# Van Den Eeckhout on Schlecker

Veerle Van Den Eeckhout (Leiden University and University of Antwerp) has posted on SSRN an English version of a paper on international employment law previously published in Dutch in "Tijdschrift Recht en Arbeid" ("TRA", Kluwer, 2014, issue 4).

The paper is entitled "The Escape-Clause of Article 6 Rome Convention (Article 8 Rome I Regulation): How Special is the Case Schlecker?"

> *In the Schlecker case (12 September 2013, C-64/12), the Court of Justice decides that Article 6(2) of the Rome Convention must be interpreted as meaning that, even where an employee carries out the work in performance of the contract habitually, for a lengthy period and without interruption in the same country, the national court may, under the concluding part of that provision, disregard the law of the country where the work is habitually carried out, if it appears from the circumstances as a whole that the contract is more closely connected with another country.*
>
> *The author analyses the Schlecker case, commenting the special/ordinary character of Article 6 Rome Convention compared to Articles 3 and 4 Rome Convention, the special/ordinary character of the Schlecker case and the relevance of the decision for cases of international employment in which issues of freedom of movement/freedom of services are addressed.*

The author is grateful to Ms. Emanuela Rotella for the English translation of this paper.

The author has also posted on the case at the Leiden Law blog here and here.

# Judge Scheindlin, In Re South Africa Apartheid Litigation, and… A Non-Fully Dead ATS?

Although in the middle of the Easter holiday (at least for some), I find it is worth briefly reporting on the opinion of the U.S. District Court for the Southern District of New York *In re South Africa Apartheid Litigation,* that was delivered yesterday.

As stated and criticized by Julian Ku, most of the opinion deals with whether a corporation may be sued under the Alien Tort Statute. Julian Ku goes on explaining that as a lower court within that circuit, the district court should have been bound to follow that court's 2010 opinion *Kiobel v. Royal Dutch Shell,* which held that corporations cannot be sued under the ATS. However, the lower court judge, Shira Scheindlin, decided that since the Supreme Court had ended up dismissing the *Kiobel* plaintiffs on other grounds (e.g. extraterritoriality), the Court had *sub silentio* reversed the original *Kiobel* decision's ruling on corporate liability.

So, let's end in the same way he starts, i.e. with an open question: "maybe the use of the Alien Tort Statute against corporations for overseas activities isn't fully dead." (Add.: yet).

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# New Czech Act on Private International Law

*By Petr Briza, co-founding partner of Briza & Trubac, a Czech law firm focusing on cross-border litigation and arbitration, among others.*

Regular readers of this blog might recall this post that referred to my article at Transnational Notes about the new Czech Act on Private International Law. The

article provided a short general description of the new law that entered into effect on January 1, 2014. In this post I would like to introduce in more detail some provisions of the act, especially those that are not preceded by the EU legislation and thus will govern cases heard by Czech courts. Also, below you will find the link to the English translation of the full text of this new act on private international law.

## Introductory remarks

For general comments on the new law I refer to my post at Transnational Notes. Here I will only shortly sum up couple of the main facts.

The act (published under No. 91/2012 Coll.) is part of the private law recodification whose main pillars are the new Civil Code (No. 89/2012 Coll.) and the new Business Corporations Act (No. 90/2012 Coll.). The act has 125 sections divided into 9 parts: (1) General Provisions (§ 1 – 5), (2) General Provisions of Procedural International Law (§ 6 – 19), (3) General Provisions of Private International Law (§ 20 – 28), (4) Provisions Concerning Individual Types of Private-Law Relations (§ 29 – 101), (5) Judicial Cooperation in Relations with Foreign States (§ 102 – 110), (6) Insolvency Proceedings (§ 111 – 116), (7) Arbitration and Recognition and Enforcement of Foreign Arbitral Awards (§ 117 – 122), (8) Transitional and Final Provisions (§ 123 – 124) and (9) Entry into Force (§ 125).

Now I will turn to the provisions that might be of interest for foreign readers.

