

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.

Van Den Eeckhout on Schlecker (Dutch Version)

Veerle Van Den Eeckhout (Leiden university (the Netherlands) and University of Antwerp (Belgium)), has posted The Escape-Clause of Article 6 Rome Convention (Article 8 Rome I Regulation): How Special Is the Case Schlecker? (De ontsnappingsclausule van artikel 6 lid 2 slot EVO Verdrag (artikel 8 lid 4 Rome I Verordening): Hoe bijzonder is de zaak Schlecker? 12 September 2013, C-64/12, Schlecker/Boedeker) on SSRN.

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 as well as for cases of international tort in which article 4(3) Rome II regulation might be relevant.

Note: Downloadable document is in Dutch.

ERA Conference on Cross Border Succession

The Academy of European Law (ERA) will host a conference on Planning Cross-Border Succession in Trier, Germany, on March 20 and 21, 2014.

Thursday, 20 March 2014

I. THE SUCCESSION REGULATION

Chair: Christian Hertel

09:15 Scope of application and international conventions that take precedence over the Regulation (Guillermo Palao Moreno)

09:45 Discussion

10:00 Which court is competent to decide cross-border succession cases? Which

law is to be applied? (Jonathan Harris)

10:45 - 11:00 Discussion

Chair: Jonathan Harris

11:30 Effects of foreign decisions and authentic instruments in matters of succession

12:00 European Certificate of Succession: conditions for issue of certificate and effects (Christian Hertel)

12:30 - 12:45 Discussion

II. CROSS-BORDER INHERITANCE TAX ISSUES

Chair: Patrick Delas

14:00 Inheritance taxation in the context of EU law (Nathalie Weber-Frisch)

- National inheritance laws in comparative perspective
- CJEU case law on the impact of free movement on inheritance

14:45 Discussion

15:00 Possible measures to avoid double taxation in cross-border successions (Niamh Carmody)

15:30 Discussion

15:45 WORKSHOP (with tea & coffee)

Drafting testamentary dispositions in the light of the Succession Regulation and diverging tax regimes (Patrick Delas & Richard Frimston)

16:45 - 17:30 Results of the workshop and discussion

Friday, 21 March 2014

III. INTERPLAY WITH OTHER AREAS OF LAW

Chair: Richard Frimston

09:15 The impact of matrimonial property on succession law (Patrick Wautelet)

09:45 Discussion

10:00 Company law, trusts and succession disputes (Paul Matthews)

10:30 - 10:45 Discussion

11:15 Proof of succession in land registration proceedings (Kurt Lechner)

11:45 Discussion

Chair: Kurt Lechner

12:00 Inheritance of (holiday) houses and bank accounts abroad: national reports

- Markus Artz
- Guillermo Palao Moreno
- Paul Matthews
- Patrick Wautelaet

13:15 Lunch and end of the conference

Mullenix on Reach of American Courts

Linda Mullenix (University of Texas School of Law) has posted Personal Jurisdiction Stops Here: Cabining the Extraterritorial Reach of American Courts on SSRN.

*In this 2013-14 term the Supreme Court will again return to its personal jurisdiction jurisprudence in two interesting cases: *DaimlerChrysler AG v. Bauman*, and *Walden v. Fiore*. While the *Walden* appeal asks the Court to revisit its “effects” and “purposeful direction” tests for a state’s ability to assert jurisdiction over a non-resident defendant, *DaimlerChrysler*’s appeal raises the sexier and more compelling issue of personal jurisdiction in the context of so-called *F-cubed* cases: lawsuits brought in an American court by foreign plaintiffs suing foreign defendants, based on events that took place in some foreign country.*

*In recent years the Court twice has manifested its distaste for *F-cubed* litigation in American courts, repudiating such litigation based on a lack of subject matter jurisdiction of the U.S. courts to adjudicate such disputes. If the combined *Kiobel* and *Morrison* decisions have not completely destabilized the*

reach of American courts over transnational disputes, then the Court this term has the opportunity to hammer a final nail in this coffin by addressing subject matter jurisdiction's twin doctrine: that of personal jurisdiction.

