Territorial Laws in a Global Era

On November 22 and 23 the Research Project "The Architecture of Regulatory Competition" at the University of Helsinki will host a seminar on "Territorial Laws in a Global Era". The programme reads as follows:

Friday, 22 November 2013

- 8.45 – 9.15 Registration and Coffee
- 9.15 – 9.30 Opening
- 9.30 – 11.30 Session I
  Erin O'Hara O'Connor: Law markets in global commerce (Key note)
  Jan Smits: Law as a package: On the limits of choice
- 11.30 – 12.30 Lunch
- 12.30 – 14.30 Session II
  Giesela Rühl: Competition for contract laws: Fiction or reality? Dream or nightmare?
  Teemu Juutilainen: Competition theory for property law: From fragments to whole
- 14.30 – 15.00 Coffee
- 15.00 – 17.00 Session III
  Peter Cserne: National judicial styles: Do they persist and do they matter in a global law market?
  Katri Havu: No-one's law at the interface of EU rights and national remedies and procedure – insights
- 18.00 Seminar dinner at Spis (http://spis.fi/)

Saturday, 23 November 2013

- 9.00 – 11.00 Session IV
  Gralf-Peter Calliess: Transnational private law: Between uniform law, legal pluralism, and competition of jurisdictions
  Lécia Vicente: Bringing the essence of lex mercatoria back: Evolving business practices, networking of market agents and competition as sources of European company law
- 11.00 – 12.00 Lunch
- 12.00 – 14.00 Session V

Elaine Fahey: The EU as a direct and indirect rule-exporter and standard bearer: Between theory and practice
Emilia Korkea-aho: Implementation of territorial laws in a global era: An emerging arena for regulatory competition

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ECJ Defines Concept of International Character of Consumer Contracts

On 14 November 2013, the Court of Justice of the European Union delivered its judgment in Armin Maletic and Marianne Maletic v lastminute.com GmbH and TUI Österreich GmbH.

The issue for the Court was whether the Brussels I Regulation applied to a consumer contract concluded with a professional based in the same jurisdiction as the consumer.

On 30 December 2011, two Austrian consumers, the Maletics, booked and paid for themselves, as private individuals, a package holiday to Egypt on the website of lastminute.com for EUR 1 858 from 10 to 24 January 2012. On its website, lastminute.com, a company whose registered office is in Munich (Germany), stated that it acted as the travel agent and that the trip would be operated by TUI, which has its registered office in Vienna (Austria).

The booking concerned the Jaz Makadi Golf & Spa hotel in Hurghada (Egypt). That booking was confirmed by lastminute.com, which passed it on to TUI. Subsequently, the Maletics received a 'confirmation/invoice' of 5 January 2012 from TUI which, while it confirmed the information concerning the trip booked with lastminute.com, mentioned the name of another hotel, the Jaz Makadi Star Resort Spa in Hurghada. It was only on their arrival in Hurghada that the applicants in the main proceedings noticed the mistake concerning the hotel and paid a surcharge of EUR 1 036 to be able to stay in the hotel initially booked on

lastminute.com's website.

On 13 April 2012, in order to recover the surcharge paid and to be compensated for the inconvenience which affected their holiday, the applicants in the main proceedings brought an action before an Austrian Court seeking payment from lastminute.com and TUI, jointly and severally of the sum of EUR 1 201.38 together with interest and costs.

The Austrian court retained jurisdiction over Lastminute on the ground of Article 15 of the Brussels Regulation, but declined it with respect to the Austrian party, ruling that the Regulation did not apply to a domestic dispute, and that another Austrian court had jurisdiction pursuant to Austrian civil procedure.

The CJEU held that the dispute was international in character.