## General issues (§ 1-5 and 20-25)

The law regulates general issues of private international law, such as public policy (ordre public) exception, overriding mandatory rules, renvoi, qualification (characterisation), preliminary questions or application of foreign law. Unlike the previous "old" act (No. 97/1963 Coll.), the law does not define "ordre public"; instead it only introduces public policy (public ordre) exception as such (§ 4). It is expected that Czech courts will interpret the notion of ordre public in line with § 36 of the old act that defined ordre public as "such principles of the social and state system of the Czech Republic and its law that are necessary to insist on unconditionally." The old law did not contain provisions on overriding mandatory norms; the new act regulates them in § 3 (lex fori overriding mandatory norms) and in § 25 (foreign overriding mandatory norms). While § 3 in fact merely

acknowledges the existence of lex fori provisions that are always applicable, § 25 dealing with third state overriding mandatory norms resembles to some extent controversial Article 7 para 1 of the Rome Convention. The new act also regulates circumvention (abuse) of law (§ 5) that may relate both to the conflict rules and the rules on jurisdiction. Characterisation should be usually made under Czech law (§ 20). Foreign law is to be ascertained and applied ex officio (§ 23).

## Jurisdiction, recognition and enforcement of foreign judgments

As already suggested, the importance of the act lies in the areas outside the scope of the EU law and/or international conventions/agreements. In cases where neither the Brussels I regulation nor the Lugano Convention (or another international agreement) is applicable, jurisdiction in general civil and commercial matters will be governed by § 6 of the act. Under this provision Czech courts have international jurisdiction if they have local jurisdiction (venue) under the Czech Civil Procedure Code (see §§ 84-89a of the Civil Procedure Code – No. 99/1963 Coll.) – one of possible jurisdictional grounds under Czech law is, e.g., an asset location in the territory of the Czech Republic.

The recognition and enforcement of third state (non-EU, non-Lugano) judgments in general commercial and civil matters is governed by §§ 14-16. Apart from traditional grounds for the refusal of recognition (ordre public, res judicata, lis pendens, fair trial) there is mandatory requirement of (material) reciprocity for cases where the decision is against Czech citizen/entity. Also, for a third country judgment to be recognized in the Czech Republic the foreign court has to have jurisdiction under a base of jurisdiction under which Czech courts may assert jurisdiction, unless the defendant voluntarily submitted to the foreign court's jurisdiction (see § 15 (1) a)).

## Conflict rules and rules on jurisdiction in specific matters

In this part I will again mention especially those conflict rules and provisions on jurisdiction that fall outside the scope of the EU legislation.

The primary connecting factor for legal capacity of natural persons is place of habitual residence (§ 29 para 1). However, in case of a name the primary connecting factor is the citizenship with habitual place of residence being a subsidiary connecting factor (see § 29 para 3). Capacity and internal matters of legal entities are governed by the law of the place of incorporation (§ 30).

As the Czech Republic is not a party to 1978 Hague Convention on Agency, the act will be applicable to relations between the principal and third person (these matters fall outside the EU law, which is applicable to principal-agent and agent-third person relations). Apart from a general rule on agency with multiple connecting factors (§ 44), there is a special rule on „proxy“ (“die Prokura” in German) and similar specific types of agency (§ 45).

In the area of family law (§ 47 – 67) one might want to take a look at the conflict rule on divorces (§ 50), as the Czech Republic is not bound by the Rome III regulation. Property regimes of spouses shall be governed by the law of the state in which both spouses are habitually resident; otherwise by the law of the state of which both spouses are citizens; otherwise by the Czech law (§ 49 para 3). The conflict rules, rules on jurisdiction and recognition of foreign judgments in matters of establishment and contesting of parentage are contained in § 53-55. International adoption is governed by § 60-63, registered partnerships and similar unions by § 67.

In the area of rights in rem § 70 para 2 is especially worth noting; it brings about an important change compared to the previous law by assigning the transfer (creation and extinguishment) of ownership under the law governing the contract on the basis of which the ownership is being transferred. § 73 regulates conflict rules for trusts, including the recognition of foreign trusts in the territory of the Czech Republic; the applicable law is the law of the closest connection with the trust, unless the settlor selects the applicable law. Succession is governed by § 74-79, although the importance of these provisions will be largely diminished by the EU regulation on succession, (fully) coming into force in August 2015.

