Conference: The Implementation of the UN Guiding Principles on Business and Human Rights in Spain (Sevilla, 4-6 November 2013)

The University of Sevilla will host on 4-6 November an international conference on the responsibility of transnational corporations with regard to human rights, focusing on the UN Guiding Principles on Business and Human Rights: **"The Implementation of the UN Guiding Principles on Business and Human Rights in Spain"**. Here's an excerpt from the conference's website:

> *Recent years have witnessed the cristallysation of the social expectation that business enterprises, and transnational corporations in particular, have a responsibility to respect the human rights of the people and communities that may be adversely affected by their activities.*
>
> *The unanimous endorsement of the Guiding Principles on Business and Human Rights by the UN Human Rights Council has helped clarifying the scope of corporate responsibility to respect human rights, in interaction with the state's duty to protect those rights. The conceptual framework "Protect, Respect and Remedy" has contributed to a rapid development of policy and regulatory standards worldwide, as evidenced by the OECD revised guidelines on multinational enterprises, the review of IFC's social and sustainability framework, or ISO 26000 (Social Responsibility), among others.*
>
> *The UN Guiding Principles are not a point of arrival, but a starting point for future developments. Implementation of the new UN business and human rights framework simultaneously requires the review of existing State regulatory frameworks; the establishment or improvement of the corporate human rights policies and due diligence mechanisms; and the opening of new avenues of dialogue and responsibility between duty-bearers, rights-holders and other stakeholders. In the development of this complex program, there is an urgent*

need for academic reflection and political innovation.

The expansion of Spanish foreign direct investment in recent decades and the growing presence of Spanish transnational corporations in various countries have given raise to growing concern and pressure from civil society concerning the human rights impacts of their operations. Allegations of human rights violations have been particularly significant in relation to extractive industries and renewable energy projects in Latin America, including in relation to the rights of indigenous peoples. However, despite an important number of CSR initiatives in the past, the business and human rights agenda in Spain remains yet to be explored. The ongoing elaboration of the Spanish National Plan on business and human rights adds timeliness for this exploration.

The following is a synopsis of the main sections of the very rich programme of the conference (the detailed content of each panel, including the full list of speakers and paper presentations, is available on the conference's website and as a .pdf file):

Monday 4 November – **The UN Guiding Principles of Business and Human Rights: Prospects and Challenges**

Keynote Address: "Assessing the UN Framework for Business and Human Rughts. An International Human Rights Perspective" (*Prof. James Anaya*, Univ. of Arizona and United Nations Special Rapporteur on the rights of indigenous peoples)

- Panel 1: "Implementing Pillar I under UN and EU Law: The State Duty to Protect Human Rights";
- Panel 2: "Implementing Pillar II Business Responsibility to Respect Human Rights";
- Panel 3: "Implementing Pillar III. The Obligation to Remedy: Judicial and Non-Judicial Mechanisms".

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Tuesday 5 November – **Spain and the Implementation of the UN Guiding Principles**

"Spain and the implementation of the Guiding Principles: The drafting and content of the National Action Plan on Business and Human Rights" (*Ms. Cristina*

Fraile, Director of the Human Rights Office, Ministry of Foreign Affairs and Cooperation of Spain)

- Panel 4: "The implementation of Spain's obligations in the area of business and human rights";
- Panel 5: "The Implementation of the Responsibility to Respect by Spanish Companies";
- Panel 6: "Remedies for Alleged Human Rights Violations by Spanish Companies".

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Wednesday 6 November – **Business, Human Rights, and Vulnerable Groups**

- Panel 7: "Business Enterprises and the Rights of Vulnerable Persons and Groups";
- Panel 8: "Business Enterprises and Human Rights in Conflict Situations".

(Many thanks to Prof. Fabrizio Marrella, Univ. of Venice, for the tip-off)

Civil Justice in the EU – Growing and Teething?

This post has been jointly drafted by Gilles Cuniberti, Xandra Kramer, Thalia Kruger and Marta Requejo.

Civil Justice in the EU – Growing and Teething? Questions regarding implementation, practice and the outlook for future policy is the title of the conference held in Uppsala, Sweden, on Thursday and Friday last week, co-organised by the Swedish Network for European Legal Studies in collaboration with the Faculty of Law at Uppsala University and the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law (see Prof. Cuniberti's announcement with the program here). This has been the first conference organized by the Max Planck Institute Luxembourg outside of the

Grand Duchy.

After the formal opening of the conference by **Antonina Bakardjieva Engelberkt**, Stockholm University, Chairman of the Swedish Network for European Legal Studies, Prof. **Burkhard Hess**, Executive Director of the MPI Luxembourg, delivered the keynote address, centered on the current situation of a European procedural law which transgresses the mere coordination of the national procedural systems. In the European framework the national systems do not appear any longer to be self-contained and self-standing: in many respects, European law ingresses and transforms the adjudicative systems of the EU-Member States. Today, European lawmaking often triggers far-reaching reforms of the national systems (Consumer ADR being one example). In addition, the ECJ transforms the adjudicative systems of the Member States as more and more areas of private and procedural law are communitarised and are subjected to its (interpretative) competence. On the other hand, the national procedures in the European Judicial Area are still divergent with regard to their efficiency. In this respect, the case-law of the ECHR on the right of a party to get a judgment in reasonable period of time has not helped to assimilate the level of judicial protection in the Member States. Yet, the different efficiencies of the national systems entail a growing competition among the "judicial marketplaces" in Europe which is reinforced by the European procedural instruments on the coordination of these systems.