> *28 If, as stated in paragraph 26 of this judgment, the international character of the legal relationship at issue need not necessarily derive from the involvement, either because of the subject-matter of the proceedings or the respective domiciles of the parties, of a number of Contracting States, it must be held, as the Commission and the Portuguese Government have argued, that Regulation No 44/2001 is applicable a fortiori in the circumstances of the case at issue in the main proceedings, since the international element is present not only as regards lastminute.com, which is not disputed, but also as regards TUI.*
>
> *29 Even assuming that a single transaction, such as the one which led the Maletics to book and pay for their package holiday on lastminute.com's website, may be divided into two separate contractual relationships, first, with the online travel agency lastminute.com and, second, with the travel operator TUI, the second contractual relationship cannot be classified as 'purely' domestic since it was inseparably linked to the first contractual relationship which was made through the travel agency situated in another Member State.*
>
> *30 Furthermore, account must be taken of the objectives set out in recitals 13 and 15 in the preamble to Regulation No 44/2001 concerning the protection of the consumer as 'the weaker party' to the contract and the aim to 'minimise the possibility of concurrent proceedings … to ensure that irreconcilable judgments will not be given in two Member States'.*
>
> *31 Those objectives preclude a solution which allows the Maletics to pursue*

parallel proceedings in Bludenz and Vienna, by way of connected actions against two operators involved in the booking and the arrangements for the package holiday at issue in the main proceedings.

Ruling:

The concept of 'other party to the contract' laid down in Article 16(1) 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, in circumstances such as those at issue in the main proceedings, that it also covers the contracting partner of the operator with which the consumer concluded that contract and which has its registered office in the Member State in which the consumer is domiciled.

Judiciary and Procedural Reforms in Spain, 2013

In his first appearance at the *Congreso de los Diputados* (House of Representatives), less than a year ago, the Spanish Minister of Justice announced a package of far-reaching measures or reforms for the Spanish justice: some address the judiciary, others affect the structure of different procedures, as well as complementary aspects. Among the former I'd like to highlight the already achieved amendment of the *Ley Orgánica del Poder Judicial*, Ley 6/1985, of July 1, by the Ley 4/2013, of June 28, reforming the *Consejo General del Poder Judicial*; and the proposal for a new *Ley de Demarcación y Planta Judicial* (the text prepared by the Institutional Committee established by Agreement of the Council of Ministers in 2012 was recently published). The proposal is based on the creation of *Tribunales de Instancia*, which will gather the current uni-personal tribunals and work at a provincial district level. Appeal hearings will correspond to the *Tribunales Superiores de Justicia* (instead of the actual *Audiencias*), which will culminate the judiciary in the corresponding Autonomous Community.

Among the latter it is worth mentioning the draft Bill of the Ministry of Justice aiming to amend the *Ley de Enjuiciamiento Civil,* Ley 1/2000*,* of January 7. The draft is devoted almost entirely to the so called *procuradores* (attorneys). Another draft Bill, this time from the Ministry of Economic Affairs, targets the same group and has met (not surprisingly) with fierce opposition, as it removes the existing fees and eliminates the incompatibility that has so far prevented lawyers to also act as *procuradores*.

From the cross-border perspective I'd like to recall the draft Bill on *Jurisdicción voluntaria*. Chapter one (Articles 9 to 12 of the Act) addresses the rules of Private International Law, meaning grounds of international jurisdiction, conflict of law rules, and effects in Spain of foreign decisions adopted on non-contentious proceedings.

Finally, last Friday the Spanish government adopted the *Real Decreto* that regulates the *Registro de Resoluciones Consursales*, where the results and the handling of bankruptcy proceedings are to be published in order to ensure transparency and legal certainty. The Real Decreto includes a provision on the interconnection of Bankruptcy Public Registers of the European Union Members States.

So, something is on the move in Spain (although it's difficult to say whether in the good direction).

