hearing of the Grand Chamber.

The spotlight is centered on Article 8 (respect for family life) in conjunction with Article 14 (prohibition of discrimination) and Article 12 (right to marry).

Key topics

To be understood taking into account that case law of the ECtHR concentrates not only on the legal implications but also on social, emotional and biological factors.

- International child abduction
- Balancing the children's rights, parents' rights and public order
- Adoption
- Surrogacy parenthood
- Recognition of parent-child relations as a result of surrogacy
- Child custody and access rights within parental authority
- Recognition of marriage and civil unions in same-sex relationships

Who should attend?

Lawyers specialised in family law, human rights lawyers, judges dealing with family law matters, ministry officials, representatives of NGOs and child's rights organisations.

For further information click here.

Rudolf Hübner on Foreign Law in

German Courts

Rudolf Hübner has authored a book on foreign law in German courts ("Ausländisches Recht vor deutschen Gerichten Grundlagen und europäische Perspektiven der Ermittlung ausländischen Rechts im gerichtlichen Verfahren". The volume is in German and has been published by Mohr Siebeck. The official abstract reads as follows:

> *The ascertainment of foreign law is a classical procedural problem: it is difficult and therefore error-prone. In order to deal with this problem properly, an accurate adjustment of procedural economics and legal certainty, as well as the procedural rights of the parties and the procedural objective to deliver judgments in accordance with substantive law, is indispensable.*

More information is available on the publisher's website.

Journal of Private International Law 10th Anniversary Conference at the University of Cambridge, 3-5 September 2015 – Call for Papers

Building on the very successful conferences held in Aberdeen (2005), Birmingham (2007), New York (2009), Milan (2011) and Madrid (2013), we are pleased to announce that the Journal of Private International Law will be holding its 10th anniversary conference at the University of Cambridge on 3-5 September 2015. We now invite abstracts for the conference. Please submit an abstract if you would like to make a presentation at the conference and you are willing to

produce a final paper that you will submit for publication in the Journal. Abstracts should be up to 500 words in length and should clearly state the name(s) and affiliation(s) of the author(s). They can be on any subject matter that falls within the scope of the Journal – see http://www.hartjournals.co.uk/jprivintl/index.html – and can be offered by people at any stage of their career, including postgraduate students. Presentation at the conference will depend on whether your abstract is selected by the Editors of the Journal (Professors Jonathan Harris of King's College, London and Paul Beaumont of the University of Aberdeen) and by the conference organisers in the University of Cambridge (Professor Richard Fentiman, Dr Louise Merrett and Dr Pippa Rogerson). The subsequent article should be submitted to the Journal. Publication in the Journal will be subject to the usual system of refereeing by two experts in the field.

There will be a mixture of plenary (Friday) and parallel panel sessions (Thursday afternoon and Saturday morning). Please indicate on the abstract whether you are willing to present in either or are only willing to do so in one or the other. A willingness to be flexible maximises our ability to select your paper.

The Conference will be held in the Faculty of Law, University of Cambridge. See http://www.law.cam.ac.uk/about-the-faculty/how-to-find-us.php for further information.

Speakers will not be expected to pay a conference fee but will be expected to pay their expenses to get to Cambridge. Conference accommodation is available in Gonville & Caius College at the speaker's own expense (see http://www.cai.cam.ac.uk/). Details about accommodation and the conference dinner on the Thursday evening will follow but bed and breakfast in a single room in the College will be about £70 per night.

Please send your abstract to the following email address by Friday 20 February 2015: (PILconf15@law.cam.ac.uk)

Conference Report: Minimum Standards in European Procedural Law

As reported earlier on this blog, Matthias Weller (EBS Law School) and Christoph Althammer (University of Regensburg) hosted a conference on "Minimum Standards in European Pocedural Law" in Wiesbaden on November 14 and 15. Here is a brief report.

By Jonas Steinle, LL.M., Doctoral Student and Fellow at the Research Center for Transnational Commercial Dispute Resolution, EBS Law School, Wiesbaden, Germany)

The European Area of Justice has developed dynamically in the last years through the implementation of a wide range of different legal instruments, and a core technique of these instruments is mutual recognition. The number of Member States has also increased. This leads to the fundamental question whether and to what extent there should be a (larger) core of harmonized European procedural law in the future as one cornerstone for strengthening the mutual trust in the judicial systems of the Member States in order to better justify mutual recognition. European Procedural law can only be (further) developed if there is some sort of common ground (*Leitbild*)amongst the Member States in procedural issues. Once such common ground is sufficiently established, national procedural laws can be measured against this standard, and the more a national law or rule departs from the common ground, the more it is put under pressure for justification. This approach mirrors the test applied by the European Court of Human Rights when it comes to controlling national rules for which there is not yet a clear autonomous standard apparent from the guarantees under the European Convention on Human Rights.

