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are welcome, and can address any topic of private international law, can be of any length, and may be published or unpublished, but not published prior to 2013.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).*
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> *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.*
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> *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.

ECJ Rules Brussels I Regulation Excludes Incompatible Interpretation of CMR

On 19 December 2013, the Court of Justice of the European Union delivered its ruling in Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV (case C452/12).

The main issue for the court was whether the more conservative requirements for lis pendens under article 31 of the Convention on the Contract for the International Carriage of Goods by Road (CMR) were compatible with the Brussels I Regulation.

> *40 By its second question, the referring court wishes to know whether Article 71 of Regulation No 44/2001 must be interpreted as meaning that it precludes an interpretation of Article 31(2) of the CMR according to which an action for a negative declaration or a negative declaratory judgment in a Member State does not have the same cause of action as an action for indemnity brought in respect of the same damage and against the same parties or the successors to their rights in another Member State.*

Article 31 of the CMR reads:

> *'1. In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory:*
>
> *(a) The defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or*
>
> *(b) The place where the goods were taken over by the carrier or the place designated for delivery is situated,*

and in no other courts or tribunals.

2. Where in respect of a claim referred to in paragraph 1 of this article an action is pending before a court or tribunal competent under that paragraph, or where in respect of such a claim a judgement has been entered by such a court or tribunal no new action shall be started between the same parties on the same grounds unless the judgement of the court or tribunal before which the first action was brought is not enforceable in the country in which the fresh proceedings are brought.

3. When a judgement entered by a court or tribunal of a contracting country in any such action as is referred to in paragraph 1 of this article has become enforceable in that country, it shall also become enforceable in each of the other contracting States, as soon as the formalities required in the country concerned have been complied with. These formalities shall not permit the merits of the case to be re-opened.

4. The provisions of paragraph 3 of this article shall apply to judgements after trial, judgements by default and settlements confirmed by an order of the court, but shall not apply to interim judgements or to awards of damages, in addition to costs against a plaintiff who wholly or partly fails in his action.

…'

The Court answers that they are not.

47 As the Court has already held, rules laid down by the special conventions referred to in Article 71 of Regulation No 44/2001, such as those deriving from Article 31(2) of the CMR, can be applied within the European Union only in so far as the principles of free movement of judgments and mutual trust in the administration of justice are observed (see, to that effect, TNT Express Nederland, paragraph 54 and the case-law cited).

48 Those principles would not be observed under conditions at least as favourable as those laid down in Regulation No 44/2001 if Article 31(2) were to be interpreted as meaning that a negative declaratory judgment in one Member State does not have the same cause of action as an action for indemnity between the same parties in another Member State.

Final ruling:

> *1. Article 71 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 it precludes an international convention from being interpreted in a manner which fails to ensure, under conditions at least as favourable as those provided for by that regulation, that the underlying objectives and principles of that regulation are observed.*
>
> *2. Article 71 of Regulation No 44/2001 must be interpreted as meaning that it precludes an interpretation of Article 31(2) of the Convention on the Contract for the International Carriage of Goods by Road, signed in Geneva on 19 May 1956, as amended by the Protocol signed in Geneva on 5 July 1978, according to which an action for a negative declaration or a negative declaratory judgment in one Member State does not have the same cause of action as an action for indemnity between the same parties in another Member State.*

Third Issue of 2013's Journal of Private International Law

The latest issue of the *Journal of Private International Law* contains the following articles:

Richard Garnett, Coexisting and Conflicting Jurisdiction and Arbitration Clauses

> *It is increasingly common for parties to an international contract to include both jurisdiction and arbitration clauses. While in some cases the clauses can be reconciled by principles of contractual interpretation, in other circumstances a true conflict between the clauses exists. The main contention of this article is that it is not appropriate, as many common law courts appear to have done, to resolve such a conflict by choosing arbitration over litigation based on some*

presumed superiority of the arbitral process. Instead, courts should adopt an evenhanded approach and apply a version of the 'more appropriate forum' test.

Pippa Rogerson, Problems of the Applicable Law of the Contract in the English Common Law Jurisdiction Rules: The Good Arguable Case

English law as the applicable law of the contract is a basis for jurisdiction in English service out cases (ie cases involving foreign defendants that are not covered by the Brussels I Regulation or the Lugano Convention). It is also a factor in the exercise of jurisdiction. In both instances the determination of the applicable law and the assessment of its relevance raise difficult legal and practical questions. The courts use the "good arguable case" test to resolve those difficulties. Many recent decisions illustrate that the test is insufficiently clear. This article discusses those questions. It concludes that the differences between the existence and the exercise of jurisdiction have been overlooked. Further it suggests that the problem lies in the competing objectives underlying the decision on jurisdiction.

Uglješa Grušic, The Right to Strike Versus Fundamental Economic Freedoms in the English Courts, Again: Hiding Behind the "Public Law Taboo" In Private International Law

This article notes the High Court's decision in British Airways Plc v Sindicato Espanol de Pilotos de Lineas Aeras, a case concerning the relationship between the right to strike and fundamental economic freedoms guaranteed by the TFEU. The court declined jurisdiction on the ground that the case involved the enforcement of foreign public law, thus falling outside the scope of the European rules of adjudicatory jurisdiction. By analysing the CJEU case-law on the concept of "civil and commercial matters", and the nature and detailed rules on which the claim in BA v SEPLA was based, this article concludes that the High Court was wrong in hiding behind the "public law taboo" in PIL. The discussion, in turn, underlines the relevance of PIL for the relationship between the right to strike and fundamental freedoms and, more generally, the role of this discipline in the EU legal framework.