American Association of PIL Elects New Officers

On 2 November 2013, the Assembly of the American Association of Private International Law (ASADIP) elected its officers for the period 2013-2016:

President: José Antonio Moreno Rodríguez (Paraguay)

Academic Vice President: Claudia M. Madrid Martínez (Venezuela)

Adjunct Academic Vice President: David Stewart (USA)

International Relations Vice President: Lauro Gama Jr (Brasil)

Adjunct International Relations Vice President: Ana Elizabeth Villalta (El Salvador)

Vice President of Communications and Publications: Paula M. All (Argentina)

Adjunct Vice President of Communications and Publications: Luis Ernesto Rodríguez Carrera (Venezuela)

Vice President of Finance: Laura Capalbo (Uruguay)

Adjunct Vice President of Finance: Guillermo Argerich (Argentina)

Secretary General: Nuria González Martín (México)

Adjunct Secretary General: Juan José Obando (Costa Rica)

Vocals:

- Virginia Aguilar (México)
- Carolina D. Iud (Argentina)
- José Luis Marín (Colombia)
- Geneviève Saumier (Canadá)
- Zhandra Marín (USA)
- Gonzalo Lorenzo (Uruguay)
- Fernando Cantuarias (Perú)
- Mirian Rodríguez (Venezuela)
- Augusto Jagger (Brasil)
- Taydit Peña Lorenzo (Cuba)

President of Honor: Didier Opertti Badán (Uruguay)

President of the Consultive Committee: Eugenio Hernández Bretón (Venezuela)

ECJ Rules on Effect of Icelandic Legislative Moratorium on Payments in France

On 24 October 2013, the Court of Justice of the European Union delivered its judgment in LBI hf, formerly Landsbanki Islands hf v Kepler Capital Markets SA and Frédéric Giraux (case C-85/12).

The Court issued the following press release:

The moratorium on payments granted to the bank LBI by the Icelandic authorities produces in France the effects which the Icelandic legislation confers on it

The directive on the reorganisation and winding up of credit institutions does not preclude that the effects of that moratorium retroactively cover interim protective measures in France

The directive on the reorganisation and winding up of credit institutions provides that, in the event of insolvency of a credit institution that has branches in other Member States, the reorganisation measures and the winding-up proceedings are part of a single insolvency procedure in the Member State where the institution has its registered office (known as the home Member State). Therefore, in principle, such measures are subject to a single law on insolvency and they are applied according to the law of the home Member State and are effective in accordance with that law throughout the EU, without any further formalities. For that purpose, States party to the Agreement on the European Economic Area, like Iceland, are treated in the same way as Member States of the EU.

In the context of the collapse of the financial system in Iceland following the international financial crisis in 2008, the Icelandic legislature adopted a series of reorganisation measures for various financial institutions established in that country. In particular, a Law of 13 November 20082, first, prohibited proceedings from being brought against financial institutions under a moratorium on payments and, second, ordered the suspension of proceedings pending. By a Law of 15 April 20093, the Icelandic legislature placed financial institutions under a

moratorium subject to transitional rules seeking to apply a specific winding-up scheme to their situation, without them being actually wound-up before the expiry of that moratorium.

LBI hf (formerly Landsbanki Islands hf) is an Icelandic credit institution to which a moratorium on payments was granted on 5 December 2008 by the District Court, Reykjavik. Shortly beforehand, on 10 November 2008, LBI was the subject of two attachment orders in France at the request of a creditor residing in that Member State. LBI contested those two attachments orders before the French courts and claimed that the directive made the reorganisation measures adopted in Iceland directly enforceable against its French creditor. In addition, the District Court, Reykjavik declared, on 22 November 2010, the opening of winding-up proceedings against LBI.

Against that background, the Cour de cassation (Court of cassation) (France), which considered that case at last instance, referred to the Court of Justice the question whether the reorganisation or winding-up measures resulting from the transitional rules in the Law of 15 April 2009 are also covered by the directive, the aim of which is the mutual recognition of reorganisation measures and of winding-up proceedings taken by the administrative and judicial authorities. Moreover, the French court seeks to ascertain whether the directive precludes the retroactive application of the effects of a moratorium on interim protective measures adopted in another Member State before it was declared.