The field of obligations (§ 84 – 101) is largely covered, except for promissory notes and bills of exchange (§ 93 – 100), by the EU legislation. One of few provisions of the act from this area that should be fully applicable is § 101 on non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation. These shall be governed by the law of the state in which the violation (the act giving rise to damage) occurred, unless the injured person chooses one of (up to) three other laws the provision offers for choice.

## Insolvency, arbitration and assistance from the Ministry of Justice

The act also deals with those aspects of international insolvency not covered by the EU Insolvency Regulation (§ 111). As regards applicable law, the act in principle extends the regime of the regulation also to the cases falling outside the regulation's scope (§ 111 para 3). In cases not covered by the regulation, Czech courts may conduct insolvency proceedings if the debtor has an establishment in the Czech Republic provided it is requested by the creditor with habitual residence or seat in the Czech Republic or the creditor?s claim arose in connection with the establishment?s activities. They can also extend jurisdiction based on the regulation to the debtor's assets in a foreign state other than a Member State of the European Union provided the foreign state attributes effects to the proceedings in its territory. Foreign judgments in the insolvency matters shall be recognized under the condition of reciprocity provided in a foreign state in which it was handed down the debtor has a centre of main interests and provided the debtor?s assets in the Czech Republic are not a subject of pending insolvency proceedings.

The arbitration matters are largely covered by international agreements to which the Czech Republic is a party, namely the New York Convention and the European Convention on International Commercial Arbitration, thus the impact of the act is limited. Still, apart from the recognition and enforcement of foreign arbitral awards (§120 – 122), the act also regulates the conditions under which a foreigner may be designated as arbitrator (§ 118). An admissibility of an arbitration agreement shall be assessed under the Czech law and its material validity shall be governed by the law of the state in which an arbitral award is to be issued.

Finally, there is one specific feature of the act worth mentioning: given the complexity of international matters the act provides an opportunity for courts to consult the Ministry of Justice in cases covered by the act (§ 110). It goes without saying that such a consultation is optional and the Ministry's opinion is by no means binding upon the court.

## Concluding remarks

I will not repeat my conclusion about the act from my post in Transactional Notes, instead I give you an opportunity to make your own conclusions about the act and its potential added value (not only practical but also in comparative perspective): in order to make the new act available to readers from around the world, my law firm has provided for the English translation of the act. You can download it free

of charge via this link.

Those who would like to explore the act, its context and related case law may be interested in the commentary I have co-authored together with my colleagues from the Ministry of Justice, Czech Supreme Court and a notary. Unfortunately, it is only in Czech; the same goes for this commentary written by other team of authors.

Any comments or questions regarding the act or its translation are welcome either under the post or at petr.briza@brizatrubac.cz .

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# Yale-Humboldt Consumer Law Lecture

On June 6, 2014 the Humboldt University Berlin will host the first Yale-Humboldt Consumer Law Lecture. The Lecture is part of an annual lecture series that aims at encouraging the exchange between U.S. and European lawyers in the field of Consumer Law understood as an interdisciplinary field affecting many branches of law. Special emphasis will be put on aspects and questions which have as yet received little or no attention in the European discourse.

The Lecture begins at 2 pm in the "Senatssaal" at Humboldt-University Berlin and will be given by Roberta Romano, Daniel Markovits and Alan Schwarte from Yale Law School. The programe reads as follows:

- *Roberta Romano:* The Consumer Financial Protection Bureau and the Iron Law of Financial Regulation
- *Daniel Markovits:* Sharing Ex Ante and Sharing Ex Post
- *Alan Schwartz*: The Rationality Assumption in Consumer Law

Participation is free of charge but prior registration by E-Mail (yhcll@rewi.hu-berlin.de ) is required.

Further information is available here.

