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

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.*

Reviewing a Review, or: What is the meaning of Article 4(1) Rome II?

The 80's British pop band *Prefab Sprout* once recorded a song called „Electric Guitars", dealing with the career of the Beatles, which contained the line: „We were quoted out of context – it was great!" Being quoted out of context in a review, however, is an entirely different and less pleasant matter. In a recent issue of Lloyd's Maritime and Commercial Law Quarterly (2013, pp. 272–274), *Adrian Briggs* from Oxford University criticizes my commentary on Article 4 of the Rome II Regulation (in: *Calliess* (ed.), Rome Regulations, Alphen aan den Rijn, 2011) as follows (p. 273):

„The book is at its best when the reader is looking for an answer to a precise question, such as whether the particular contract with which he is dealing, and which does not contain an express choice of law, falls within any the specific contracts listed in Art. 4(2) of the Rome I Regulation, or whether the particular kind of assignment, or particular right to be assigned, falls within the choice of law rule in Art. 14 of the same Regulation, and so on. There are, of course, odd points with which one is simply bound to disagree. One such is the assertion, in relation to the Rome II Regulation, that the said instrument "is rather conservative, in giving the *lex loci delicti* pride of place as the general rule for torts" (p. 404). It is not the first time this kind of sentiment has been heard, but it is simply not true, and credibility is neither gained nor given by advancing it. The most striking thing about Art. 4, as it was about earlier English legislation, is that it saves one from the gymnastic pain of having to decide where a cross-border tort was committed: to look for the place of the tort is, in a significant number of cases, to look for something which is not there. Article 4 accordingly places its emphasis on the place where the damage occurs. It is not helpful to pretend that this is a rule which it manifestly is not. Indeed, the commentary makes no more of the assertion set out above; it is still a pity that it was there at all.
It might be said that the presentation of arguments is still more German than it is delocalised. For example, the elucidation of the country in which the damage occurs (which is the proper reading of Art.4(1)) states, at p. 406, that the legislation reflects something which is rendered in German as *Erfolgsort*. No

doubt it does. But for the non-German reader, the more helpful starting point would surely be to go to the substantial jurisprudence of the European Court in relation to Art. 5(3) of the Brussels I Regulation. This is soon done, but putting it after the German law point seems wrong. Certainly, when one gets there the analysis of the European material is good and clear, but one might still have thought that this, rather than German understanding of damage and its location, should have been presented as the primary source material. It must be said, however, that the citation of material from sources outside Germany is extraordinarily impressive; and it is, of course, hard not to offer lessons from one's own law where these appear to be instructive. But there are still advantages in trying, in this context, to treat the European law source material as the first resource, and anything generated by national law as ancillary only."

Briggs' first point seems to be that my commentary erroneously tries to assert that the Rome II Regulation clings to the primacy of the place where the tortfeasor acted (place of conduct). Of course, such a statement would be utterly nonsensical. Read in context, however, the incriminated section merely points out that the systematic position of Art. 4(1) Rome II as a general rule must be put into perspective when viewing the more complex structure of the Regulation. The whole section reads as follows:

„Contrary to earlier drafts (*see* mn. 12), the final Rome II Regulation is rather conservative in giving *lex loci delicti* pride of place as the 'general rule' for torts. In fact, *lex loci delicti* is, for logical and systematic reasons, rather a **subsidiary rule**: It applies only if the parties have not chosen the applicable law (Article 14), if there is no manifestly closer connection, for example, because of a contract between the parties (Article 4(3)) and if there is no common habitual residence of the parties (Article 4(2)) [footnotes omitted]".

I have difficulty in understanding what should be wrong about this analysis concerning the obvious, not to say trivial, discrepancy between the numerical position of Art. 4(1) in the Regulation and its real importance for the choice-of-law process. *Briggs*, however, seems to be more infuriated by what he perceives as my incorrect use of "lex loci *delicti*" as encompassing the lex loci *damni* (and not only the law in force at the place of conduct). In this regard, however, the text merely follows the understanding of the term as it was used by the European Commission when it drafted the Rome II Regulation. In its Explanatory Memorandum on the 2003 draft, which already opted for the place of damage as