In today’s judgment, the Court notes, first, that the administrative and judicial authorities of the home Member State are alone empowered to decide on the implementation of reorganisation measures for a credit institution and on the opening of winding-up proceedings against it. Accordingly, only the measures decided by those authorities are the subject, under the directive, of recognition in the other Member States, with the effects which the law of the home Member State confers on them.

However, the legislation of the home Member State relating to the reorganisation and winding-up of credit institutions can, in principle, take effect in the other Member States only through specific measures taken by the administrative and judicial authorities of that Member State against a credit institution.

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However, the legislation of the home Member State relating to the reorganisation and winding-up of credit institutions can, in principle, take effect in the other Member States only through specific measures taken by the administrative and judicial authorities of that Member State against a credit institution.

As regards the transitional rules of the Law of 15 April 2009, the Court states that, by adopting those rules, the **Icelandic legislature did not order, as such, the winding-up of the credit institutions placed under a moratorium**, but conferred certain effects linked to winding-up proceedings on the moratoria which were in force on a specific date. Likewise, it follows from those transitional provisions that, unless a judicial decision has granted or extended a moratorium for the benefit of a credit institution before that date, they cannot produce any effects. Accordingly, **those rules take effect not directly but through a reorganisation measure granted by a judicial authority** for a credit institution. Therefore the moratorium granted to LBI is capable of producing, under the directive, the effects which the Icelandic legislation confers on it in the EU Member States.

As regards the question whether the transitional rules must be able to form the subject of an action in order to take effect in the EU Member States, the Court notes that the directive establishes a system of mutual recognition of national reorganisation and winding-up measures, without seeking to harmonise national legislation on that subject. It points out that the directive does not make the recognition of reorganisation and winding-up measures subject to a condition that it be possible to bring an action against them. Similarly, the law of a Member State may not make that recognition subject to a condition of that type for which its national rules may provide.

Next, as regards the question whether the directive precludes the retroactive application of the effects of a moratorium on interim protective measures adopted in another Member State, the Court observes that the effects of

reorganisation measures and winding-up proceedings are, in principle, governed by the law of the home Member State. That general rule does not, however, apply to 'lawsuits pending' which are governed by the law of the Member State in which the lawsuit is pending. As regards the scope of that exception, the Court states that **the words 'lawsuits pending' cover only proceedings on the substance and that individual enforcement actions arising from those lawsuits remain subject to the legislation of the home Member State**. In that respect, the Court states that the **interim protective measures taken in France** constitute individual enforcement actions and, therefore, the effects of the moratorium granted to LBI in Iceland on those interim protective measures **are governed by Icelandic law**.

Moreover, the fact that those measures were adopted before the moratorium at issue in the main proceedings had been granted to LBI cannot invalidate that conclusion as **it is Icelandic law which also governs**, under the directive, **its temporal effects**. The directive does not prevent a reorganisation measure, such as the moratorium, from having retroactive effect.

Schultz on Postulates of Justice in Transnational Law and Private International Law Reasoning

Thomas Schultz (Kings College London) has posted Postulates of Justice in Transnational Law and Private International Law Reasoning. A Few Simple Points (*Postulats De Justice En Droit Transnational Et Raisonnements De Droit International Privé. Premier Balisage D'Un Champ D'Études*) on SSRN.

> *Certain postulates of justice that led to legal statism constitute an epistemological obstacle in our search for the rules and regulatory systems that best fulfil certain fundamental objectives of private international law and the rule of law more generally. Transnational private rules may, in certain*

situations, be the best choice for these objectives.

Note: Downloadable document is in French.

The paper was published in the *Mélanges Jean-Michel Jacquet*.

Book: Marongiu Buonaiuti, Le obbligazioni non contrattuali nel diritto internazionale privato

Fabrizio Marongiu Buonaiuti (Univ. of Macerata) has recently published "Le obbligazioni non contrattuali nel diritto internazionale privato" (Non-contractual Obligations in Private International Law) (Giuffrè, 2013). An abstract has been kindly provided by the author (the complete table of contents is available on the publisher's website):

The volume deals with non-contractual obligations in private international law, addressing both issues related to jurisdiction and to conflict of laws.