This term's DaimlerChrysler case, the third time in as many years where the Court will evaluate whether American courts may assert personal jurisdiction over non-resident foreign defendants for injuries occurring either in the United States, or on foreign soil. Based on the Court's general trend declining to allow the extraterritorial reach of American courts over foreign nationals as a matter of subject matter jurisdiction, it seems unlikely that the Court will reverse course and embrace an expansive doctrine of extraterritoriality in the guise of personal jurisdiction jurisprudence.

Nonetheless, the Court's personal jurisdiction doctrine has been so muddled and fractured over several decades that one can never predict with certainty where the Court will wind up. This article suggests that while the Court's consideration of the DaimlerChrysler appeal most likely will look to the Court's 2011 Goodyear decision relating to general jurisdiction, the Court's companion opinions in McIntyre Machinery may offer a seductive analytical paradigm that diverts the Court into the ongoing debate between sovereignty and fairness theories of personal jurisdiction. Thus, in deciding the DaimlerChrysler appeal, although the Court's Goodyear decision is the reigning precedent concerning general personal jurisdiction, it may well turn out that the Court's McIntyre decision asserts more hydraulic pull with the Court.

The article is forthcoming in the *University of Toledo Law Review*.

Jurisdiction of Greek courts in insurance matters - A follow up on

FBTO Schadeverzekeringen NV (C-463/06)

By Apostolos Anthimos.

Dr. Apostolos Anthimos is attorney at law at the Thessaloniki Bar, Greece, and a visiting lecturer at International Hellenic University.

A number of rulings of the Greek Supreme Court have been rendered within the last five years on the issue of jurisdiction in matters relating to insurance, as stipulated in Regulation 44/2001, Arts 9(1)(b) and 11(2). To be precise, seven decisions of Areios Pagos have applied the findings of the ECJ in the case *FBTO Schadeverzekeringen NV v Jack Odenbreit*. In a nutshell, the line of the European Court, according to which “*the reference in Article 11(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 to Article 9(1)(b) of that regulation is to be interpreted as meaning that the injured party may bring an action directly against the insurer before the courts for the place in a Member State where that injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State*”, has been followed literally, unlike 1st & 2nd instance decisions, where motions to declare the court as lacking jurisdiction had prevailed (see Athens CoA 5419/2007, Theory & Practice of Civil Law 2008, 956, Athens CoA 392/2008, Hellenic Justice 2009, 838, Athens CoA 7270/2007, 5152/2008, 6364/2009 & 2352/2010 [unreported]). Admittedly, for some of the instance rulings, it was not possible to take into account the fresh news coming from Luxemburg, given the fact that they were tried or published before December 13, 2007 (the publication date of the ECJ ruling).

The Supreme Court took a firm stance on the matter, starting from 2009. In a series of decisions (2163/2009, Civil Procedure Law Review 2010, 68, 599/2010, unreported, 640/2010, Commercial Law Review 2010, 640, 487/2011, Civil Procedure Law Review 2011, 468, 37/2012, Chronicles of Private Law 2012, 449, and 442/2013, not yet reported) the Court reiterated the ruling of the ECJ and reversed all 2nd instance decisions. The exception to the rule was the decision Nr. 379/2013 (not yet reported): In this case, the Supreme Court denied the cassation

(appeal), because the German foreign company proved that the appellant was not a resident of Greece. In light of the unambiguous wording of the European Court in the *FBTO* case, namely that the injured party may bring an action directly against the insurer before the courts for the place in a Member State where (s)he is domiciled, the CoA judgment was reaffirmed.