Against this background, Prof. Hess stressed the importance of the Commissioner for Justice. Since the entry into force of the Lisbon Treaty, the Commissioner for Justice implements a genuine lawmaking policy, not only with regard to cross-border litigation under Article 81 TFEU, but also with regard to the supervision of the national judicial systems. A new tool is the so-called judicial scoreboard aimed at the evaluation of the adjudicative systems of the EU-Member States. Although this scoreboard does not provide for substantial new information (the data are largely borrowed from the Council of Europe), the political ambition goes further: The Commission understands its mission in a comprehensive way covering all areas of dispute resolution, including the efficiency and the independence of the national court systems.

Prof. Hess went on to say the if the development of the European procedural law is regarded, not from the number of the instruments enacted so far, but from a systematic point of view, the balance would appear less successful. Until now, the

law-making of the Union has been mainly sectorial and the choices of legislative activities have not been comprehensive, but rather incidental. At present, there is no master-plan, no roadmap; a comprehensive and systematic approach is lacking. This situation has been criticized by the legal literature and alternatives have been discussed and proposed. All in all, a more systematic approach with a better coordination of the EU-instruments at the horizontal and the vertical level is needed. And it is the task of procedural science to discuss the different regulatory options with regard of their feasibility and efficiency in order to improve and to systemize European law-making in this field. Thus, the Director of the MPI Luxembourg announced that regulatory approaches of the European law of civil procedural are going to become a major research area of the Institute.

The first panel, which was chaired by **Marie Linton** (University of Uppsala), carried the title ***Avoiding Torpedoes and Forum Shopping***. The four speakers focused on two topics. First, **Trevor Hartley** (London School of Economics) and **Gilles Cuniberti** (University of Luxembourg) explored whether the remedy established by the Recast of the Regulation to reinforce choice of court agreements would indeed eliminate torpedoes, whether Italian or not. While agreeing that the new remedy would probably be satisfactory in simple cases, the speakers debated whether problems might still arise in case of conflicting or complex clauses. Then, **Erik Tiberg** (Government offices of Sweden) and **Michael Hellner** (University of Stockholm) discussed the consequences of the new rules of jurisdiction with respect to third states.

The second panel, addressing alternative dispute resolution, was composed of three speakers. In his speech **Jim Davies**, University of Northampton, provided a broad historical background of the recently adopted Directive on ADR for consumers (Directive 3013/11/EU), starting from the 1998 and 2001 European Commission's Recommendations and moving on to the Commission's Proposal and the Directive's final text. Thereafter, **Antonina Bakardjieva Engelbrekt**, Stockholm University, tackled the new rules on ADR with a view to assessing how these new provisions provide a further step toward network governance in EU consumer protection policy, especially highlighting the role of consumer organizations. Finally, **Cristina M. Mariottini**, Max Planck Institute Luxembourg, addressed two ADR systems concerning disputes over top level domains, and namely ICANN's New gTLD program and dispute resolution system and EURid's ADR system for disputes concerning the ".eu" domain, with a view to

assessing whether and to what extent the protection of consumers has been kept into consideration within these systems.

The third panel, entitled *Simplified procedures and debt collection – much ado about nothing?,* brought together four speakers. **Mikael Berglund** (Swedish Enforcement Authority) noticed that the European enforcement order and the European order for payment procedure are not frequently used in Sweden; on the European small claims procedure there are no reported cases at all. He explained that creditors do not find it worth the time and money because there is no reliable information on the debtor's assets in other Member States; also, that they have problems finding the competent enforcement authority. He presented several practical ideas to cure the enforcement 'Achilles' heel' of EU law. **Carla Crifó,** of the University of Leicester, provided information and several – limitedly available – data on the implementation and enforcement of the European order for payment procedure and the small claims procedure in England and Wales. This shows that little use is made of these European procedures. In this context, Ms Crifò stressed the problem of the use of English in European instruments which does not necessarily correspond to the legal terminology used in the United Kingdom. English courts and practitioners are usually not well-acquainted with these procedures. Against the background of the current "euroscepticism" in England, this situation is not likely to improve. **Xandra Kramer,** of the Erasmus University (Rotterdam)**,** addressed the potential of the uniform European procedures in view of their scope and limitation to cross-border cases. She presented data on the use and appreciation of these procedures in the Netherlands acquired in empirical research and gave recommendations for improvement. Though particularly the use of the European small claims procedures is disappointing up to date, she stressed that one should not be too pessimistic since the European procedures are very new compared to national procedure and the building of a well-functioning European procedural order will take time and efforts. **Cristian Oro Martinez**, from the MPI Luxembourg, reviewed some of the aspects of the Regulation on the European Small Claims Procedure which, besides the general lack of awareness of the instrument, may account for its relatively small success. These issues include, among others, problems such as the territorial scope of application of the Regulation (narrow definition of cross-border cases), the limitation of the right to an oral hearing with regard to non-consumer cases, or the problems arising out of the interface between the Regulation and other EU instruments (especially the Brussels I Regulation), as well as domestic procedural