The conference, organized by *Prof. Matthias Weller* (EBS University Wiesbaden) and *Prof. Christoph Althammer* (University of Regensburg) and hosted by the Research Center for Transnational Commercial Dispute Resolution (http://www.ebs-tcdr.de/) at the EBS Law School in Wiesbaden, dealt with a number of perspectives for and on such common ground.

The conference started with three reports on the German (*Prof. Christoph Althammer*), French (*Prof. Frédérique Ferrand,* University Jean Moulin, Lyon) and English legal system (*Prof. Matthias Weller*) as to their various forms of minimum standards and guiding principles. As a starting point, *Christoph Althammer* gave some insights into the German traditional procedural standards (*Prozessmaximen*) as classic legislative driven requirements and how they are derived from superior rules of law. *Frédérique Ferrand,* on the other hand, discussed the particular role of the Court of Cassation (*Cour de Cassation*) in the French civil procedure system. *Matthias Weller* highlighted the strong pressure on the parties for going into mediation rather than litigating their claims at state courts and in general punitive elements. As a conclusion of the first day of the conference, *Prof. Thomas Pfeiffer* (University of Heidelberg) presented a synthesis on the various national reports.

On the second day of the conference, *Prof. Michael Kubiciel* (University of Cologne) and *Prof. Andreas Glaser* (University of Zurich) provided insights in minimum standards in criminal procedural and administrative law as a point of comparison. These presentations were followed by two reports on areas of strongly Europeanized procedural rules, first by *Prof. Friedemann Kainer* (University of Mannheim) on European influences and standards in competition law, in particular in private enforcement litigation, and *Prof. Mary-Rose McGuire* (also University of Mannheim) on litigation in intellectual property law. It became clear that a strong "effet utile" from European substantive law influences in many ways procedural law but sometimes generates specific solutions that may not count as a general European standard.

As a final presentation, *Prof. Burkhard Hess* (Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law) summarized the outcome of the various perspectives during the second day of the conference by making reference *inter alia* to the *acquis communautaire* and he provided a far-reaching perspective on the future of European procedural law.

After the various sessions there were intense debates amongst many prominent international civil procedure law experts in the audience. All presentations will be published with Mohr Siebeck. A follow-up event is being planned.

International Conference: Settlement of International Trade Disputes in the Region of Central Asia and Caucasus: Public and Private Mechanisms

The **Kiel Centre for Eurasian Economic Law (KEEL)** at the Institute of East European Law of the University of Kiel in cooperation with the Academy of Public Administration under the President of the Republic of Azerbaijan, the Al-Farabi Kazakh National University and the Ural State Law University will host an International Conference on the topic "**Settlement of International Trade Disputes in the Region of Central Asia and Caucasus: Public and Private Mechanisms**".

The conference will take place on **28-29 November** at the Parliamt (Landtag) of Schleswig-Holstein in Kiel and will be held in English and Russian with simultaneous translation.

For more **information, the full programme** as well as **registration** please visit the following page: Conference in Kiel.

ADR & ODR in the EU- Joint

Conference ERA&MPI Luxembourg

2015 will be a landmark year for the debate on ADR & ODR. The Directive on Alternative Dispute Resolution (ADR) will have to be transposed into national legislation by 9 July 2015; the Online Dispute Resolution (ODR) platform will become operational six months later.

The conference, jointly organized by the ERA and the MPI Luxembourg and taking place in Trier, will discuss at an early stage the existing proposals for transposing the requirements of the ADR Directive into national law.

Key topics

- In-depth analysis of the legal and practical issues regarding the implementation of the Consumer Alternative Dispute Resolution Directive
- Forthcoming changes after the entry into force of the Regulation on Consumer Online Dispute Resolution

