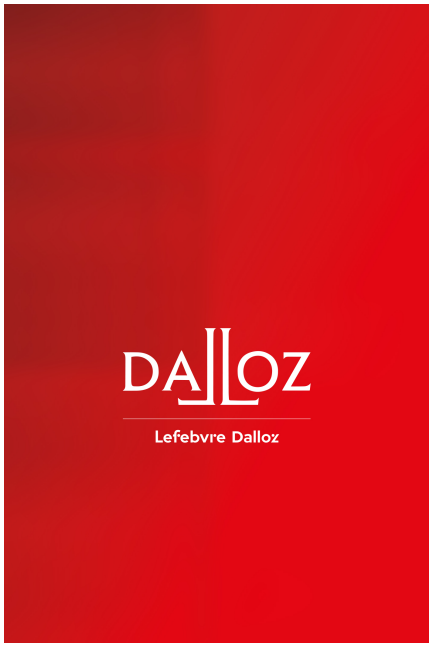
Fourth Issue of 2013's Revue critique droit international privé

The next installment of the *Revue critique de droit international privé* will contain four articles.



-Petra Hammje on the New French Conflict of Law rules on Same Sex Marriage.

> *Changing radically the conception of marriage in the French civil code without proposing a global vision of the family, the French law of 17th May 2013 asserts a firm will, in respect of cross-border relationships, to encourage the conclusion of same-sex unions whether through the adoption of a « commited » conflicts rule relating to the creation of the union (formal and substantive validity) or through the generous recognition of unions celebrated abroad. However, the law remains silent on the international effects of such unions, often prohibited elsewhere, both in respect of the effects of marriage between spouses and in respect of the access to parent-child relationships through adoption or surrogacy arrangements.*

-Symeon Symeonides on The Hague Principles on the law applicable to international contracts.

> *This Article discusses the Hague Principles on Choice of Law for International Contracts, a new soft-law instrument recently adopted by the Hague Conference of Private International Law. They will apply to "commercial"*

contracts only, specifically excluding consumer and employment contracts. For this reason, the Principles adopt a decidedly liberal stance toward party autonomy, exemplified inter alia by a strong endorsement of non-state norms. Such a liberality would be unobjectionable, indeed appropriate, if a contract's "commerciality" alone would preclude the disparity of bargaining power that characterizes consumer and employment contracts. The fact that—as franchise contracts illustrate—this is not always the case makes even more necessary the deployment of other mechanisms of policing party autonomy. The Principles provide these mechanisms under the rubric of public policy and mandatory rules, but their effectiveness is not beyond doubt.

The Principles are intended to serve as a model for other international or national instruments and as a guide to courts and arbitrators in interpreting or supplementing rules on party autonomy. Like other international instruments, the Principles are as good as the consensus of the participating delegations would allow. But the real test of success for these Principles depends not on academic approbation but on their reception by contracting parties, courts, and arbitrators. While it is too early to tell whether the Principles will pass this test, there is reason for optimism.

-Dieter Martiny on the PIL dimensions of the 2010 agreement between France and Germany on a new optional matrimonial property regime.

– Horatia Muir Watt on the follow-up to Kiobel (the case of Sexual Minorities v. Lively).

Once More Unto the Breach of Extraterritorial Discovery under

Section 1782

We've discussed on this site in the past the various nuances and pervasive disagreements among the U.S. federal courts regarding the scope of discovery in aid of foreign tribunals under 28 U.S.C. § 1782. The longest-running dispute is whether that statute can be used in aid of arbitral tribunals, and the scholarship on this question is rich. (See here, and here.). Another disagreement, however, just won't go away, but hasn't garnered nearly as much public attention: that is, whether the statute can reach documents held outside the United States.

Before the holidays, the Southern District of New York decided *In re Application of Kreke Immobilien KG* (S.D.N.Y. 2013), a case brought in U.S. court under § 1782 to obtain documents from Deutsche Bank for use in a German litigation. Deutsche Bank argued that the court had to deny the application because the documents in question were not kept in the United States. To be sure, the statute does not impose such a limitation, but citing Judge Rakoff's decision in *In re Godfrey*, 526 F. Supp. 2d 417 (S.D.N.Y. 2007), Judge Buchwald held that the statute does indeed bar extraterritorial discovery. She therefore denied the application.