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# CJEU rules on Storage Contracts and Article 5(1) (b) Brussels I Regulation

It has not yet been mentioned on this blog that the Court of Justice of the European Union (CJEU) rendered another interesting decision on Article 5(1)(b) Brussels I Regulation in November 2013 (C-496/12, Krejci Lager & Umschlagsbetriebs GmbH ./. Olbrich Transport & Logistik GmbH). The Commercial Court Vienna (Austria) had requested a preliminary ruling on whether a storage contract is a contract for the "provision of service" within the meaning of Article 5(1)(b) Brussels I Regulation (Article 7(1)(b) of the Brussels I recast of 2012). The CJEU answered the question in the affirmative:

> *It must be borne in mind that, according to the Court's case-law, the concept of service found in the second indent of Article 5(1)(b) of Regulation No 44/2001, implies, at the least, that the party who provides the service carries out a particular activity in return for remuneration (Case C-533/07 Falco Privatstiftung and Rabitsch [2009] ECR I-3327, paragraph 29).*
>
> *In that regard, as the Austrian and Greek Governments as well as the European Commission submit in their written observations, the predominant element of a storage contract is the fact that the warehousekeeper undertakes to store the goods concerned on behalf of the other party to the contract. Accordingly, that commitment entails a specific activity, consisting, at the least, of the reception of goods, their storage in a safe place and their return to the other party to the contract in an appropriate state.*
>
> *As regards the argument that the subject-matter of the contract at issue is the mere renting of an area of space, it must be noted that, in the context of proceedings under Article 267 TFEU, which are based on a clear separation of*

*functions between the national courts and tribunals and the Court of Justice, any assessment of the facts is a matter for the national court or tribunal. In particular, the Court is empowered to rule only on the interpretation or the validity of European Union acts on the basis of the facts placed before it by the national court or tribunal (Case C-491/06 Danske Svineproducenter [2008] ECR I-3339, paragraph 23, and the judgment of 10 November 2011 in Joined Cases C-319/10 and C-320/10 X and X BV, paragraph 29).*

*According to the information provided by the order for reference, the contract at issue in the case in the main proceedings does not concern the rental of premises, but the storage of goods. Moreover, besides the fact that it is not for the Court to call into question that finding of fact, it must be noted that jurisdiction relating to the former type of contract is, in any event, governed by Article 22(1) of Regulation No 44/2001, relating to exclusive jurisdiction in the matter of tenancies of immovable property (see, as regards the Brussels Convention, Case 241/83 Rösler [1985] ECR 99, paragraph 24, and Case C-280/90 Hacker [1992] ECR I-1111, paragraph 10), under which only the courts and tribunals of the Member State where the property is situated have jurisdiction.*

*In the light of the foregoing, the answer to the question referred is therefore that the second indent of Article 5(1)(b) of Regulation No 44/2001 must be interpreted as meaning that a contract relating to the storage of goods, such as that at issue in the main proceedings, constitutes a contract for the 'provision of services' within the meaning of that provision.*

The full decision is available here.

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# CJEU rules on Arts. 22 No 1 and

# 27(1) Brussels I-Regulation

On 3 April 2014 the Court of Justice of the European Union (CJEU) rendered a noteworthy decision on Arts. 22 No 1 and 27(1) Brussels I-Regulation (C-438/12 – Weber ./. Weber). The court clarified a number of issues relating to the scope of Art. 22 No 1, the obligations of the court second seised under Art. 27(1) as well as the relationship between Art. 22 No 1 and 27(1) Brussels I-Regulation.

The facts of the underlying case (as presented in the judgment) were as follows: Ms I. Weber (82) and Ms M. Weber (78) were co-owners of a property in Munich (Germany). On the basis of a notarised act of 20 December 1971, a right in rem of pre-emption over the share belonging to Ms M. Weber was entered in the Land Register in favour of Ms I. Weber. By a notorial contract of 28 October 2009, Ms M. Weber sold her share to Z. GbR, a company incorporated under German law, of which one of the directors is her son, Mr Calmetta, a lawyer established in Milan (Italy). According to that contract, Ms M. Weber, as the seller, reserved a right of withdrawal valid until 28 March 2010 and subject to certain conditions. Being informed by the notary who had drawn up the contract in Munich, Ms I. Weber exercised her right of pre- emption over that share of the property by letter of 18 December 2009. On 25 February 2010, by a contract concluded before that notary, Ms I. Weber and Ms M. Weber expressly recognised the effective exercise of the right of pre-emption by Ms I. Weber and agreed that the property should be transferred to her for the same price as that agreed in the contract for sale signed between Ms M. Weber and Z. GbR.