Speakers: **Karin Basenach**, Director, European Consumer Centre Luxembourg; **Juan Bueso**, Legal Adviser, European Consumer Centre Ireland, Dublin; **Alessandro Bruni**, Attorney-at-Law, Professional Mediator and Arbitrator, Rome; **Dr Pablo Cortés**, Attorney-at-Law, Senior Lecturer, School of Law, University of Leicester; **Christoph Decker**, DG Justice and Consumers, European Commission, Brussels; **Marie Luise Graf-Schlicker**, Ministerial Director, Federal Ministry of Justice and Consumer Protection, Berlin; **Professor Burkhard Hess**, Director, Max Planck Institute for; International, European and Regulatory Procedural Law, Luxembourg; **Professor Christopher Hodges**, Professor of Justice Systems, University of Oxford;**Ulrike Janzen**, Head of Division, Federal Ministry of Justice and Consumer Protection, Berlin; **Nathalie Jouant**, Attachée, DG Economic Regulation – Consumers & Entreprises Unit, FPS Economy, Brussels; **Augusta Maciuleviciute**, Senior Legal Officer and Consumer Redress Leader, BEUC, Brussels; **Dr Rafa? Morek**, Adjunct Professor, University of Warsaw, Of Counsel, K&L Gates LLP, Warsaw; **Nicole Nespoulous**, DG Competition Policy, Consumer Affairs and Fraud Control, Ministry of Finance, Paris; **Marie-Josée Ries**, Director, DG Internal Market, Ministry of Economy, Luxembourg.

Click here to see the program , here for practical further information.

Language: English

Organisers: Dr Angelika Fuchs, ERA with the support of Professor Burkhard Hess, Max Planck Institute Luxembourg

Event number: 115D31

To steward or not to steward, that is the question

Some thoughts on the ATS by James Armstrong. James has been working internationally as a business process coordinator responsible for a major Oil and Gas company since 2000 in countries such as Korea, Angola, Malaysia and more recently Papua New Guinea. He is currently working as an advisor, and completing an LLM on international law with a focus on Conflicts of law and the application and use of the ATS.

The Alien Tort Claims Act (ATS) was passed in 1789 and did in effect sit on the statute shelves for nearly two centuries, until the Filartiga case. The main impact of this Act has been to grant US Federal Courts the ability to hear cases dealing with private claims for a reasonable number of international law violations, provided they are in breach of the Law of Nations or a treaty of the United States. The synergy between ATS and conflicts of law issues, I would suggest, have now come to forefront; forum shopping has been seen as a defining factor with the applications of ATS and the US courts have recently, in the Kiobel case, provided us rules, namely the "touch and concern", that would seem, prima facie, to bring ATS in line with the British rules on conflicts of law. After all jurisdictional questions are about selecting the correct forum.

A recent case which has some significance here is *Al Shimari v CACI*[1], where Iraq national brought a case against CACI and L-3 services for torts, namely

torture, war crimes, crimes against humanity, sexual assault and cruel, inhuman treatment[2]. The plaintiffs were former prisoners at the Abu Ghraib prison in Iraq; this prison was run and managed by US military personnel and or their contractors from 2003 until 2006; it has now been closed[3]. The plaintiffs claim that they suffered mistreatment at the hands of the servicer personnel and contractors responsible for the management of the prison and the prisoners. This case is significant as Justice Breyer[4] made the statement that the "*claim*" must "*touch and concern*", therefore extended, correctly so, the rationale behind the application of the "*touch and concern*" rule developed by *Kiobel*. He went further to look at the parties and indicated that that US Congress had taken a strong position against the offense of torture and had created a statute dealing specifically with Torture, the Torture Victims Protection Act 1991. The key distinction between *Kiobel* and *CACI* is that *CACI* is an American corporation; the senior management are located within America; the employees for the prison where recruited in America; the senior management were made aware of the actions and events that had taken place in the prison. Adding all these elements up Justice Breyer concluded that congress has taken a strong position against torture and wanted to ensure that any American participating in such act would be brought to justice[5]. America should steward Americans: citizenship is a key factor.

Recently the American courts have applied the rules initially defined within *Kiobel* and subsequently applied and developed in *CACI*[6] to the *Chevron*[7] case. On reading this case the failings of the court to apply their own rules became apparent: they have failed to take into consideration not only the application of forum selection, as per their own rulings, but they have also failed to demonstrate a desire to steward their own, Americans, when their actions have, or may have, breached internationally accepted standards and laws. Stewardship of a countries individual, both natural and legal, should, I would suggest, be paramount when looking at the conflicts and trying to assess jurisdictional applications.

In my view, the US Courts are now demonstrating a desire -or at least are heading down a route- to remove the rational and possibility of giving jurisdiction for actions under ATS as opposed to looking to steward and control the actions of their own citizens, be these natural or legal. I was appalled to read the views of the Second Circuit Court of Appeals in *Mastafa v. Chevron Corp*[8]. This, as I am

assure your are aware, was a joint case with Chevron and BNP claiming that they had aided and abetted human rights abuses by the Government of Iraq during the Saddam Hussein's regime. This case was brought under the ATS; the court looked to apply the decision from *Kiobel*[9] and stated that the citizenship, element as identified in *CACI*[10], was not relevant. They reiterate that for a case to be given jurisdiction by ATS it must a) touch and concern the United States with sufficient force to displace the presumption against extraterritoriality and: b) demonstrate that the conduct, prima facie, breaches a law of nations or treaty of the United States.