Judge Rakoff decided five years ago that the Supreme Court in Intel "implicitly assumed that evidence discoverable under § 1782(a) would be located in the United States." But the evidence of that implicit assumption is merely dictum: "nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, *available in the United States*, may be unobtainable absent § 1782(a) aid." (emphasis added). "Available in the United States," however, could mean simply that the evidence is obtainable via legal process in the United States; it need not mean that the evidence is physically located in the United States. And this seems the better reading given the metaphysical problem of determining exactly where a document is "located." I'm not the only one to espouse that view; Ted Folkman's recent post on the Kreke Immobilien decision seems to agree.

As Judge Buchwald noted, the federal courts are deeply split on this issue. Some courts have followed Judge Rakoff's decision in *Godfrey* and read § 1782 narrowly. *See, e.g., In re Sarrio S.A.*, No. 9-372, 1995 WL 598988 (S.D.N.Y. Oct. 11, 1995); *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 194, fn. 5 (S.D.N.Y. 2006);

Norex Petroleum Ltd. v. Chubb Ins. Co. of Can., 384 F. Supp. 2d 45 (D.D.C. 2005). Other courts, however, read the statute more naturally, and hold that a court's power under § 1782 is coextensive with the Federal Rules. Indeed, this is what the penultimate sentence of § 1782(a) says (stating that discovery should generally proceed "in accordance with the Federal Rules of Civil Procedure"). Under those Rules, a person under subpoena in the United States can be compelled to produce all documents within his "possession, custody or control," *see* Fed. R. Civ. P. 45(a)(1)(A)(iii), "even if the documents are located abroad," *Tequila Centinela, S.A. de C.V. v. Bacardi & Co. Ltd.*, 242 F.R.D. 1, 12 (D.D.C. 2007) (emphasis added); *see also Cooper Indus., Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984). On this basis, a number of federal courts in recent years have ordered Section 1782 discovery of documents located outside the United States when the person is found there. *See, e.g, In re Eli Lilly & Co.*, No. 3:09MC296 (AWT), 2010 WL 2509133, at *4 (D. Conn. June 15, 2010); *In re Gemeinshcaftspraxis Dr. Med. Schottdorf*, No. Civ. M19-88 (BSJ), 2006 WL 3844464, at *5 (S.D.N.Y. Dec. 29, 2006); *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 957 n.3 (D. Minn. 2007); *In re Minatec Fin. S.À.R.L.*, No. 1:08-CV-269 (LEK/RFT), 2008 WL 3884374, at *4 n.8 (N.D.N.Y. Aug. 18, 2008).

Even courts who have come down between this split of authority have still applied Section 1782 and Rule 45 to reach electronically stored information accessible from within this District. In *In re Veiga II*, 746 F. Supp. 2d 8, 25 (D.D.C. 2010), Judge Kollar-Kotelly (who also decided Norex five years earlier) outlined the "split of authority" on the geographic scope of Section 1782; "assum[ed] there is no absolute bar to the discovery of documents located outside the United States"; but nevertheless "exercise[d] [her] discretion to decline to order the production of [physical] documents abroad." When she did so, however, she still required the Respondent to produce all materials "located within the United States, a category that includes electronically stored information accessible from within this District." *Id.* at 26 (emphasis added). Decisions like this prudently avoid the metaphysical question of where electronic materials are "located," and still give effect to the complementary reach of Rule 45 and Section 1782.

Ultimately, this may be a question for the Supreme Court; but until then, it illustrates the sometimes-difficult intersection of judicial restraint and liberal statutory intent when it comes to extraterritorial issues.

Book on Rome Regulations and Maritime Law

For all interested in the maritime conflict of laws there is a book titled **Regulations Rome I and Rome II and Maritime Law** available here. This book is published by Giappichelli Editore and comes as a result of an EU funded project. Editors are Evangelos Vassilakakis, Nikolay Natov and Reuben Balzan and the contents include:

Introduction.
I. Regulations (EC) n. 593/2008 on the law applicable to contractual obligations ("Rome I") and (EC) n. 864/2007 on the law applicable to non-contractual obligations ("Rome II") (C. Esplugues Mota, G. Palao Moreno, C. Azcárraga Monzonís – Spain).
II. Marine insurance contracts under the Rome I and Brussels I Regulations: c?nflict of laws and jurisdiction issues (E. Vassilakakis, V. Kourtis – Greece).
III. The discipline of maritime transport contracts under the Rome I and Brussels I Regulations: conflict of laws and jurisdictional issues (I. Queirolo, C. Cellerino – Italy).
IV. Collisions and maritime salvage (Reuben Balzan, Keith A. Borg, Carlos Bugeja – Malta).
V. Maritime environmental delict/tort (N. Natov, B.a Musseva, V. Pandov, D. Sarbinova, Z.i Ianakiev, I. Kirchev, M. Stankov – Bulgaria).