law

Two other panels took place simultaneously after the coffee break, on Family Law and Collective Redress respectively. The first one was composed of three speakers. **Katharina Boele-Woelki,** of Utrecht University, discussed the issue of partial harmonisation, referring to the example of the Rome III Regulation. As today, only 16 of 28 Member States are participating in the Rome III framework. She indicated the different political reasons underlying Member States' choices whether to participate in the Regulation or not. She also showed that fragmented harmonisation is not only the result of enhanced cooperation, but also, in other instruments, of the particular status that some EU Member States (Denmark, Ireland and the UK) have with respect to civil justice. Thus, the application of enhanced cooperation in the Area of Freedom, Security and Justice is a matter of concern. Thereafter **Thalia Kruger,** of the University of Antwerp, discussed the element of choice in the Rome III Regulation, showing that a rule that looks clear at first sight has many underlying uncertainties. The debate raised the issue of how habitual residence can be ascertained as a preliminary matter for purposes of jurisdiction, without requiring too cumbersome an investigation by the judge (with a waste of time as a result).

The third speaker, **Björn Laukemann** of the Max Planck Institute in Luxembourg, addressed the issue of the new Succession Regulation and the European Certificate of Succession. The debate on the subject pointed out the problem of EU certificates that remain valid for only six months, while some national certificates, which will co-exist with the EU certificates, are eternally valid. Another question related to this co-existence is the issue of contradictory certificates (EU and national).

The second track of the fourth section addressed some issues relating to collective redress, especially in the light of the Commission's Recommendation of 11 June 2013. **Eva Storskrubb**, from Roschier, assessed the potential impact of the Recommendation highlighting that, although it is non-binding, its rather prescriptive formulation and the Commission's commitment to review its implementation by Member States may entail significant changes in the domestic regulation of collective actions. **Rebecca Money-Kyrle**, from the University of Oxford, addressed some possible consequences of the Recommendations' approach to legal standing. She pointed out that the basic principles set out in the text may force to do away with existing domestic procedures which are efficient.

Moreover, they fail to establish satisfactory rules as regards commonality criteria or cross-border cases. **Laura Ervo**, from Örebro University, provided several arguments to support an opt-out approach to collective redress, hence critically assessing the Commission's Recommendation in this respect. She drew from models provided by Scandinavian legislation, especially the Danish authority-driven system, to support the idea that only opt-out can guarantee access to justice for all damaged parties. Finally, **Stefaan Voet**, from Ghent University, dealt with different systems of funding of collective actions. He evaluated their compatibility with the principles laid down in the Recommendation on lawyers' remuneration and third-party funding, critically assessing the latter for being sometimes too strict.

Under the heading *The Quest for Mutual Recognition,* with Dean **Torbjörn Andersson** as chairman, the first panel of Friday morning discussed several issues related to mutual trust and mutual recognition. **Marie Linton**, from the Uppsala University, addressed the balance between efficiency and procedural human rights in civil justice, particularly in the field covered by the Brussels I Regulation and under the future Brussels I bis Regulation. **Marta Requejo Isidro**, MPI Luxembourg, presented the ECtHR decision of 18 June 2013, *Povse*, pointing out questions that remain open after it. As for the most important, i.e., its possible influence on the abolition of exequatur in civil and commercial matters, Prof. Requejo adopted a somewhat skeptical position on a wide reach of the ECtHR decision, both in the light of the features characterising the Brussels I bis Regulation (although it may still be disputable to what extent there is room for discretion at the requested State), and the reasoning of the Court itself. Finally, **Eva Storskrubb**, Senior Associate, Roschier (Stockholm), dealt with the evolution of mutual recognition as part of a regulatory strategy comparing its Internal Market historical context with the current civil justice context.

The conference ended with a presentation of Future Measures and Challenges by Mr. **Jacek Garstka**, Legislative Officer, DG Justice, European Commission, and **Signe Öhman**, Legal Counsellor, Permanent Representation of Sweden, Brussels. Announcements were made regarding the immediate release of several Commission's Reports – among others, on the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure; on Regulation (EC) No 864/2007 of the European

Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), and on the Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000. Mr. Garstka also referred to future areas of concern for the Commission, such as justice as a means to enhance economic growth, the legal framework of insurance contracts, and the area of insurance law. Ms. Öhman recalled the forthcoming end of the Stockholm program, and ventured an opinion on the follow up. She also pointed out some topics on the Council agenda -data protection, the rights of citizens, judicial networking… This panel was chaired by **Prof. Antonina Bakardjieva-Engelbrekt**, Stockholm University, who pronounced the closing remarks.