Two final comments on the situation in Greece: First, it is no coincidence that all cases were tried before the courts of the capital. As it is well known, articles 9 & 11 Regulation 44/2001 deal with the issue of international jurisdiction, leaving the venue of the court to be decided pursuant to domestic law provisions. Apparently the claimants (i.e. their lawyer) made use of Article 6.1 Brussels I Regulation, in conjunction with Article 37.1 Greek Code of Civil Procedure, in order to establish the venue of the Athens court. In particular, by filing a claim against both the foreign insurance company and its agent in Greece (it is common ground that all agents of foreign enterprises are situated in the capital), the Athens court become territorially competent by virtue of a joinder of parties. Second, no decision has been yet rendered on the merits, thus leaving ample space for speculation about the problems that Greek courts will eventually face in terms of applicable law [see in this respect *Jayme*, Der Klägergerichtsstand für Direktklagen am Wohnsitz des Geschädigten (Art. 11 Abs. 2 i.V.m. Art. 9 EuGVO): Ein Danaergeschenk des EuGH für die Opfer von Verkehrsunfällen, in: Grenzen überwinden - Prinzipien bewahren, Festschrift für Bernd von Hoffmann zum 70. Geburtstag (2011), p. 656-663, and *Fuchs*, Internationale Zuständigkeit für Direktklagen, IPRax 2008, p.104-107].

US Supreme Court Hears New Hague Abduction Case

See this post of Ann Laquer Estin over at Families Across Borders

*The Supreme Court heard arguments on December 11 in *Lozano v. Alvarez*, a case raising issues regarding “equitable tolling” under Article 12 of the Hague*

Child Abduction Convention. (For background, please see our previous post.) The Court makes available both an audio recording of the oral arguments and the transcript.

An analysis of the arguments by Amy Howe of SCOTUSblog is available [here](#). SCOTUSblog also has links to the briefs filed in the case, including amicus briefs filed by the United States and by the Mexican Association for Abducted and Missing Children, the International Academy of Matrimonial Lawyers (IAML), Reunite International Child Abduction, the National Center for Missing and Exploited Children, A Child Is Missing, Inc., and the Domestic Violence Legal Empowerment & Appeals Project (DV LEAP).

Coffee on Extraterritorial Financial Regulation

John Coffee Jr (Columbia Law School) has posted Extraterritorial Financial Regulation: Why E.T. Can't Come Home on SSRN.

Systemic risk poses a classic “public goods” problem. All nations want systemic stability, but most would prefer that other nations pay for it, allowing them to “free ride.” Moreover, because global financial institutions can park their higher risk operations almost anywhere, some nations can profit from regulatory arbitrage by keeping their regulatory controls laxer than in the more financially developed nations (which bear the principal share of the costs from financial contagion). As a result, the free riders do not need to internalize the full costs of systemic risk, but profit from imposing costs on others.

Under these conditions, all the preconditions for a “tragedy of the commons” are satisfied, because (i) the nations that profit from regulatory arbitrage cannot be excluded from offering under-regulated markets, and (ii) they do not need to internalize the costs they impose on others. While the “tragedy of the commons” literature has been much used in environmental law and related

fields, it applies equally well to international financial markets. The solution to this problem lies in finding ways to tax the free riders or otherwise subject them to stronger controls. But here is exactly where current “soft law” approaches to international financial regulation fail. Because “soft law” is almost by definition non-binding and unenforceable, it cannot control a financial services industry that wishes to pursue highly profitable, higher risk strategies.

Aspirational theorists of international “soft law” thus misconceive the problem. To expect “soft law” to be kinder and gentler than formal law and to give every nation an equal voice is to prescribe the essential conditions for a “tragedy of the commons.”

Instead, as this article argues, only the major financial nations have the right incentives to curb systemic risk, precisely because they are exposed to it. Thus, bilateral negotiations among them (particularly between the U.S. and the E.U.) and the assertion of extraterritorial jurisdiction by them is necessary to create a governance structure under which highly mobile financial institutions cannot flee to less regulated venues. Ultimately, this assertion of extraterritorial authority (which both the U.S. and the E.U. have now done) may be an interim stage in the longer term development of adequate international “soft law” standards. But, absent the assertion of such authority, the commons will predictably collapse again into tragedy.