Symeonides on Choice of Law in

American Courts in 2013

Dean Symeon C. Symeonides (Willamette University – College of Law) has posted Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey on SSRN. It is, as usual, to be published in the American Journal of Comparative Law. Here is the abstract:

This is the Twenty-Seventh Annual Survey of American choice-of-law cases. It is written at the request of the Association of American Law Schools Section on Conflict of Laws and is intended as a service to fellow teachers of conflicts law, both in and outside the United States. Its purpose remains the same as it has been from the beginning: to inform, rather than to advocate.

This Survey covers cases decided by American state and federal appellate courts from January 1 to December 31, 2013, and posted on Westlaw by midnight, December 31, 2013. Of the 1,354 cases that meet these parameters, the Survey focuses on those cases that may contribute something new to the development or understanding of conflicts law—and, particularly, choice of law. This Survey is longer than the Surveys of any of the previous 26 years because 2013 produced more, and more noteworthy, cases than any of the previous years. The following are some of the highlights:

** Five decisions of the U.S. Supreme Court holding, respectively, that: (1) The Alien Tort Statute does not apply to conduct and injury occurring entirely in another country; (2) Section 3 of the Defense of Marriage Act (DOMA), which defines "marriage" for federal law purposes so as to exclude same-sex relationships, is unconstitutional; (3) The Federal Arbitration Act trumps the provisions of the Sherman Antitrust Act; (4) The "first sale" doctrine as codified in the Copyright Act applies to copies of copyrighted works lawfully made abroad and first sold abroad; and (5) The National Voter Registration Act preempts an Arizona law that sets more stringent standard for proof of citizenship when registering to vote.*
** A sixth Supreme Court decision explaining the methodology that federal courts should use when evaluating venue challenges in cases involving choice-of-forum clauses.*
** Two federal appellate decisions involving piracy off the Somali coast, and several decisions involving the extraterritorial reach of federal statutes in civil*

and criminal cases.
** Several state court decisions striving to protect consumers, employees, and other weak parties through the few cracks left by the Supreme Court's decisions on arbitration and choice-of-forum clauses.*
** An assortment of interesting cases involving products liability, other cross-border torts, economic torts, and other tort conflicts.*
** A case holding that enforcement of a Japanese tort judgment against a California Church is not "state action" triggering constitutional scrutiny under the Constitution's Free Exercise clause, and is not repugnant to the public policy.*
** A case holding that one state's dismissal of an action on statute of limitation grounds is a dismissal "on the merits," barring a second action on the same claim in another state.*
** A case defining "habitual residence" and "wrongful" removal or retention of a child under the Hague Convention on Child Abduction.*

2014 ASIL Private International Law Paper Prize

The American Society of International Law is currently accepting submissions for this year's Private International Law prize. The prize is given annually for the best text on private international law written by a young scholar. Essays, articles, and books are welcome, and can address any topic of private international law, can be of any length, and may be published or unpublished, but not published prior to 2013. Submitted essays should be in the English language. Competitors may be citizens of any nation but must be 35 years old or younger on December 31, 2013. They need not be members of ASIL.

This year, the prize will consist of a $500 stipend to participate in the 2014 or 2015 ASIL Annual Conference, and one year's membership to ASIL. The prize will be awarded by the Private International Law Interest Group based upon the

recommendation of a Prize Committee. Decisions of the Prize Committee on the winning essay and on any conditions relating to this prize are final.

Submissions to the Prize Committee must be received by March 15, 2014. Entries should be submitted by email in Word or pdf format. They should contain two different documents: a) the essay itself, without any identifying information other than the title; and b) a second document containing the title of the entry and the author's name, affiliation, and contact details.

Submissions and any queries should be addressed by email to Private International Law Interest Group Co-Chairs Rahim Moloo (rahim.moloo@nyu.edu) and Ralf Michaels (michaels@law.duke.edu). All submissions will be acknowledged by e-mail.

ECJ Rules on Jurisdiction in Exclusive Distribution Contracts

On 19 December 2013, the Court of Justice of the European Union delivered its ruling in Corman-Collins SA v. La Maison du Whisky SA (case 9/12).

The main issue before the Court was whether an exclusive distribution agreement is a contract for the supply of services for the purpose of Article 5(1)(b) of the Brussels I Regulation.