The ELI-UNIDROIT Project: From Transnational Principles to European Rules of Civil Procedure – 1st Exploratory Workshop

By Matthias Weller

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On 18 and 19 October 2013, the European Law Institute (ELI) and the International Institute for the Unification of Private Law (UNIDROIT) invited to a "First Explanatory Workshop" on the joint project „European Rules of Civil Procedure". This workshop intended to develop possible answers to the fundamental questions of why and how such a project could be put on the agenda and what it could possibly entail. In addition to these general questions on

conception, methodology and scope in the first part of the workshop, the second part dealt with a series of special problems and topics in civil procedure that might be considered as promising issues on the agenda. The idea was to see whether the Principles of Transnational Civil Procedure adopted in 2004 by the American Law Institute (ALI) and UNIDROIT could and/or should be adapted to the European legal context and whether European Rules of Civil Procedure could and/or should be developed.

The ALI/UNIDROIT Principles, developed from a universal perspective, were accompanied by Rules of Transnational Civil Procedure providing for a higher degree of precision and for suggestions on how the Principles could work. These Rules were never formally adopted either by ALI or by UNIDROIT but express the Reporters' views on how the Principles could be implemented, subject to adaptation under a certain legal order, as the case may be. Evidently, this structure provides for a plausible starting point for thinking about European(isation of) Rules of Civil Procedure that would have to take account of e.g. the European Convention on Human Rights as well as the European acquis of civil procedure.

The first public session was chaired by Professor Loïc Cadiet, University of Paris 1 and President of the International Association of Procedural Law. In opening the session, Cadiet drew the attention to the fact that European Rules of Civil Procedure could potentially contribute to reinforce the mutual trust of the Member States in the respective judiciary systems of other Member States. Indeed, a set of principles, possibly accompanied by rules making certain decisions on particularly important issues, could provide for a common standard to which a judicial system could be measured. In the following, José Angelo Estrella Faria, Secretary General of UNIDROIT, and Diana Wallis, President of the ELI, addressed the audience with introductory notes. Professors Geoffrey Hazard, University of Pennsylvania Law School and former director of the ALI, and Antonio Gidi, University of Houston Law Center and Associate Reporter and Secretary to the ALI / UNIDROIT project on Principles and Rules of Transnational Civil Procedure, presented their views and experiences with elaborating and "selling" the 2004 ALI/UNIDROIT Principles. Hazard also reported from the experiences with the introduction of US Federal Rules of Civil Procedure that resulted in "one generation of discontent" and a variety of problems still unresolved – a lesson that should limit the expectations to a realistic degree when

it comes to unifying rules on universal problems in civil litigation such as the judge's role, professional privileges, parallel litigation, group litigation and the like. Gidi underlined the necessity of taking certain decision on the scope such as covering only transnational litigation or including domestic litigation or covering only commercial litigation or including b-to-c litigation. His general experience is that the broader the scope the bigger the objections. Therefore, Gidi suggested excluding e.g. group litigation and other particularly contentious areas. In sum, Gidi appeared to be rather optimistic because there might be a broader consensus on core principles in the European legal cultures than there is worldwide.

In the discussion, Professor Thomas Pfeiffer, University of Heidelberg, suggested that the experiences from drafting European rules on contract law should be taken into account – both top-down and bottom-up input, both input from the national legal orders involved and from the acquis in EU law – as well as the guidance from influential rules on international arbitral proceedings such as e.g. on taking evidence or on dealing with conflict of interests.

Professor Catherine Kessedjian, University of Paris 2, agreed with the view that model rules could considerably help building (rather than "re-" inforcing) mutual trust.

The author of these lines suggested that the parallel agenda of the European Commission on formulating minimum standards (inter alia) for civil procedure should be taken into account because the European Commission, in its Action Plan on the Stockholm Programme (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme, COM/2010/0171 final), foresees at para. 4:

> *Strengthening confidence in the European judicial area: The European judicial area and the proper functioning of the single market are built on the cornerstone principle of mutual recognition. This can only function effectively on the basis of mutual trust among judges, legal professionals, businesses and citizens. Mutual trust requires minimum standards and a reinforced understanding of the different legal traditions and methods.*

And in the Annex the Commission announced for 2013 a Green paper on the

minimum standards for civil procedures and necessary follow up and, for 2014, a legislative proposal aimed at improving the consistency of existing Union legislation in the field of civil procedural law.

Interestingly, in its latest „Discussion Paper 1: EU Civil Law“ for the *Assises de la Justice* to be held on 21 and 22 November 2013 in Brussels, the Commission, on page 3, after underlining the necessity to reinforce mutual trust through procedural law integration, summarises its view to the future as follows:

> *The step-by-step progress being made in EU civil procedural law may call for a codification of these rules in the interests of legal certainty.*

In the second public session, Alexandra Prechal, judge of the Court of Justice of the European Union from the Netherlands, presented a series of cases connected to constitutional aspects of civil procedure. Professor Burkhard Hess, Director of the Max-Planck-Institute Luxembourg for International, European and Regulatory Procedural Law presented core concepts and trends in the European acquis of civil procedure. He suggested thinking of a “Brussels 0-Regulation” for civil procedure containing general principles and rules parallel to the discussion about a “Rome 0-Regulation” containing similarly general provisions for the European conflicts of law rules. Hess further reminded the audience of the great influence that special fields of European procedural law such as e.g. rules on ADR, IP litigation or cartel damages litigation do and should have on the building of general rules under an acquis perspective. Hess also drew attention to the potentially growing importance of the Judicial Scoreboard for evaluating Member States’ jurisdictions. Finally, Michael Shotter, European Commission, member of Commissioner Viviane Reding’s Cabinet, closed the public part of the conference with a report on the agenda of the European Commission in the field of civil procedure. He once more underlined the role of the Judicial Scoreboard as a tool for verifying the legitimacy of mutual trust as the essential principle of the architecture of EU civil procedure.