By an application of 29 March 2010, Z. GbR brought an action against Ms I. Weber and Ms M. Weber, before the Tribunale ordinario di Milano (District Court, Milan), seeking a declaration that the exercise of the right of pre-emption by Ms I. Weber was ineffective and invalid, and that the contract concluded between Ms M. Weber and that company was valid. On 15 July 2010, Ms I. Weber brought proceedings against Ms M. Weber before the Landgericht München I (Regional Court, Munich I) (Germany), seeking an order that Ms M. Weber register the transfer of ownership of the said share with the Land Register.

The Landgericht München I having regard to the proceedings brought before the Tribunale ordinario di Milan decided to stay the proceedings in accordance with Article 27(1) Brussels I-Regulation. Ms I. Weber appealed against that

decision  to the Oberlandesgericht München (Higher Regional Court, Munich) (Germany) which, in turn, referred (among others) the following two questions to the CJEU for a preliminary ruling:

Are there proceedings which have as their object a right in rem in immovable property within the meaning of Article 22(1) of Regulation No 44/2001 if a declaration is sought that the defendant did not validly exercise a right in rem of pre-emption over land situated in Germany which indisputably exists in German law?

Is the court second seised, when making its decision under Article 27(1) of Regulation No 44/2001, and hence before the question of jurisdiction is decided by the court first seised, obliged to ascertain whether the court first seised lacks jurisdiction because of Article 22(1) of Regulation No 44/2001, because such lack of jurisdiction of the court first seised would, under Article 35(1) of Regulation No 44/2001, lead to a judgment of the court first seised not being recognised? Is Article 27(1) of Regulation No 44/2001 not applicable for the court second seised if the court second seised comes to the conclusion that the court first seised lacks jurisdiction because of Article 22(1) of Regulation No 44/2001?

The CJEU started its reasoning with the first of these questions relating to the scope of Art. 22 No 1 Brussels I-Regulation. It held that actions seeking a declaration of invalidity of the exercise of a right of pre-emption attaching to that property and which produces effects with respect to all parties. ‘proceedings which have as their object rights in rem in immovable property’:

> *… the essential reason for conferring exclusive jurisdiction on the courts of the Contracting State in which the property is situated is that the courts of the locus rei sitae are the best placed, for reasons of proximity, to ascertain the facts satisfactorily and to apply the rules and practices which are generally those of the State in which the property is situated (Reichert and Kockler, paragraph 10).*
>
> *The Court has already had the occasion to rule that Article 16 of the Brussels Convention and, accordingly, Article 22(1) of Regulation No 44/2001, must be interpreted as meaning that the exclusive jurisdiction of the courts of the Contracting State in which the property is situated does not encompass all actions concerning rights in rem in immovable property, but only those which*

*both come within the scope of the Convention or of Regulation No 44/2001 and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with protection for the powers which attach to their interest (Case C-386/12 Schneider [2013] ECR, paragraph 21 and the case-law cited).*

*Similarly, under reference to the Schlosser Report on the association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (OJ 1979 C 59/71, p. 166), the Court has held that the difference between a right in rem and a right in personam is that the former, existing in an item of property, has effect erga omnes, whereas the latter can be claimed only against the debtor (see order in Case C-518/99 Gaillard [2001] ECR I-2771, paragraph 17).*

*…*

*As is apparent from the file before the Court, a right of pre-emption, such as that provided for by Paragraph 1094 of the BGB, which attaches to immovable property and which is registered with the Land Register, produces its effects not only with respect to the debtor, but guarantees the right of the holder of that right to transfer the property also vis-à-vis third parties, so that, if a contract for sale is concluded between a third party and the owner of the property burdened, the proper exercise of that right of pre-emption has the consequence that the sale is without effect with respect to the holder of that right, and the sale is deemed to be concluded between the holder of that right and the owner of the property on the same conditions as those agreed between the latter and the third party.*

*It follows that, where the third party purchaser challenges the validity of the exercise of the right of pre- emption in an action such as that before the Tribunale ordinario di Milano, that action will seek essentially to determine whether the exercise of the right of pre-emption has enabled, for the benefit of its holder, the right to the transfer of the ownership of the immovable property subject to the dispute to be respected. In such a case, as is clear from paragraph 166 of the Schlosser Report, referred to in paragraph 43 of the*

*present judgment, the dispute concerns proceedings which have as their object a right in rem in immovable property and fall within the exclusive jurisdiction of the forum rei sitae.*