Verity Winship, Personal Jurisdiction and Corporate Groups: *Daimlerchrysler AG v Bauman*

This article proposes a framework for understanding what is at stake in the US Supreme Court's upcoming decision in DaimlerChrysler AG v Bauman. Argentine plaintiffs sued a German corporation in US courts, alleging violations of the Alien Tort Statutes. The outcome and consequences of the Supreme

Court's decision depend on how the Court analyses three aspects of personal jurisdiction. The first is the extent to which a subsidiary's contacts with a forum state can be attributed to the corporate parent. The second is whether the contacts are so extensive that the court may exercise jurisdiction over a defendant for any cause of action, even one unrelated to the contacts. The third is whether jurisdiction is "reasonable". The opinion promises to provide either much-needed guidance about jurisdictional attribution within corporate groups, or an example of the discretionary, policy-driven analysis of when jurisdiction is reasonable in the context of multinational businesses.

Chukwuma Okoli, The Significance of the Doctrine of Accessory Allocation As a Connecting Factor Under Article 4 of the Rome I Regulation

The doctrine of accessory allocation is given special significance as a connecting factor by the framers of Rome I Regulation (through Recitals 20 and 21) in utilising the escape clause and principle of closest connection under Article 4. This article analyses the application of the doctrine under the Rome Convention; the possible reasons why the framers of Rome I gave the doctrine special significance; the nature of inquiry a Member State court would be faced with in applying the doctrine especially in very closely related contracts such as back-to-back contracts; and the dilemma faced by the court in determining the quantum of weight to attach to the application of the doctrine as it relates to displacing the main rule(s). The author concludes by stating that there is need for more clarity on the significance of the doctrine of accessory allocation as a connecting factor under Article 4 of Rome I.

Sharon Shakargy, Marriage by the State or Married to the State? on Choice of Law in Marriage and Divorce

The paper suggests reshaping the choice of law rules for marriage and divorce and basing them on the parties' will rather than on the will of the parties' home country. The paper discusses the evolution of choice-of-law in matters of marriage and divorce in relation to that of substantive marriage law in Western legal systems prior to WWII and today. It argues that the early view of marriage and divorce as matter of state concern was reflected in the choice of law rules. However these current rules have not internalized changes that have occurred in the way national laws treats marriage today, according to which marriage is regarded far more as a private matter. The paper therefore agues that while in

the early period there was a close correlation between the substantive regulation of marriage and divorce and the choice-of-law rules in this field, this correlation no longer exists. In order to re-establish the correlation between substantive law and the choice of law rules, the paper identifies leading theoretical features of modern-day marriage law, including the principle of party autonomy. The paper concludes by suggesting ways of incorporating the modern view of marriage and divorce in choice of law.

Elena Rodríguez-Pineau, Book Review: Brauchen Wir Eine Rom O-verordnung? (Do We Need a Rome 0 Regulation?)

Fourth Issue of 2013´s Belgian PIL E-Journal

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

It includes a case comment by Patrick Wautelet (Liège University) on jurisdiction in same sex divorce proceedings (*Dissolution d'un mariage entre personnes de même sexe: le for de nécessité comme réponse à l'impossibilité de divorcer?*)

Back to the Federal District Court for One Alien Tort Statute Case

On December 19, 2013, the United States Court of Appeals for the Ninth Circuit issued an order in the case of *Doe I v. Nestle USA, Inc*. vacating a federal district court's dismissal of Plaintiffs' ATS claim and remanding for further proceedings. The case has been around for some time and relates to allegations of slave labor

performed on plantations in the Ivory Coast in 2005. Nestle was sued by Malian children who allegedly were forced to labor on plantations that produced cocoa that was later purchased by Nestle. The suit alleged that Nestle was aware of the conditions on the plantations but nevertheless bought the cocoa. Plaintiffs did not argue that Nestle engaged in any acts of forced labor or violence. Instead, Plaintiffs argued that Nestle was liable for violations of international law under the Alien Tort Statute, specifically for aiding and abetting forced labor and child labor violations in purchasing the cocoa.

The district court had dismissed the case finding that corporations cannot be liable for violations of international law and finding that Plaintiffs had failed to plausibly plead that Nestle knew or should have known that the wrongful acts were being committed. In vacating the district court's decision and remanding for further proceedings, the Ninth Circuit explained

"In light of intervening developments in the law, we conclude that corporations can face liability for claims brought under the Alien Tort Statute. . . . Additionally, the district court erred in requiring plaintiff-appellants to allege specific intent in order to satisfy the applicable purpose *mens rea* standard. Furthermore, we grant plaintiff-appellants leave to amend their complaint in light of recent authority regarding the extraterritorial reach of the Alien Tort Statute and the *actus reus* standard for aiding and abetting. Kiobel, 133 S. Ct. at 1669; *Prosecutor v. Charles Ghankay Taylor,* Case No. SCSL–03–01–A Judgment, at ¶ 475 (SCSL Sept. 26, 2013) ("[T]he *actus reus* of aiding and abetting liability is established by assistance that has a substantial effect on the crimes, not the particular manner in which such assistance is provided."); *Prosecutor v. Perisic,* Case No. IT–04–81–A Judgment, at ¶ 36 & n.97 (ICTY Feb. 28, 2013) (holding that "specific direction remains an element of the *actus reus* of aiding and abetting," but noting that "specific direction may be addressed implicitly in the context of analysing substantial contribution")."

It will be interesting to see how the plaintiffs respond and what the district court ultimately does in this case.