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.*

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.