This article examines recent negotiations over the international regulation of OTC derivatives markets and the uncertain status of the Volcker Rule as cases in point. With respect to the latter, it poses the question: how should a legal regime of “substituted compliance” deal with the Volcker Rule where no other nations has adopted or proposed a close financial equivalent? Finally, it asks: how “extraterritorial” does U.S. law need to be and proposes some limits.

Colangelo on Extraterritorial Jurisdiction

Anthony Colangelo (Southern Methodist University - Dedman School of Law) has posted *What is Extraterritorial Jurisdiction?* on SSRN.

The phenomenon of extraterritorial jurisdiction, or the exercise of legal power beyond territorial borders, presents lawyers, courts, and scholars with analytical onions comprising layers of national and international legal issues; as each layer peels away, more issues are revealed. U.S. courts, including the Supreme Court, have increasingly been wrestling this conceptual and doctrinal Hydra. Any legal analysis of extraterritorial jurisdiction leans heavily on the answers to two key definitional questions: What do we mean by “extraterritorial”? And, what do we mean by “jurisdiction”? Because the answer to the first question is often conditional on the answer to the second, the questions are probably better addressed in reverse order, that is: What type of “jurisdiction” is at issue? And, is its exercise “extraterritorial”?

*This Article aims to supply legal thinkers, practitioners, and decision-makers with tools to go about answering these increasingly prevalent and multi-layered questions of U.S. law — the answers to which hold potentially massive consequences for a rapidly and diversely growing number of cases and fields, from corporate and securities law, to human rights, to anti-drug trafficking and terrorism. The Article addresses major issues of constitutional law, statutory construction (including the Supreme Court’s most recent decisions in *Morrison v. National Australia Bank* and *Kiobel v. Royal Dutch Petroleum*), and common law choice-of-law methodology.*

The proliferating phenomenon of extraterritoriality across diverse fields has thus far resisted trans-substantive and systematic analysis. Yet the legal and practical stakes of resolving a mounting array of extraterritorial jurisdiction issues have never been higher. This Article seeks to approach extraterritoriality as a fundamentally singular phenomenon with myriad doctrinal manifestations instead of a scattershot smattering of discrete legal issues in isolated areas. My principal aim in doing so is to help legal thinkers and decision makers not only to resolve extraterritoriality issues but also to comprehend how their

resolutions fit within a larger jurisprudence on increasingly important questions of when and how the United States may exercise legal power beyond U.S. borders.

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

UK Supreme Court Rules on Inherent Jurisdiction to Order Return of Children

On 4 December 2013, the UK Supreme Court delivered its judgment in *In the matter of KL (A Child)*.

The Court issued the following press summary.

BACKGROUND TO THE APPEAL

This appeal arises from proceedings under the Hague Convention on the Civil Aspects of International Child Abduction ('the Convention'). The Convention establishes procedures to ensure the prompt return of children to the state of their habitual residence. The question arising is the approach that the courts of this country should take when a child is brought here pursuant to an order made abroad in Convention proceedings which is later overturned on appeal.

The proceedings concern a child, K, who was born in 2006 in Texas and is a United States citizen. His father is also a US citizen; his mother came to the UK from Ghana as a very young child and she has indefinite leave to remain in the UK. They married in Texas in December 2005 and lived together there. The marriage broke up and in March 2008 the father issued divorce proceedings in the Texas state court. That court made orders by consent providing for the mother to take care of K (in the former matrimonial home) while the father was posted abroad on military service. In July 2008 she took him to London. In March

2010 a welfare-based custody hearing took place in the Texas court in which both parents were represented. The judge in those proceedings decided that it was in K's best interests that he reside with his father and have contact with his mother. As a result K moved back to the US.