The Court held that it is.

> *37 As to whether an exclusive distribution agreement may be classified as a contract for the 'supply of services' within the meaning of the second indent of Article 5(1)(b) of the Regulation, it must be recalled that, according to the definition given by the Court, the concept of 'services' within the meaning of that provision requires at 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).*

38 As far as the first criterion in that definition, namely, the existence of an activity, it is clear from the case-law of the Court that it requires the performance of positive acts, rather than mere omissions (see, to that effect, Falco Privatstiftung and Rabitsch, paragraphs 29 to 31). That criterion corresponds, in the case of an exclusive distribution agreement, to the characteristic service provided by the distributor which, by distributing the grantor's products, is involved in increasing their distribution. As a result of the supply guarantee it enjoys under the exclusive distribution agreement and, as the case may be, its involvement in the grantor's commercial planning, in particular with respect to marketing operations, factors in respect of which the national court has jurisdiction to make a ruling, the distributor is able to offer clients services and benefits that a mere reseller cannot and thereby acquire, for the benefit of the grantor's products, a larger share of the local market.

39 As to the second criterion, namely the remuneration paid as consideration for an activity, it must be stated that it is not to be understood strictly as the payment of a sum of money. Such a restriction is neither stipulated by the very general wording of the second indent of Article 5(1)(b) of the Regulation nor consistent with the objectives of proximity and standardisation, set out in paragraphs 30 to 32 of the present judgment, pursued by that provision.

40 In that connection, account must be taken of the fact that the distribution agreement is based on a selection of the distributor by the grantor. That selection, which is a characteristic element of that type of agreement, confers a competitive advantage on the distributor in that the latter has the sole right to sell the grantor's products in a particular territory or, at least the very least, that a limited number of distributors enjoy that right. Moreover, the distribution agreement often provides assistance to the distributor regarding access to advertising, communicating know-how by means of training or yet even payment facilities. All those advantages, whose existence it is for the court adjudicating on the substantive action to ascertain, represent an economic value for the distributor that may be regarded as constituting remuneration.

41 It follows that a distribution agreement containing the typical obligations set out in paragraphs 27 and 28 above may be classified as a contract for the supply of services for the purpose of applying the rule of jurisdiction in the second indent of Article 5(1)(b) of the Regulation.

Final ruling:

> *1. Article 2 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, where the defendant is domiciled in a Member State other than that in which the court seised is situated, it precludes the application of a national rule of jurisdiction such as that provided for in Article 4 of Law of 27 July 1961 on Unilateral Termination of Exclusive Distribution Agreements of Indefinite Duration, as amended by the Law of 13 April 1971 on Unilateral termination of distribution agreements.*
>
> *2. Article 5(1)(b) of Regulation No 44/2001 must be interpreted as meaning that the rule of jurisdiction laid down in the second indent of that provision for disputes relating to contracts for the supply of services is applicable in the case of a legal action by which a plaintiff established in one Member State claims, against a defendant established in another Member State, rights arising from an exclusive distribution agreement, which requires the contract binding the parties to contain specific terms concerning the distribution by the distributor of goods sold by the grantor. It is for the national court to ascertain whether that is the case in the pbefore it.*

Liste on Kiobel and the Politics of Space

Philip Liste (Humboldt and Hamburg Universities) has posted Transnational Human Rights Litigation and Territorialized Knowledge: Kiobel and the 'Politics of Space' on SSRN.

> *In Kiobel v. Royal Dutch Petroleum Dutch and British private corporations were accused of having aided and abetted in the violation of the human rights of individuals in Nigeria. A lawsuit, however, was brought in the United States, relying on the Alien Tort Statute — part of a Judiciary Act from 1789. In its final*

decision on the case, the US Supreme Court has strongly focused on 'territory.' This usage of a spatial category calls for closer scrutiny of how the making of legal arguments presupposes 'spatial knowledge,' especially in the field of transnational human rights litigation. Space is hardly a neutral category. What is at stake is normativity in a global scale with the domestic courtroom turned into a site of spatial contestation. The paper is interested in the construction of 'the transnational' as space, which implicates a 'politics of space' at work underneath the exposed surface of legal argumentation. The 'Kiobel situation' as it unfolded before the Supreme Court is addressed as example of a broader picture including a variety of contested elements of space: a particular spatial condition of modern nation-state territoriality; the production of 'counter-space,' eventually undermining the spatial regime of inter-state society; and the state not accepting its withering away. The paper will ask: How are normative boundaries between the involved jurisdictional spaces drawn? How do the 'politics of space' work underneath or beyond the plain moments of judicial decision-making? How territorialized is the legal knowledge at work and how does territoriality work in legal arguments?