In the final discussion, Diana Wallis noted that ADR may have a considerable influence on the development of civil procedure because the more ADR becomes successful the more it takes out small claims from mainstream justice and rule-building. Wallis articulated the concern of special forms of “ebay-justice” that may not be desirable in all its facets.

In the closed expert workshops following the public part of the workshop a number of issues were addressed by presentations such as the possible structure of the proceedings (Xandra Kramer, Erasmus University Rotterdam), multiple claims and parties (Ianika Tzankova, Tilburg University/BarentsKrans), access to information and evidence (Nicolò Trocker, University of Florence), due notice and proceedings (Eva Storskrubb, Senior Associate, Roschier, Stockholm), obligations of the parties and lawyers (C. H. Remco van Rhee, University of Maastricht), provisional and protective measures (Gilles Cuniberti, University of Luxembourg), costs (Neil H. Andrews, University of Cambridge), lis pendens and res iudicata (Frédérique Ferrand, University Jean Moulin Lyon 3), transparency of assets and enforcement (Miklos Kengyel, University of Pécs), followed by closing remarks by Rolf Stürner, University of Freiburg.

The workshop took place at the impressive Palace of Justice in its neo-renaissance style at Schmerlingplatz in Vienna, the building in which, inter alia, the Supreme Court of Austria resides. According to its website, “in March 1873 Emperor Franz Josef I chose the site for a Palace of Justice, and by Imperial Ruling in September 1874, he resolved to construct it in Vienna, the capital and imperial residence, ‚in permanent solicitude for the needs of the administration of justice and the population in its quest for justice‘. The 1st exploratory workshop on the ELI-UNIDROIT Project on European Rules of Civil Procedure certainly furthered these aims excellently.

Third Issue of 2013’s Revue Critique Droit International Privé

The last issue of the *Revue critique de droit international privé* is out. It contains three articles and several casenotes.

In the first article, Eric Agostini (University of Bordeaux) revisits the doctrine of *renvoi* (*Le mécanisme du renvoi*). The English abstract reads:

> *The mechanism known as renvoi supposes, as a prerequisite, that the forum's choice of law rule, which refers to a foreign law with a different view on the determination of the applicable law, takes such a view into account for one reason or another. It then rests upon a debatable assumption that the diverging choice of law rules which are called upon to fit together are of a similar nature and that each one targets the totality of the conflict.*

In the second article, Léna Gannage (Paris II University) comments on two judgments of the French supreme court which declared adoption by homosexuals contrary to French public policy and which might have lost their relevance when France adopted a law allowing gay marriage a few months later (*Deux arrêts mort-nés. A propos des décisions rendues par la première chambre civile le 7 juin 2012*)

Finally, in the last article, Horatia Muir Watt (Sciences Po Law School) discusses the *Kiobel* decision of the US Supreme Court (*L'A*lien Tort Statute *devant la Cour Suprême des Etats-Unis. Territorialité, diplomatie judiciaire ou économie politique ?*)

CJEU rules on Art. 15 (1) lit. c) Brussels I-Regulation

On 17 October 2013 the Court of Justice of the European Union (CJEU) has handed down its long-awaited decision in *Lokman Emrek ./. Vlado Sabranovic*. The court held that consumers may sue professionals before their home courts according to Art. 15 (1) lit. c), 16 (1) Regulation 44/2000 (Brussels I) even if there is no causal link between the means used to direct the commercial or professional activity to the consumers' member state and the conclusion of the contract.

The facts of the case were as followed: Vlado Sabranovic, a resident of France, ran a used car business close to the German border. On his business website he listed several French telephone numbers and a German mobile phone number together with the respective international codes. Lokman Emrek, a resident of Saarbrücken in Germany, learnt about Mr. Sabranovic's business through friends. He, therefore, went to Mr. Sabranovic and bought a used car. Subsequently, he filed a claim against Mr. Sabranovic in Germany under the warranty agreement. He argued that German courts were competent according to Art. 15 (1) lit. c) 16 (1) of the Brussels I-Regulation because Mr. Sabranovic had targeted his activities through his website to Germany. Mr. Sabranovic, in contrast, argued that Art. 15 (1) lit. c), 16 (1) of the Brussels I-Regulation did not apply. Even though he had targeted his activity towards Germany the contract had not been the result of this activity. Mr. Emrek had never seen his website prior to conclusion of the contract.