the basic connecting factor, the Commission points out explicitly: "The Commission's objectives in confirming [!] the *lex loci delicti commissi* rule [!] are to guarantee certainty in the law and to seek to strike a reasonable balance between the person claimed to be liable and the person sustaining the damage. The solutions adopted here also reflect recent developments in the Member States' conflict rules" (COM [2003]427 final, p. 11). The fact that the European legislature saw lex loci damni merely as a more precise, uniform definition of the place where a harmful event occurred rather than an antithetical novelty is also supported by Recitals 15 and 16 of the final Regulation. Being a non-native speaker, I concede that I would accept any criticism referring to an idiosyncratic use of established English (or, in this case, Latin) legal terms. In their treatise „The Private International Law of Obligations", 3rd ed. 2009, para. 18–007, however, *Richard Plender & Michael Wilderspin* state as well: „Article 4(1) [Rome II] thus represents a refined version of the classic *lex loci delicti commissi* rule [!] which has always been applied in one way or another in all Member States." Thus, with due respect for my learned colleague *Adrian Briggs*, I still think that the section he strongly criticizes as pitiful is correct both in its wording and its substance.

Briggs' second point of concern refers to my seemingly parochial preference for quoting German sources rather than genuine European material. Again, the section that he criticizes is far more nuanced when it is read in context:

„Although the language of Article 4(1) Rome II is rather complex, defining the place of injury as 'the country in which the damage occurs … irrespective of the country or the countries in which the indirect consequences of that event occur', the explicit exclusion of 'indirect consequences' makes clear that the real connecting factor is not the place where mere pecuniary damage was suffered ('I suffered the damage in my pocket'),[35] but the place of injury, the *Erfolgsort* in the traditional German terminology.[36]"

The footnote 35 explicitly refers to the rejection of a so-called money pocket rule under Art. 5(3) of the Brussels I Regulation. Moreover, the section *Briggs* criticizes is actually preceded [!] by a paragraph (marginal number 13) which draws the reader's attention to the "settled case law of the ECJ" on Art. 5(3) Brussels I. Apart from that, even the Commission, when drafting Rome II, occasionally referred to established German legal terms, for instance in COM [2003]427 final, p. 11: "The rule entails, where damage is sustained in several

countries, that the laws of all the countries concerned will have to be applied on a distributive basis, applying what is known as *‚Mosaikbetrachtung'* in German law." This explanation shows that the Commission did not legislate on a clean slate, but was very aware of the experience gained under former domestic approaches to choice of law in torts. Thus, making the reader familiar with some established German legal terms and their background might actually be helpful in understanding some ideas underlying the Rome II Regulation.

For other, more balanced reviews of the Commentary, see, for example, *Matteo Fornasier*, Zeitschrift für Europäisches Privatrecht (ZEuP) 20 (2012), p. 676 et seq. and *Xandra Kramer*, Common Market Law Review 51 (2014), pp. 335-337. By the way: A new edition of the Commentary is forthcoming in 2015. In addition to the Rome I and II Regulations, Rome III will be covered as well. Stay tuned!

Stefan Wrbka on European Consumer Access to Justice Revisited

Stefan Wrbka, Associate Professor for European and Comparative Private Law at Kyushu University, has authored a book on "European Consumer Access to Justice Revisited". Published by Cambridge University Press it will be out in late November.

More information is available on the publisher's website. The official abstract reads as follows:

> *European Consumer Access to Justice Revisited takes into account both procedural and substantive law questions in order to give the term 'access to justice' an enhanced meaning. Specifically, it analyses developments and recent trends in EU consumer law and aims to evaluate their potential for increasing consumer confidence in the cross-border market. Via a critical assessment of the advantages and disadvantages of the means initiated at the EU level, the*

author highlights possible detriments to the cross-border business-to-consumer (B2C) market. To remedy this, he introduces an alternative method of creating a legal framework that facilitates B2C transactions in the EU – 'access to justice 2.0'.

A Note from Professor S.I. Strong on the Results of Her Recent Survey on International Commercial Mediation and Conciliation

With the permission of the publishers, I wanted to let you know that the preliminary results from a recent empirical study on international commercial mediation and conciliation are now available. The study, which is entitled "*Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation*," collected detailed data on 34 different questions from 221 respondents from all over the world. Survey participants included private practitioners, neutrals, in-house counsel, government lawyers, academics and judges with expertise in both domestic and international proceedings.

This information was gathered to assist UNCITRAL and UNCITRAL Working Group II (Arbitration and Conciliation) as they consider a proposal from the Government of the United States regarding a possible convention in this area of law. The U.S. proposal will be considered in depth at the Working Group II meeting in February 2015.

Those who would like to see a copy of the preliminary report can download a free

copy here. The data will be further analyzed in the coming months and published sometime next year as an article.

Many thanks to those from conflictsoflaw.net who participated in the survey and who helped distribute it among their networks. If you have any questions about the preliminary report, please feel free to let me know.

Kind regards,

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