The paper is forthcoming in *Transnational Legal Theory*, Vol. 4, 2013.

Hague Conference Publishes New Principles for Judicial Communication

The Hague Conference on Private International Law has announced the publication of the General Principles for Judicial Communications.

This document represents the latest version of Emerging Guidance regarding the development of the International Hague Network of Judges and a set of General Principles for Judicial Communications within the context of the Hague Convention of 25 October 1980 on the Civil Aspects of

International Child Abduction (hereinafter the "1980 Hague Child Abduction Convention") and the International Hague Network of Judges, including commonly accepted safeguards for direct judicial communications in specific cases.

The creation of the International Hague Network of Judges specialising in family matters was first proposed at the 1998 De Ruwenberg Seminar for Judges on the international protection of children. It was recommended that the relevant authorities (e.g., court presidents or other officials as is appropriate within the different legal cultures) in the different jurisdictions designate one or more members of the judiciary to act as a channel of communication and liaison with their national Central Authorities, with other judges within their jurisdictions and with judges in other Contracting States, in respect, at least initially, of issues relevant to the 1980 Hague Child Abduction Convention. It was felt that the development of such a network would facilitate communications and co-operation between judges at the international level and would assist in ensuring the effective operation of the 1980 Hague Child Abduction Convention. More than 15 years later, it is now recognised that there is a broad range of international instruments, both regional and multilateral, in relation to which direct judicial communications can play a role. The International Hague Network currently includes more than 80 judges from more than 55 States in all continents.

The General Principles for Judicial Communications are work in progress, as they could be improved in the future. Comments and suggestions from States, interested organisations, or judges, especially members of the International Hague Network of Judges, are always welcome.

Erbsen on Erie and Default Rules

Allan Erbsen (University of Minnesota Law School) has posted Erie's Starting Points: The Potential Role of Default Rules in Structuring Choice of Law Analysis on SSRN.

This contribution to a symposium marking the seventy-fifth anniversary of Erie Railroad Company v. Tompkins is part of a larger project in which I seek to demystify a decision that has enchanted, entangled, and enervated commentators for decades. In prior work I contended that the "Erie doctrine" is a misleading label encompassing four distinct inquiries that address the creation, interpretation, and prioritization of federal law and the adoption of state law when federal law is inapplicable. This article builds from that premise to argue that courts pursuing Erie's four inquiries would benefit from default rules that establish initial assumptions and structure judicial analysis. Considering the potential utility of default rules leads to several conclusions that could help clarify and improve decision-making under Erie. First, courts deciding whether a state rule has priority over a conflicting judge-made federal rule in diversity cases should default to federal law despite the intuitive appeal of state law. Second, when courts are considering whether to create federal common law, the proponent of a federal solution should bear the burden of persuasion. Third, the Supreme Court should replace the rule from Klaxon v. Stentor Electric, which requires federal courts to identify applicable nonfederal law by using the forum state's choice of law standards, with a default rule that favors forum standards while authorizing federal choice of law standards in appropriate circumstances. Reconsidering how federal courts choose applicable nonfederal laws would also provide an opportunity to reconcile Klaxon's irrebuttable preference for intrastate uniformity with the more flexible default rule in United States v. Kimbell Foods, which requires courts crafting federal common law to incorporate state standards unless there is a good reason to create nationally uniform standards. Finally, courts should develop a default rule — which one might label an "Erie canon" — to determine whether federal statutes and rules should be interpreted broadly or narrowly to embrace or avoid conflict with otherwise applicable state laws.

The paper was published in the Journal of Law, Economics and Policy earlier this year.

Folkman on Gurung

Theodore J Folkman (Murphy & King, P.C.) has posted Gurung v. Malhotra is wrongly decided on SSRN.

A line of cases, beginning with Gurung v. Malhotra, 279 F.R.D. 215 (S.D.N.Y. 2011), has begun to hold that service by email is proper in cases where the Hague Service Convention applies. This article demonstrates that these cases are wrongly decided where the defendant is to be served in a state that is a party to the Convention and that has objected to service via postal channels. The matter is less clear in states that are party to the Convention but that have not made such an objection, but the article suggests reasons for concluding that service by email is impermissible in those states as well.