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.*
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> *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.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2013)

Recently, the November/December issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Bernhard Pfister***: "Kollisionsrechtliche Probleme bei der Vermarktung von Persönlichkeitsrechten" – the English abstract reads as follows:

Internationally famous celebrities often commercialize their personality rights

in different countries. The following article tries to solve the problem, what national law is applicable in regard to the protection of these rights; the relevant sources of law for a German court are Arts. 42, 40 and 41 EGBGB. In this context, German courts and literature mostly deal with defamation by the press. In those cases, the personality of the defamed is offended and the law of the state, where the injured person lives (Erfolgsort) or where the newspaper is published (Handlungsort), is applicable. The issue of protection of commercially used property rights, however, is a different matter: The personality of the celebrity is not harmed, but the property right gained by her/his achievement. It is situated in the country, where the she/he is known.

Only the law of the state, where the advertisement was placed, has to be applied. This is the place, where the action occurred (Handlungsort) and where the damage was caused (Erfolgsort). Neither the law of the country, where the advertising documents had been written, nor the law of the country of the habitual residence are applicable.

- ***Kurt Lechner:*** "The interplay between the law applicable to the succession and national property law (lex rei sitae) in the EU regulation on successions"

The line the European regulation on successions draws between the law applicable to the succession on the one hand, and property law on the other hand, raises specific questions in legal practice. The way a legatum vindicationis is to be treated by German law is a good example. Only a thorough analysis of the provisions in the regulation and their historic evolution in the law-making process can illustrate the functioning of the regulatory system. The stipulations of Article 1 (2) lit. l together with recital 18 of the regulation are the result of a carefully considered compromise between the institutions involved in the legislative process. Besides leaving the national register proceedings as such unaffected, the final wording expressly states that it is the national law that determines "the effects of recording or failing to record such rights in a register". Moreover, as far as immovable property is concerned, recital 18 confirms the lex rei sitae principle. The European legislator hence gives precedence to the national property law, the accuracy of registers and the protection of bona fide rights over a more comprehensive application of the law applicable to the succession. As a result, and as far as real estate located in

Germany is concerned, neither can rights in rem be created nor ownership be transferred without registration in the German land register. Accordingly, the protection of the integrity of the German land register and the protection of bona fide rights require a formal agreement (Auflassung) between the parties involved in the transfer of ownership.

- ***Matthias Weller***: "Keine Drittwirkung von Gerichtsstandsvereinbarungen bei Vertragsketten" – the English abstract reads as follows:

In Refcomp the ECJ rejected any binding effect of a choice of forum clause on following buyers in the distribution chain raising an "action directe" under French law against the first seller. The judgment is unconvincing both in its reasoning and its result. It appears preferable to characterise as contractual the direct claim against the first seller if and to the extent the claim aims at compensating the contractual interests in full performance. The characterisation as delictual results in unforeseeable places of jurisdiction at the domicile of the respective buyer in the distribution chain. If the applicable law grants a direct claim to a third party, thereby transgressing the relativity of the contract, it appears justified to bind the privileged third party to what the contractual parties agreed for each other in respect to claims compensating the contractual interest.

- ***Jan von Hein***: "The applicability of Art. 5 No. 3 Brussels I-Regulation to damages caused by multiple tortfeasors"

In Melzer v. MF Global UK Ltd, the CJEU refused the application of article 5 no. 3 of the Brussels I Regulation in a case in which the plaintiff who claimed to have been harmed by multiple tortfeasors had sued only the alleged accomplice, a London broker, at the place where the main perpetrator, a German company, had committed the relevant acts, i.e. defrauded the claimant. The German courts had so far applied a principle of "reciprocal attribution of the place where the event occurred" amongst multiple tortfeasors in such cases. The CJEU argued, however, that there is no equivalent autonomous concept in the Regulation, that art. 5 no. 3 must be interpreted restrictively and that the plaintiff could instead have sued under art. 5 no. 1 or art. 6 no. 1 of the Regulation. In his critical note, Jan von Hein argues that, given the substantial

convergence of Member States' laws on joint and several liability of multiple tortfeasors, the Court should have contributed to the development of an autonomous rule on attribution. The doctrine of restrictive application of art. 5 no. 3 is not absolute, but must be balanced against the principle of effet utile. The alternatives suggested by the CJEU – generously re-characterizing claims sounding in tort as contractual or suing all alleged tortfeasors at the same time – are, in a large number of cases, either not available or lead to unsatisfactory consequences. Particularly in the given case, a suit against the main perpetrator would not have been admissible because of its insolvency. The note concludes with an outlook on pending cases concerning infringements of intellectual property rights.

- ***Wulf-Henning Roth:*** "Choice-of-law clauses in consumer contracts – a difficult matter?"