The main issue, I would suggest, for the application of ATS is now the disagreement between the second and fourth circuit on the application of citizenship -the second circuit court clearly stating that the citizenship should have no bearing on the application of "*touch and concerns*".

I would suggest this is wholly wrong: a given country should take responsibility for stewarding the actions of their own citizens, especially when the other country has a less than acceptable legal system. I believe this view is in alignment with the UK courts and the views expressed by Justice Breyer in the CACI case; I would further suggest that this should be of paramount importance, and therefore this is a fundamental failing by the court that will adversely affect the ability of the courts to hear cases under ATS.

In the recent case of Abdul-Hakim Belhaj[11] the [UK] Court of Appeal has clearly indicated that there if no remedy is left open the home country should be able to hear the case; they were actually considering action against UK officials and agencies, here we are looking for the American courts to steward their own citizens, both legal and natural. I would go further and state that the American courts could well learn from the view taken by the [UK] Court of Appeal, who considered the implications of not accepting jurisdiction, and stated that this would have an adverse effect on the international view on British justice[12].

I therefore put it forward that the courts have not applied the findings in *Kiobel* correctly, as discussed and applied by *CACI*. *Kiobel* states that a "*mere corporate presents*"[13] should not be an indication of jurisdictionally liability; Shell only has a minor office in the USA and is in fact a Dutch company, not a wholly owned American corporation. This view is correct: a mere presence should not give arise to jurisdiction; however, Chevron has more than a mere presence and therefore

the Court is in error regarding this element. Chevron can be identified as being an American corporation all the way back to 1876[14], unlike Shell which shows that its history and heritage is outside the USA[15].

At the end of the day, it seems that major corporations and the dollar are openly controlling the US courts: *CACI* is a small company with lots of media attention; *Chevron* is a major international oil company that brings in billions of dollars into the American market.

These are my views on what I can only describe as a vibrant and interesting time, although things are not moving in the right direction here. This reminds me of a favorite phrase of mine

“The only thing necessary for the triumph of evil is for good men to do nothing.” ? Edmund Burke

[1] Suhail Najim Abdullah Al Shimari; Taha Yaseen Arraq Rashid; Salah Hasan Nusaif Al-Ejaili; Asa’ad Hamza Hanfoosh Al Zuba’e v CACI Premier Technology, Inc. CACI International, Inc. 13-1937

[2]
www.business-humanrights.org/en/abu-ghraib-lawsuits-against-caci-titan-now-I-3-0#c17777

[3]
http://www.nytimes.com/2014/04/16/world/middleeast/iraq-says-abu-ghraib-prison-is-closed.html?_r=0

[4] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013) Justice Breyer Opinion, Chapter 2 , B

[5]Suhail Najim Abdullah Al Shimari; Taha Yaseen Arraq Rashid; Salah Hasan Nusaif Al-Ejaili; Asa’ad Hamza Hanfoosh Al Zuba’e v CACI Premier Technology, Inc. CACI International, Inc. 13-1937 page 31

[6] Suhail Najim Abdullah Al Shimari; Taha Yaseen Arraq Rashid; Salah Hasan Nusaif Al-Ejaili; Asa’ad Hamza Hanfoosh Al Zuba’e v CACI Premier Technology, Inc. CACI International, Inc. 13-1937

[7] Mastafa v. Chevron Corp., No. 10-5258-cv, 2014 WL 5368853 (2d Cir. Oct.23,

2014)

[8] Mastafa v. Chevron Corp., No. 10-5258-cv, 2014 WL 5368853 (2d Cir. Oct.23, 2014)

[9] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013)

[10] Suhail Najim Abdullah Al Shimari; Taha Yaseen Arraq Rashid; Salah Hasan Nusaif Al-Ejaili; Asa'ad Hamza Hanfoosh Al Zuba'e v CACI Premier Technology, Inc. CACI International, Inc. 13-1937

[11]Belhaj & Boudchar -v- The Rt. Hon Jack Straw, Sir Mark Allen (CMG) and others [2014] EWCA Civ 1394

[12] Belhaj & Boudchar -v- The Rt. Hon Jack Straw, Sir Mark Allen (CMG) and others [2014] EWCA Civ 1394, para 120

[13] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013) Para 14 IV

[14] http://www.chevron.com/about/history/1876/

[15]http://www.shell.com/global/aboutshell/who-we-are/our-history/the-beginnings.html

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Call for Papers: Testing the stress of the EU – EU law after the financial crisis

The University of Bayreuth (Germany) and the Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales (Spain), with support from the German Academic Exchange Service (DAAD), will host a joint conference on the topic: "**Testing the stress of the EU: EU law after the financial crisis**".