As concerns jurisdiction, the volume discusses the problems posed by the application of the rules on jurisdiction in civil and commercial matters as contained in EC Regulation No. 44/2001 (s.c. "Brussels I") to disputes concerning non-contractual obligations. Special attention is devoted to the specific rule of jurisdiction in matters of tort or delict under Article 5.3 of the said Regulation (to be replaced, without modifications as to the substance, by Article 7.2 of EU Regulation No. 1215/2012 providing for its recast) and to its coordination with the other rules of jurisdiction. The volume addresses also the more recent case law of the European Court of Justice concerning the application of the said rule to non-contractual obligations arising from activities performed through the Internet and implying violations either of privacy and personality rights or of intellectual property rights.

As concerns conflict of laws, the volume examines the rules contained in EC Regulation No. 864/2007 (s.c. "Rome II") on the law applicable to non-contractual obligations, stressing parallelism and differences in respect of the solutions achieved as concerns jurisdiction under the Brussels I Regulation. Furthermore, the volume deals with the problems of coordination of the conflict of laws rules as contained in the Rome II Regulation with the rules contained in international conventions applicable in the field concerned, to which the Regulation grants priority. The volume finally addresses the domestic rules on conflict of laws as contained in Law No. 218 of 31 May 1995 providing for the reform of the Italian system of private international law, which apply residually to non-contractual obligations not governed by the Regulation.

Title: "Le obbligazioni non contrattuali nel diritto internazionale privato", by *Fabrizio Marongiu Buonaiuti*, Giuffrè (series: Pubblicazioni del Dipartimento di Giurisprudenza dell'Università degli Studi di Macerata, Nuova serie, vol. 139), Milano, 2013, X – 254 pages.

ISBN: 9788814182419. Price: EUR 26. Available at Giuffrè.

Publication book Resolving Mass Disputes

An interesting book entitled **Resolving Mass Disputes. ADR and Settlement of Mass Claims**, edited by Christopher Hodges (Centre for Social-Legal Studies, Oxford/Erasmus University Rotterdam) and Astrid Stadler (University of Konstanz/Erasmus University Rotterdam) has just been published (Edward Elgar, 2013).

The blurb reads:

The landscape of mass litigation in Europe has changed impressively in recent years, and collective redress litigation has proved a popular topic. Although

much of the literature focuses on the political context, contentious litigation, or how to handle cross-border multi-party cases, this book has a different focus and a fresh approach.

Taking as a starting-point the observation that mass litigation claims are a 'nuisance' for both parties and courts, the book considers new ways of settling mass disputes. Contributors from across the globe, Australia, Canada, China, Europe and the US, point towards an international convergence of the importance of settlements, mediation and alternative dispute resolution (ADR). They question whether the spread of a culture of settlement signifies a trend or philosophical desire for less confrontation in some societies, and explore the reasons for such a trend.

Raising a series of questions on resolving mass disputes, and fuelling future debate, this book will provide a challenging and thought-provoking read for law academics, practitioners and policy-makers.

Contributors include: I. Benöhr, N. Creutzfeldt-Banda, M. Faure, D.R. Hensler, C. Hodges, J. Hörnle, J. Kaladjzic, X. Kramer, M. Legg, R. Marcus, A. Stadler, I. Tzankova, S. Voet, Z. Wusheng.

More information is available here.

Fourth Issue of 2013's Journal du Droit International

The fourth issue of French *Journal du droit international* (*Clunet*) for 2013 was just released. It contains two articles discussing issues of private international law and several casenotes. A full table of content will soon be available here.