In its decision the CJEU argues that the actual wording of Art. 15 (1) lit. c) does not expressly require the existence of a causal link between the targeted activity and the conclusion of the contract. In addition, it argues that there is no need to read an "unwritten condition" into the provision because Art. 15 (1) lit. c) is meant to protect the consumer as a weaker party. Introducing an additional requirement of causality, however, would require consumers to prove that they actually visited a website prior to the conclusion of the contract. This, in turn,

could prevent consumers from bringing a suit – and, thus, weaken consumer protection.

The court's decision is problematic for (at least) two reasons. First of all, while it is correct that Art. 15 (1) lit. c) of the Brussels I-Regulation does not expressly require a causal link between the targeted activity and the conclusion of the contract, the provision requires that the "contract falls within the scope of such activities". This phrase, however, is usually understood to require the kind of causal link that the court refuses to read into Art. 15 (1) lit. c) as an "unwritten condition". The court, therefore, does injustice to the wording of Art. 15 (1) lit. c) and ignores the pertaining literature. In addition, it also ignores Recital 25 of the Rome I-Regulation. Recital 25 elaborates on Art. 6 of the Rome I-Regulation and, thus, the provision that was expressly modeled on Art. 15 (1) lit. c). It explains that consumers should be protected if the professional directs his activities towards the consumer's habitual residence "*and the contract is concluded as a result of such activities*." Recital 25, thus, makes clear that Art. 6 (1) of the Rome I-Regulation requires a causal connection between targeted activity and conclusion of the contract. Since Art. 6 of the Rome I-Regulation and Art. 15 of the Brussels I-Regulation have to be interpreted in a coherent and consistent fashion there is little doubt that Recital 25 should also inform the interpretation of Art. 15 (1) lit. c).

Second, the CJEU decision runs counter to the rationale of Art. 15 (1) lit. c) of the Brussels I-Regulation. While it is true that Art. 15 (1) lit. c) Brussels I is meant to protect consumers it does not set out to protect all consumers in all cases. Rather it draws a line between consumers who deserve protection and those who don't. Consumers who actively go abroad to purchase goods and services without having been motivated by professionals to do so can hardly ever be regarded as being in need of protection. They leave their home country and, therefore, must expect to be subject to the jurisdiction and the laws of a foreign country. The mere fact that their contracting partner – without the consumers' knowledge – tried to attract foreign consumers is no reason to allow these consumers to rely on Art. 15 (1) lit. c). The CJEU, therefore, pushes the boundaries of consumer protection beyond what the European legislator had in mind – and beyond what is needed.

The full text of the decision is available here, the press release can be downloaded here.

Applying Foreign Punitive Damage Laws in Louisiana: The Experience of a Mixed Jurisdiction

F.X. Licari (Université de Lorraine) and B. West Janke (Baker, Donelson, Bearman, Caldwell & Berkowitz, PC), have posted this article on SSRN. Here is the abstract:

There is perhaps no better laboratory to scrutinize punitive damages than Louisiana. As a civil law island surrounded by common law jurisdictions, it shares some compensation principles that are decidedly civilian, and others that are clearly influenced by its American neighbors. Likewise, Louisiana's geography has given rise to a sophisticated, and well-exercised, system for addressing conflicts of laws. Here, the intersection of divergent principles of compensation provokes an inquiry into the validity of the "full compensation" theory. The conflicts analysis in the context of delicts and quasi-delicts, and especially in the context of punitive damages, is complex and involves a plurality of norms of the Louisiana Civil Code (La. Civ. Code). The general inquiry under Louisiana's conflicts analysis is the determination of the state whose policies would be most seriously impaired if its law were not applied to that issue. The central provision is La. Civ. Code art. 3515, which states :

Except as otherwise provided in this Book, an issue in a case having contacts with other states is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue. That state is determined by evaluating the strength and pertinence of the relevant policies of all involved states in the light of: (1) the relationship of each state to the parties and the dispute; and (2) the policies and needs of the interstate and international systems, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state.

> Analyzing this article with other Code articles and Louisiana case-law, the authors conclude that the likelihood that a Louisiana court will enforce a foreign punitive damage law is low, given that the conflicts analysis weighs heavily in favor of a determination that the tortfeasor has more contacts with Louisiana than elsewhere. The general policy prohibiting punitive damages greatly influences every factor of the conflicts analysis except for those factors that clearly weigh in favor of applying the law of another state. So long as Louisiana holds on to the belief that punitive damages are per se incompatible with the theory of full compensation, the conflicts analysis for punitive damages will seldom result in the imposition of the law of another state.

Ps: this contribution was first presented in a workshop held at the University of Metz on 24 May 2013 under the direction of F.X. Licari and Prof. O. Cachard. All the presentations have been collected in the *Revue Lamy Droit des Affaires* (nº 85, sept. 2013).

Two academic events in Ferrara concerning the Succession Regulation

On 8 November 2013 the Department of Law of the University of Ferrara, in cooperation with the Council of Notaries of Ferrara, will host a workshop (in English) and a roundtable (in Italian) on issues relating to Regulation No 650/2012 on successions.

The workshop (the third, this year, in a series of workshops on topics in the area of private international law: see this post for previous seminars) will feature Anatol Dutta (Max-Planck-Institut fur ausländisches und internationales Privatrecht. Hamburg), as main speaker, and Antonio Leandro (University of Bari) as discussant, with Luigi Fumagalli (University of Milan) presenting some concluding remarks. The topic of the workshop is “The European Certificate of

Successions – A didactic play on the challenges to forge integrated private international law regimes".