The judgment of the Bundesgerichtshof (BGH) deals with the use of a choice-of-law clause in the standard terms of a consumer contract. Applying German law to the relevant clause the Court holds that a choice-of-law clause may not be misleading and has to stand up to the standard of transparency. The implications of this approach need to be discussed further on. The Court classified the action for injunctive relief brought by a trade organisation as delictual, applying German private international law of torts, thereby disregarding the Rome II-Regulation. Moreover, the Court hold that the question whether the relevant choice-of-law clause stands up to the standard of transparency shall be determined by the applicable law of torts, instead of classifying this issue as a contractual one. It is suggested that this classification should be reconsidered.

- ***Stefan Arnold***: "Claims for Damages by Private Investors in Foreign Funds – Some Aspects Concerning International Private and Procedural Law"

The Federal Court of Justice (Bundesgerichtshof) reaffirms its jurispru- dence concerning the jurisdiction of German courts in consumer matters under sec. 13 and 14 Lugano Convention 1988. These provisions give German courts jurisdiction in proceedings brought to by German consumers concerning

investments in Switzerland. Actions based on an infringement of § 32 German Banking Act (Kreditwesengesetz), on culpa in contrahendo (here: breach of precontractual duties of disclosure) and on prospectus liability according to sec. 127 German Investment Act (Investmentgesetz) are considered as „proceedings concerning a contract" in the sense of sec. 13 Lugano Convention 1988. This wide interpretation is not mirrored at the Conflict of Laws level however. Here, it is argued, the law applicable to damage claims based on an infringement of § 32 German Banking Act and on sec. 127 German Investment Act does not follow the law applicable to the contracts. It must rather be determined according to the Conflict of Law rules as it regards non-contractual obligations.

- ***Marc-Philippe Weller/Bettina Rentsch***: "The Combination Theory (Kombinationslehre) and cross-border Company Conversion: Incentives from EU Law"

The ECJ VALE Case (ECJ, 12.7.2012 – C-378/10 – VALE Építési kft) concerns an Italian Company's conversion into a Hungarian legal form, but being refused to register according to Hungarian corporate law. The Court, with reference to its well-known Cartesio Judgement, considers the refusal, firstly, to fall under the scope of Art. 49, 54 TFEU, and, secondly, to interfere with the EU freedom of establishment. The article examines the consequences of this reasoning for Private International Law. Especially, it adapts the requirements of the so-called Combination Theory, developed by Beitzke, to the requirements of the Freedom of Establishment.

- ***Dieter Martiny***: "Deutscher Kündigungsschutz für das Personal ausländischer Botschaften?" – the English abstract reads as follows:

The case note analyses a judgment of the Federal Supreme Labour Court (Bundesarbeitsgericht; BAG) as well as a related judgment of the European Court of Justice in a case concerning the dismissal of a member of the local staff of the Algerian Embassy in Berlin. The case first required determining whether sovereign immunity of the Algerian State barred German jurisdiction. The Federal Supreme Labour Court expressed some sympathy for the argument of the Algerian State that the employed driver also performed other duties, such as translation services, which could justify immunity. The Federal Court reversed the judgment of the Appellate Labour Court of Berlin-Brandenburg for

insufficient findings of fact and remanded the matter back to the Appellate Court. In respect of the law applicable to the employment contract, there was an implied contractual choice of Algerian law, and therefore the so-called "principle of favourability" under Article 6 of the Rome Convention of 1980 had to be applied. Subsequently, after it again rejected immunity, the Appellate Labour Court of Berlin- Brandenburg referred the case to the European Court of Justice for clarification on whether an embassy constitutes a branch, agency or other establishment within the meaning of Article 18(2) of Regulation No. 44/2001. The Court of Justice ruled that Article 18(2) must be interpreted as meaning that an embassy of a third State situated in a Member State is an "establishment" within the meaning of that provision in a dispute concerning a contract of employment concluded by the embassy on behalf of the sending State, where the functions carried out by the employee do not fall within the exercise of public powers (an act iure gestionis). It is for the national court seized to determine the precise nature of the functions carried out by the employee. There is no uniform European approach for the interpretation of international law criteria, and the European Court of Justice has insofar no competence to render such a decision. However, the European Court of Justice affirmed the rejection of immunity as concerns the preliminary reference procedure. According to the European Court of Justice, an embassy may be equated with a centre of operations which has the appearance of permanency and contributes to the identification and representation of the State from which it emanates. A dispute in the field of employment relations has a sufficient link with the functioning of the embassy in question with respect to the management of its staff.

The agreement on jurisdiction in favour of the Algerian courts did not preclude the jurisdiction of German labour courts. Article 21(2) of Regulation No. 44/2001 must be interpreted as meaning that an agreement on jurisdiction concluded before a dispute arises falls within that provision in so far as it gives the employee the possibility of bringing proceedings not only before the courts ordinarily having jurisdiction under the special rules in Articles 18 and 19 of that regulation, but also before other courts, which may include courts outside the European Union. However, a jurisdiction clause depriving the employee of a possibility to sue would have no effect.