The court then went on to discuss the second question (the fourth in total) relating to the obligations of the court second seised under Article 27(1) Brussels I-Regulation. It held that  Article 27(1) must be interpreted as meaning that, before staying its proceedings, the court second seised must examine whether, by reason of a failure to take into consideration the exclusive jurisdiction laid down in Article 22(1), a decision on the substance by the court first seised will be recognised by other Member States in accordance with Article 35(1) of that regulation:

*It is clear from the wording of Article 27 of Regulation No 44/2001 that, in a situation of lis pendens, any court other than the court first seised must of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established and, where that jurisdiction is established, it must decline jurisdiction in favour of that court.*

*Called on to rule on the question whether the provision of the Brussels Convention corresponding to Article 27 of Regulation No 44/2001, namely Article 21 thereof, authorises or requires the court second seised to examine the jurisdiction of the court first seised, the Court has held, without prejudice to the case where the court other than the court first seised has exclusive jurisdiction under the Brussels Convention and in particular under Article 16 thereof, that Article 21 concerning lis pendens must be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court other than the court first seised may, if it does not decline jurisdiction, only stay the proceedings and may not itself examine the jurisdiction of the court first seised (see Case C-351/89 Overseas Union Insurance and Others [1991] ECR I-3317, paragraphs 20 and 26).*

*It follows that, in the absence of any claim that the court other than the court first seised had exclusive jurisdiction in the main proceedings, the Court has simply declined to prejudge the interpretation of Article 21 of the Brussels Convention in the hypothetical situation which it specifically excluded from its judgment (Case C-116/02 Gasser [2003] ECR I-14693, paragraph 45, and Case*

*C-1/13 Cartier parfums — lunettes and Axa Corporate Solutions Assurances [2014] ECR, paragraph 26).*

*Having subsequently been asked about the relationship between Article 21 of the Brussels Convention and Article 17 thereof, relating to exclusive jurisdiction pursuant to a jurisdiction clause, which corresponds to Article 23 of Regulation No 44/2001, it is true that the Court held in Gasser that the fact that the jurisdiction of the court other than the court first seised is assessed under Article 17 of that Convention cannot call in question the application of the procedural rule contained in Article 21 of the Convention, which is based clearly and solely on the chronological order in which the courts involved are seised.*

*However, as stated in paragraph 47 of the present judgment, and unlike the situation in case which gave rise to the judgment in Gasser, in the present case exclusive jurisdiction has been established in favour of the court second seised pursuant to Article 22(1) of Regulation No 44/2001, which is in Section 6 of Chapter II thereof.*

*According to Article 35(1) of that regulation, a judgment is not to be recognised in another Member State if it conflicts with Section 6 of Chapter II of that regulation, relating to exclusive jurisdiction.*

*It follows that, in a situation such as that at issue in the main proceedings, if the court first seised gives a judgment which fails to take account of Article 22(1) of Regulation No 44/2001, that judgment cannot be recognised in the Member State in which the court second seised is situated.*

*In those circumstances, the court second seised is no longer entitled to stay its proceedings or to decline jurisdiction, and it must give a ruling on the substance of the action before it in order to comply with the rule on exclusive jurisdiction.*

*Any other interpretation would run counter to the objectives which underlie the general scheme of Regulation No 44/2001, such as the harmonious administration of justice by avoiding negative conflicts of jurisdiction, the free movement of judgments in civil and commercial matters, in particular the recognition of those judgments.*

*Thus, as the Advocate General also observed in point 41 of his Opinion, the fact that, in accordance with Article 27 of Regulation No 44/2001 the court second seised, which has exclusive jurisdiction under Article 22(1) thereof, must stay its proceedings until the jurisdiction of the court first seised is established and, where that jurisdiction is established, must decline jurisdiction in favour of the latter, does not correspond to the requirement of the sound administration of justice.*

*Furthermore, the objective referred to in Article 27 of that regulation, namely to avoid the non-recognition of a decision on account of its incompatibility with a judgment given between the same parties in the specific context in which the court second seised has exclusive jurisdiction under Article 22(1) of that regulation, would be undermined.*

The full decision can be downloaded here. The press release is available here.