The conference will be held on **08 May 2015** in Madrid.

Papers on the following topics are very welcome:

- Financial crisis and general contract law
- Financial crisis and merger control law
- A common external policy for Europe
- A common tax policy for Europe

Moreover, places for German participants on a panel discussion on "The current situation of the European Union" are still available.

Submissions from Ph.D. students and Post Docs are especially encouraged.

Applicants are asked to send an abstract of a maximum of 300 words to Professor Jessica Schmidt (jessica.schmidt@uni-bayreuth.de) by **31 January 2015** and to include a short biographical note.

The conference flyer may be found here.

Dutch draft bill on collective action for compensation – a note on extraterritorial application

As many readers will know, the Dutch collective settlement scheme – laid down in the Dutch collective settlement act (*Wet collective afhandeling massaschade*, WCAM) – has attracted a lot of international attention in recent years as a result of several global settlements, including those in the *Shell* and *Converium* securities cases. Once the Amsterdam Court of Appeal (that has exclusive competence in these cases) declares the settlement binding, it binds all interested parties, except those beneficiaries that have exercised the right to opt-out. When the WCAM was enacted almost ten years ago, the Dutch legislature deliberately choose not to include a collective action for the compensation of damages to avoid

some of the problematic issues associated with US class actions and settlements.

However, following a Parliamentary motion, this summer the Dutch legislature published a draft proposal for public consultation (meanwhile closed, public responses available here) to extend the existing collective action to obtain injunctive relief to compensation for damages. As the brief English version of the consultation paper states, the draft bill aims to:

> *"enhance the efficient and effective redress of mass damages claims and to strike a balance between a better access to justice in a mass damages claim and the protection of the justified interests of persons held liable. It contains a five-step procedure for a collective damages action before the Dutch district court. Legal entities which fulfill certain specific requirements (expertise regarding the claim, adequate representation, safeguarding of the interests of the persons on whose behalf the action is brought) can start a collective damages action on behalf of a group of persons. The group of persons on whose behalf the entity brings the action must be of a size justifying the use of the collective damages action. Those persons must not have other efficient and effective means to get redress. The entity must have tried to obtain redress from the person held liable amicably."*

A point of particular interest is a provision regarding the extraterritorial application of the proposed act. The Amsterdam Court of Appeal has been criticized by both Dutch and other scholars for adopting a wide extraterritorial jurisdiction in the WCAM procedure, on the basis of the Brussels Regulation, the Lugano Convention and domestic international jurisdiction rules. The application of the European jurisdiction rules is challenging in view of the particular procedural design of the WCAM scheme (a request to declare a settlement binding between a responsible party and representative organisations/foundations on behalf of interested parties). This draft bill does not introduce separate international jurisdiction rules, but proposes a 'scope rule' to ensure that the case is sufficiently connected to the Netherlands. The draft explanatory memorandum (in Dutch) states that a choice of forum of two foreign parties in relation to an event occurring outside the Netherlands will not suffice to seize the Dutch court for a collective compensatory action, even if parties have made a choice of law for Dutch law (yes, we see similarities to the US Supreme Court case *Morrison v. National Australia Bank*). It is required that either the party addressed has its

domicile or habitual residence in the Netherlands (a), or that the majority of the interested parties have their habitual residence in the Netherlands (b), or that the event(s) on which the claim is based occurred in the Netherlands. Needless to say that these rules leave the application of the jurisdiction rules of Brussels and Lugano unimpeded. It is clear that the proposed provision limits the possibility for foreign parties to seek collective compensatory relief in the Netherlands. The risk of the Netherlands becoming a 'magnet jurisdiction' for collective redress as put forward by some commentators seems therefor absent.

See for two recent English publications on the Dutch collective settlements act, published in the *Global Business & Development Law Journal* 2014 (volume 27, issue 2) devoted to Transnational Securities and Regulatory Litigation in the Aftermath of Morrison v. Australia National Bank: Bart Krans (University of Groningen), *The Dutch Act on Collective Settlement of Mass Damages,* and Xandra Kramer (Erasmus University Rotterdam), *Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries.*