The roundtable will focus on the relevance of the new rules on cross-border successions to the planning of intergenerational passage in family businesses ("Passaggio generazionale nell'impresa e successione transfrontaliera – Problemi e prospettive alla luce del Regolamento (UE) n. 650/2012"). Speakers include Francesco Salerno (University of Ferrara), Paolo Pasqualis (Italian Council of Notaries), Fabrizio Vismara (University of Insubria) and Lorenzo Schiano di Pepe (University of Genova).

The roundtable will provide the opportunity to present a recently published collection of essays on Regulation No 650/2012 (see this post).

For more information: *pilworkshops@unife.it*.

The Instrumentalisation of PIL (article on SSRN)

Veerle Van Den Eeckhout (Leiden University and University of Antwerp) has published a short, updated version of "The Instrumentalisation of Private International Law: Quo Vadis?" on ssrn (click here).

The abstract reads as follows:

"Private International Law is known as a very abstract, legal-technical and inaccessible discipline. Yet it is striking that PIL issues are conspiciously often interwoven with a number of heated, topical socio-legal debates, see for example the debate on transnational corporate social responsibility, the debate on posting of employees from Eastern to Western Europe, the debate on residency and social-security entitlements of foreigners based on family relationships. Both where it concerns situations governed by European PIL rules and national PIL rules, the question arises what position PIL should take in the forces at play and

to what extent PIL can or should still adopt a *neutral* position."

The author would also like to share her ppt presentation on "Choice and Regulatory Competition – Rules on Choice of Law and Forum", which will be shown as part of the programme of the Maastrich Conference "The Citizen in European Private Law: Norm-setting, Enforcement and Choice", next Friday (click here).

Niedermaier on Arbitration and Arbitration Agreements Between Parties of Unequal Bargaining Power

Tilman Niedermaier, LL.M. (University of Chicago) has authored a book on "Arbitration Agreements and Agreements on Arbitral Procedure Between Parties of Unequal Bargaining Power. A Comparison of German and U.S. Law With Consideration of Further Legal Systems." (Originial German title: "Schieds- und Schiedsverfahrensvereinbarungen in strukturellen Ungleichgewichtslagen. Ein deutsch-U.S.-amerikanischer Rechtsvergleich mit Schlaglichtern auf weitere Rechtsordnungen").

The book is in German. The official English abstract reads as follows:

> *The German Arbitration Law of 1998 is particularly intended to meet the requirements of international commerce. One characteristic of international commercial disputes is a balance of power between the parties. However, structural imbalances between parties do occur not only in domestic and non-commercial disputes. In the recent years, issues raised by such imbalances in arbitration have received increasing attention in case law and legal scholarship in the United States.*

Tilman Niedermaier compares the law in Germany and the United States. Taking into account recent developments in EU law, he assesses to what extent the interests of parties with unequal bargaining power in arbitration can be safeguarded under German law.

More information is available on the publishers website.

Second Issue of 2013's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The second issue of 2013 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features three articles and two comments.

In her article *Nerina Boschiero*, Professor of International Law at the University of Milan, addresses the issue of "Corporate Responsibility in Transnational Human Rights Cases. The U.S. Supreme Court Decision in *Kiobel v. Royal Dutch Petroleum*" (in English).

With a decision based upon the consideration that all the significant conduct occurred outside the territory of the United States, in Kiobel the U.S. Supreme Court unanimously ruled that the presumption against extraterritoriality applies to claims under the Alien Tort Statute, and that nothing in the statute refutes that presumption. However, in its decision the Supreme Court did not directly address the issue whether a corporation can be a proper defendant in a lawsuit under the ATS. In this article, the Author begins by providing a substantial "pre-Kiobel" analysis of the business-human rights relationship. Furthermore,

in addressing – with reference to the Kiobel case – the issues of corporate liability and extraterritorial jurisdiction over abuses committed abroad, the Author provides a detailed description of the governments' positions on universal civil jurisdiction, also providing a critical evaluation of the arguments put forth by the EU Member States on the extraterritorial application of ATS. As the Author illustrates, this decision is far more complex and problematic than it may appear: it in fact leaves a number of questions open on what exactly remains of the ATS, as well as various uncertainties due to the substantive differences between the majority opinion and the different concurring opinions, difficult to be reconciled and harmonized, especially from an European standpoint.

In his article *Andrea Bonomi*, Professor of Comparative Law and Private international Law at the University of Lausanne, provides an assessment of the new EU Regulation on succession matters in "Il regolamento europeo sulle successioni" (The EU Regulation in Matters of Successions; in Italian).