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# Malbon on Online Cross Border Consumer Transactions

Justin Malbon (Monash University Faculty of Law) has posted Online Cross-Border Consumer Transactions: A Proposal for Developing Fair Standard Form Contract Terms on SSRN.

*Online consumer sales are growing at a substantial rate. An estimated 45% of online purchases by consumers in Australia are from overseas sellers, including US sellers. The question whether these transactions are governed by the Australian Consumer Law (ACL) is examined. The conclusion drawn is that cross-border transactions are usually governed by the ACL – at least in theory. In practice a consumer will invariably confront a bewildering array of procedural complexities and face prohibitive costs. US law and standard form*

*terms are generally less favourable to consumers than Australian and European laws. There also appears to be an increasingly pro-seller bias developing in US standard form terms. The article considers why this is so. Why, for instance, are market forces not operating to provide incentives for the development of party balanced terms? The article then considers ways in which the interests of consumers can be better protected and enhanced regarding cross-border online transactions. It is proposed that a series of standard form 'Fair Terms' which could be made freely available on the Internet for parties to voluntarily incorporate into their contracts should be developed. This proposal follows the lead provided by developments for international commercial transactions. The article concludes by suggesting starting points for the development of fair terms provisions.*

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# First Issue of 2014's Belgian PIL E-Journal

The first issue of the Belgian bilingual (French/Dutch) e-journal on private international law *Tijdschrift@ipr.be / Revue@dipr.be* for 2014 was just released.

The journal essentially reports on European and Belgian cases addressing issues of private international law.

It includes one article by Christelle Chalas (Paris VIII University) on Recognition in France of Foreign Acts and Judgments (*La reconnaissance en France des actes et des jugements étrangers*).

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# Trimble on Advancing IP Policies in a Transnational Context

Marketa Trimble (University of Nevada William S Boyd School of Law) has posted Advancing National Intellectual Property Policies in a Transnational Context on SSRN.

*The increasing frequency with which activities involving intellectual property ("IP") cross national borders now warrants a clear definition of the territorial reach of national IP laws so that parties engaging in the activities can operate with sufficient notice of the laws applicable to their activities. Legislators, however, have not devoted adequate attention to the territorial delineation of IP law; in fact, legislators rarely draft IP statutes with any consideration of cross-border scenarios, and with few exceptions IP laws are designed with only single-country scenarios in mind. Delineating the reach of national IP laws is actually a complex matter because the reach depends not only on substantive IP law, but also on conflict of lawsrules. Yet until recently conflict of laws rules had rarely been considered or drafted with IP issues in mind. In some countries, such as Switzerland, Poland, and China, legislators have reviewed conflict of laws rules in light of IP laws and passed conflict of laws statutes with IP-specific provisions; the European Union has IP-specific provisions in its instruments on conflict of laws as well. In the United States, state conflict of laws rules provide no IP-specific rules, nor does the Restatement (Second) of Conflict of Laws, which federal courts apply when deciding federal question cases.*

*This article argues that because of the rising importance of cross-border IP activities and the increasing need for clear territorial delineation of IP laws it is important for legislators to give equal consideration to cross-border and single-country scenarios when drafting legislation, and to calibrate the territorial scope of national IP laws with conflict of laws rules to achieve the desired territorial reach of national IP policies. The article analyzes the interaction of IP laws and conflict oflaws rules and reviews from both the IP law and the conflict of laws perspectives the various tools that are available to define the territorial reach of national IP laws. The fact that legislators deal with numerous "moving pieces" (particularly theconflict of laws rules of foreign*

*countries) when they design the territorial reach of national laws should not discourage the legislators from striving to improve certainty about the territorial reach of national laws. Depending on the degree to which the "moving pieces" limit legislators' ability to improve the certainty, countries may wish to negotiate and enter into international agreements in order to set uniform conflict of laws rules and define the limits of the territorial reach of national IP laws.*

The paper is forthcoming in the *Maryland Law Review*.