In the first article, Hughes Fulchiron (University of Lyon III) discusses the private international law aspects of same-sex marriage after the French statute allowing

same sex marriage (*Le mariage entre personnes de même sexe en droit international privé au lendemain de la reconnaissance du « mariage pour tous »*). The English abstract reads:

> *Concerned about giving the widest possible international influence to the consecration of same-sex marriage, the french legislator of 17 May 2013 enacted a new rule of conflict of laws according to which « two people of the same sex can contract marriage when for at least one of them, either his [her] personal law or the law of the State in which he [she] has his [her] domicile or residence permits it ». The same rule applies to appreciate the validity in France of same-sex marriages celebrated abroad. The freedom to get married between same-sex persons is setted up as a real French international public policy principle. The new rules arouse many difficulties on the legal plan, but also on the diplomatic plan. Moreover, they increase « lame » marriages. Especially, the legislator in 2013 did not cared about the effects of same-sex marriages, whether the effects in France of a marriage celebrated abroad or effects abroad of a marriage celebrated in France. The question of same-sex marriages in international private law sheds a new light on some of the key issues of the international private law, as it creates original situation, poses complex problems and arouse various legal responses.*

In the second article, Fanny Cornette, who is a researcher at the University of Delft (Holland), explores the issue of the COMI of natural persons under the Insolvency Regulation with a special focus on Alsace-Moselle (*Le « centre des intérêts principaux » des personnes physiques dans le cadre de l'application du Règlement Insolvabilité dans les départements de la Moselle, du Bas-Rhin et du Haut-Rhin*). The English abstract reads:

> *The notion of « center of main interest », key concept of the Insolvancy Regulation, caused difficulties even when applying this concept to individuals. Abundant jurisprudence was developed in the departments of Moselle, Bas-Rhin and Haut-Rhin, which are in France, for historical reasons, the only ones concerned by the application of this Regulation to individuals. Lots of debtors, coming from Germany and recently settled in these departments, were denied the application of this text. In fact, judges considered that they moved their center of main interests solely to benefit from the French law, which is more favorable to them than the German one. Therefore, several lines of thoughts*

should be considered to improve the application of the Insolvency Regulation.

Collective Arbitration (by Stacie I. Strong)

It is my pleasure to announce the publication of two works of Professor Stacie I. Strong, Associate Professor of Law, Senior Fellow, Center for the Study of Dispute Resolution, University of Missouri.

Class, Mass, and Collective Arbitration in National and International Law, has just been published by Oxford University Press. The book considers class, mass and collective arbitration as a matter of domestic and international law, providing arbitrators, advocates and scholars with the tools they need to evaluate these sorts of procedural mechanisms. The discussion covers the best-known decisions in the field – Stolt-Nielsen S.A. v. AnimalFeeds International Corp. and AT&T Mobility LLC v. Concepcion from the U.S. Supreme Court as well as Abaclat v. Argentine Republic from the world of investment arbitration – while also considering specialized rules on large-scale arbitration promulgated by the American Arbitration Association (AAA), JAMS and the German Institution of Arbitration (DIS). The text introduces dozens of previously undiscussed judicial opinions and covers issues ranging from contractual (or treaty-based) silence and waiver to regulatory concerns and matters of enforcement. The entire timeline of class, mass and collective arbitration is covered, beginning with the devices' historical origins and continuing through the present and into the future. Lawyers in a wide variety of jurisdictions will benefit from the material contained in this text, which is the first full-length monograph to address large-scale arbitration as a matter of national and international law.

The second work is an article entitled *Collective Consumer Arbitration in Spain: A Civil Law Response to U.S.-Style Class Arbitration*, published in 30 *Journal of International Arbitration* 495 (2013). Prof. Strong analyses the Spanish approach, which establishes a statutory form of large-scale arbitration that arises in the

post-dispute context. According to the author, because this mechanism is built largely on express rather than implied consent, it could act as a model for reformers in other jurisdictions. In particular, it could provide an answer to the various problems that are anticipated to develop in the United States following the recent Supreme Court decisions in Oxford Health Plans LLC v. Sutter and American Express Co. v. Italian Colors Restaurants.