The European Regulation on Succession Matters, adopted on 4 July 2012, will be applicable from 17 August 2015 to the succession of persons who die on or after this date. The final text reflects in its main features the Commission proposal of 2010, albeit with several amendments. Among the most important novelties, we will mention the restructuring of the jurisdictional scheme, the introduction of an exception clause and of some specific provisions concerning wills and the formal validity of mortis causa provisions, as well as the admission of renvoi. Several useful clarifications have also been included, sometimes in the text of the Regulation and sometimes in the preamble, inter alia with respect to the definition of "court", the determination of the last habitual residence of the deceased, the "acceptance" of evidentiary effects of authentic instruments, and the purpose and effects of the European Certificate of Succession. Overall, the Regulation is a very detailed and well-balanced instrument. In the majority of cases, the adoption of the habitual residence as the main criteria for the allocation of jurisdiction and the determination of the applicable law will allow national courts in the Member States to regulate the succession according to their domestic law. Derogations from this approach result in particular from the admission of party autonomy, and are mainly provided for estate planning purposes. The unification of the conflict of law rules in the Member States as well as the extension of the principle of mutual

recognition to decisions and authentic instruments to succession law matters will also significantly contribute to legal certainty, and further estate planning. Last but not least, the European Certificate of Succession will greatly facilitate the transnational administration of estates by heirs and representatives. On the other hand, the main weaknesses of the new instruments concern the relationships with non-Member States, and with those Member States who are not subject to the Regulation (Denmark, Ireland, and the United Kingdom); potential conflicts with the courts of those States, due to the wide reach of the Regulation's jurisdictional rules, cannot be avoided through lis pendens and recognition mechanisms. It is therefore to be hoped that the efforts of harmonization in the area of international succession will continue under the auspices of the Hague Convention at a global level.

In her article *Francesca C. Villata*, Professor of International Law at the University of Milan, addresses the reorganisation of the Greek sovereign debt in "Remarks on the 2012 Greek Sovereign Debt Restructuring: Between Choice-Of-Law Agreements and New EU Rules on Derivative Instruments" (in English).

The paper analyses – from a choice-of-law perspective – the restructuring mechanism implemented for the Greek sovereign debt bonds in 2012. In this respect, on one hand, the role played by parties' autonomy in determining the law applicable both to contractual and to non-contractual matters is emphasised; on the other hand, an analysis of the relevant EU Regulations on CDSs and derivative instruments, as wells as of the Mi-FID II and MiFIR proposals is conducted mainly through the lens of unilateral mandatory rules following the lex mercatus approach. The paper concludes with an auspice for the adoption of uniform rules on the insolvency or pre-insolvency of states, providing for agreed-upon restructuring processes.

In addition to the foregoing, the following comments are also featured:

Olivia Lopes Pegna, Researcher of International Law at the University of Florence, "L'interesse superiore del minore nel regolamento n. 2201/2003" (The Superior Interest of the Child in Regulation No 2201/2003; in Italian).

The European Union is increasingly concerned with private international law instruments regarding, directly or indirectly, children. The UN Convention on

the rights of the child (Art. 3) and the European Charter of Fundamental Rights (Art. 24) require that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests be a primary consideration. It is therefore mandatory for EU Institutions, and for national judges, to construe and apply EU legislative instruments in compliance with this principle. The present work concerns rules on jurisdiction and enforcement of foreign judgments that expressly refer to the best interests of the child in order to operate, and in particular the rules set in Regulation No 2201/2003 (Brussels II-bis) concerning decisions on parental responsibility. It tries to show how, and to what extent, "the best interests of the child" principle introduce flexibility, or even derogate, to the traditional private international law methods. The case-law of the European Court of Justice on the Brussels II-bis Regulation is examined, together with the main decisions of the Italian courts, in order to evaluate to what extent effectiveness to the aforementioned principle is guaranteed in the application of the Regulation's provisions. It is also suggested that the Regulation shall be construed in a way that permits, in some circumstances, the participation of the child to the proceedings for recognition and enforcement of foreign decisions.

Nicolò Nisi (PhD candidate at the Bocconi University), "La giurisdizione in materia di responsabilità delle agenzie di rating alla luce del regolamento Bruxelles I" (Jurisdiction over the Liability of Rating Agencies under the Brussels I Regulation; in Italian).

A recent judgment delivered by the Italian Supreme Court decided upon the jurisdiction over damage claims brought by investors against rating agencies based in the U.S., allegedly liable for issuing inaccurate ratings capable of having a significant impact on their investment decisions. In this regard, the new Regulation (EU) No 462/2013 amending Regulation (EC) No 1060/2009 on credit rating agencies has introduced a new Article 35-bis specifically addressing the liability of rating agencies but it failed to provide some guidance with respect to private international law issues. The Italian Supreme Court declined its jurisdiction on the grounds of Article 5(3) of Regulation (EC) No 44/2001 ("Brussels I") and ruled that the "place where the harmful event occurred" is localized at the place of the initial damage, i.e. where the shares were first purchased at an excessive price, without any reference to the seat of the depositary bank, nor to the place where the rating is issued. This judgment

turned out to be very interesting since it was the first Italian judgment to deal with jurisdiction issues relating to liability of rating agencies under the Brussels I Regulation and it provided for the opportunity to make a contribution to the discussion on the interpretation of Article 5(3) in case of financial torts and purely financial losses.

Indexes and archives of the RDIPP since its establishment (1965) are available on the website of the Department of Italian and Supranational Public Law of the University of Milan.