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# Online Public Consultation on Investment Protection and ISDS Dispute Settlement in the TTIP

*By Ana Koprivica, research fellow at the Max Planck Institute Luxembourg*

The negotiations between the EU and the US, the two largest single trading blocs in the world, concerning a free trade agreement – the Transatlantic Trade and Investment Partnership (TTIP) – started in July 2013. With an ambition of making these negotiations the most open and transparent trade talks until now, the European Commission has just launched a public consultation on it. The questionnaire to be filled in, as well as additional relevant documents, can be found at http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=ISDS. The intention of the Commission is to consult the public in the EU on a possible approach to investment protection and ISDS in the TTIP and publish the contributions received by 21st June 2014 in a report, provided the contributors had previously agreed to this.

From the procedural point of view, some relevant novelties (compared to most existing investment treaties) are included in the consultation document and referred to in the Questionnaire: transparency of the investor-state dispute

settlement (ISDS); the relationship with domestic courts; the rules on arbitrators' conduct and qualifications; the mechanism for a quick dismissal of frivolous or unfounded claims; the use of "filter mechanisms" and, the creation of an appellate body. For the sake of brevity, only the inclusion of the ISDS mechanism and transparency of the proceedings shall be addressed here.

## ISDS and Transparency

At the outset it should be noted that there has been a strong opposition to inclusion of the ISDS in the TTIP. Interestingly enough, the Commission does not seem to question the adequacy of this ISDS in the Questionnaire, unless perhaps in the General Assessment Section, but instead goes on to include the reference to the UNCITRAL Transparency Rules which entered into force on 1st April. This is indeed a result of the ongoing public criticism regarding ISDS, displayed by the NGOs, environmental groups and globalism activists who raised doubts on its legitimacy.

The Commission, however, did react to this criticism also by defending the necessity of keeping ISDS rather than referring the disputes to national courts, stating that the latter could in some circumstances be unattractive to investors due to the risk of home team bias (e.g., some States may deny foreign nationals access to courts). This is, of course, in line with the main purpose of having international investment agreements and that is to encourage foreign investors from one state party to invest in the territory of the other, although some reports by the World Bank cast doubts on the actual effects of this stimulation.

Even though the arguments set out by the Commission seem sensible and difficult to argue against, it is hard to believe that the US and EU are truly fearing that their investors could be treated unfairly, since the European and American legal systems do not have an investor-unfriendly reputation. In fact, both the US and the EU are currently negotiating investment agreements with China, which should provide the investors with greater legal certainty and market access. Consequently, should the EU and the US fail to include ISDS provisions in the TTIP, there is a concern that China might understand this as a signal to resist the pressure to undertake further liberalisation measures. It is, therefore, the necessity of including such a chapter in TTIP, from the economic point of view, that is still a debatable matter.

The EU's goal is to ensure transparency in the ISDS mechanism under TTIP in order to foster accountability, consistency and predictability and to that end the Questionnaire includes the reference to the UNCITRAL Transparency Rules. To remind, these rules provide for open hearings as well as disclosure of most of the documents, with an exception when it concerns confidential information, allowed by the tribunal. The additional documents whose disclosure is mandatory pursuant to Article xx-33 of EU-Canada Agreement, which is used as a reference for the consultations on transparency under TTIP, are: the request for consultations, the request for a determination, the notice of determination, the agreement to mediate, the notice of intent to challenge, the decision on an arbitrator challenge and the request for consolidation. In addition, a modification of the Rules has been made with regard to exceptions to disclosure. Article xx-33(6) stipulates an obligation for the respondent to disclose information to public if its laws so require and instructs the respondent to apply such laws in a manner sensitive to protecting from disclosure of confidential or protected information.

Once more, due to numerous attacks on the account of lack of transparency, the Commission does not even question whether rules on transparency should be included in the TTIP but asks for views on whether the approach proposed contributes to the EU objective to increase transparency in the ISDS under TTIP. It should be added that, if the US and the EU agree on the applicability of UNCITRAL Transparency Rules, this would not be a precedent since the EU has already reached a political agreement with Canada to introduce these rules in the upcoming free trade agreement between them.

Finally, looking at a broad picture and a long-term impact, one may conclude that if the rules on transparency are included in the TTIP as well as the agreement with Canada (and both are highly likely to happen), it is to be expected that this would certainly put actors in investor-State arbitration under the pressure to allow for greater transparency. It will be interesting to see in which direction the contributions with regard to this and other issues would go until 21st June; however, it seems that the landscape of investor-State arbitration is certainly undergoing significant changes and that this will be yet another step in that direction.