The mother applied to the US Federal District Court for an order under the Convention, alleging that K had been habitually resident in the UK in March 2010 and that K had been wrongfully retained in Texas by the father. This argument succeeded in the District Court in August 2011. The father complied with the order to return K and his passport to the mother, whereupon the mother returned to the UK with K and they have lived here ever since. The father appealed against the order. On 31 July 2012 the US Court of Appeals for the Fifth Circuit overturned the decision of the District Court and on 29 August 2012 the District Court ordered K's return to the US. When the mother did not comply, the father issued applications under the Convention in the UK. He argued that the mother's retention of K in the UK was wrongful because K's habitual residence had remained in the US. He further argued that the UK court should exercise its inherent jurisdiction to return K to the US in the circumstances of his case, even if it was not required to do so under the Convention.

On 17 January 2013 the judge in the High Court dismissed the father's applications, and his decision was upheld on appeal to the Court of Appeal. The Supreme Court granted the father permission to appeal on the grounds that K had been wrongfully retained in the UK after 29 August 2012 under the Convention and/or that the court should order his return to the US under its inherent jurisdiction.

JUDGMENT

The Supreme Court unanimously allows the appeal by the father and orders the return of K to the US on the basis of the undertakings offered by the father to enable the mother to live in Texas, independently of the father and sharing the care of K between them, pending any application she might make to the Texas court to modify the order relating to K's residence. The sole judgment is given by Lady Hale.

REASONS FOR THE JUDGMENT

Convention proceedings

The father's application could only succeed if K was habitually resident in the US when the US Court of Appeals overturned the earlier order of the District Court in the mother's favour. [17]. The Convention does not define habitual residence but the UK applies the concept of habitual residence adopted by most member states of the European Union, namely that it is a question of fact and corresponds to the place which reflects some degree of integration by the child in a social and family environment [20]. Parental intention plays a part in establishing or changing a child's residence and this has to be factored in with all the other relevant factors in deciding whether a move from one country to another has a sufficient degree of stability to amount to a change of habitual residence [23].

In this case, the move of the mother with K to the UK in August 2011 was intended by her to be permanent and neither she nor K will have perceived it as temporary, notwithstanding the appeal. K became integrated into a social and family environment in the UK during the year before the appeal succeeded [26]. The judge was entitled to hold that K had become habitually resident in the UK by 29 August 2012 [27]. Thus the father was not entitled to an order for K's return under the Convention.

Inherent jurisdiction

Under the Family Law Act 1986 the High Court has power to exercise its inherent jurisdiction in relation to children by virtue of the child's habitual residence and presence here. Before the Convention was adopted this jurisdiction was used to secure the prompt return of children who had been wrongfully removed from their home country. The existence of an order made by a competent foreign court is a relevant factor in deciding whether to exercise it [28].

The judge did not ask himself the correct question, which is whether it is in K's best interests to remain in the UK, so that the dispute between his parents is decided here, or to return to Texas so that the dispute can be decided there. The Supreme Court is in as good a position as the judge was to answer this as he heard no oral evidence [32]. The approach and procedure of the Texan and English courts are very similar and the father's evidence is that an application by the mother in Texas would be decided in less than three months [30, 33]. In favour of K's remaining in the UK is the fact that he has been living here with his mother for over two years, is at school and apparently doing well [34]. In favour of return to the US is the fact that he was born in Texas, has a large extended

family in the US, and has spent half his life living there, most recently in the sole care of his father, who has facilitated contact with his mother [35]. The crucial factor is that K is a Texan child who is currently being denied a proper opportunity to develop a relationship with his father and with his country of birth. While the conflicting orders remain in force he has effectively been denied access to the US. It is necessary to restore the synthesis between the two jurisdictions which the mother's actions have distorted [36]. Despite the passage of time there is no reason to consider that K would suffer any significant harm by returning to Texas on the basis proposed by the father and accordingly the Supreme Court allows the appeal and orders K's return on these terms. This order is to stand even if the mother chooses not to avail herself of the opportunity to return with her son [38].