The case note discusses the concept of immunity in cases of employment of

embassy personnel. It argues that performance of additional duties like translation services cannot justify an exclusion of jurisdiction. The application of the pro- visions on jurisdiction in labour cases by the European Court of Justice is correct. The applicable law on the employment contract is discussed not only under the Rome Convention of 1980 but also under Article 8 of the Rome I Regulation on contractual obligations of 2008. It is argued that unfair dismissal provisions protecting a single employee are not overriding mandatory provisions under the Convention of 1980 and also not under the Rome I Regulation. However, since the employee habitually carried out his work in Germany and there was no closer connection to Algeria, the standard of protection is German law in any event.

- ***Ulrich Spellenberg***: "Form und Zugang" – the English abstract reads as follows:

The sole director of a German private limited company (GmbH) wants to resign and sends his notice to the sole shareholder of the company, a Californian Incorporated Company. The reception of the notice is confirmed by a fax sent by a person whose position or function in the Incorporated Company remains unclear. The Commercial Register in Hamburg and the lower German courts who dealt with the case refuse to enter the termination of the director's function in the commercial register because he didn't establish that his notice reached a competent person or organ of the American Incorporated Company. The federal Court (BGH) allows the appeal by applying the German rules to decide when a notice is deemed to have reached its addressee since it was sent from Germany. The outcome in this case is correct but the reasoning is not. In contradiction to its former ruling and to the general opinion the Court falsely classifies "reception" as matter of form of legal acts in the sense of Article 11 EGBGB which alternatively applies the law of the place of sending and the law of the contract. However, reception is not a matter of "form" and the Court would at least have needed to support its new classification with reasons.

- ***Csongor István Nagy***: "Cross-border company conversions in a legal vacuum: the Hungarian Supreme Court's follow-on judgment in VALE"

After the CJEU's judgment in VALE, the EU right to cross-border conversions remains a largely unregulated right. When national law contains no special

rules concerning international conversions, the judge has to apply, by analogy, the rules of domestic conversions to cross-border conversions. The Hungarian Supreme Court's judgment in the principal proceeding is a good example for what kind of troubles emerge, if as to cross-border conversions the companies and their founders, instead of concrete requirements, have to fulfill conditions that are interpreted and applied mutatis mutandis. The moral of the Hungarian Supreme Court's judgment is that conversions raise complex issues, which are to be addressed not in the court room but through careful legislation. Cross-border company conversions in a legal vacuum: the Hungarian Supreme Court's follow-on judgment in VALE

Curran on Extraterritoriality, Universal Jurisdiction, and the Challenge of Kiobel

Vivian Grosswald Curran (University of Pittsburgh – School of Law) has posted Extraterritoriality, Universal Jurisdiction, and the Challenge of *Kiobel v. Royal Dutch Petroleum Co.* on SSRN.

This article analyzes Kiobel v. Royal Dutch Petroleum Co. as a point of juncture between extraterritorial and universal jurisdiction, inasmuch as it harks from two lines of case law which have both overlapping and distinctive attributes. It also touches on the comparative law challenge to international law, ending by noting the immense leaps and bounds of the field since the days of the valiant Helmuth von Moltke.

The article is forthcoming in the *Maryland Journal of International Law.*

UK Supreme Court Rules on European Lis Pendens

On 6 November 2013, the UK Supreme Court delivered its judgment in the three cases *in the Matter of the Alexandros T*.

The Court issued the following press release:

BACKGROUND TO THE APPEALS

On 3 May 2006, the vessel Alexandros T sank and became a total loss 300 miles south of Port Elizabeth with considerable loss of life. Her owners were Starlight Shipping Company ("Starlight"). Starlight made a claim against their insurers, who denied liability on the basis that the vessel was unseaworthy with the privity of Starlight. In response, Starlight made a number of serious allegations against their insurers including allegations of misconduct involving tampering with and bribing of witnesses.

On 15 August 2006, Starlight issued proceedings in the Commercial Court against various insurers ("the 2006 proceedings"). One group of insurers was described as the Company Market Insurers ("CMI") and the other group was described as the Lloyd's Market Insurers ("LMI"). Before the hearing, the 2006 proceedings were settled between Starlight and the insurers and the proceedings were stayed by way of a Tomlin Order.

In April 2011, nine sets of Greek proceedings, in materially identical form, were issued by Starlight although they were expressed as torts actionable in Greece. The insurers sought to enforce the earlier settlement agreements. Starlight applied for a stay of these proceedings, firstly pursuant to Article 28 then Article 27 of Council Regulation (EC) No 44/2001 ("the Regulation")

The judge refused to grant a stay under Article 28 and gave summary judgment to the insurers. The Court of Appeal held that it was bound to stay the 2006 proceedings under Article 27, which provides for a mandatory stay, and it was not

therefore necessary to reach a final determination of the position under Article 28. Before the Supreme Court, the insurers challenge the correctness of the Court of Appeal's conclusion under Article 27 and submit that the judge was correct to refuse a stay under Article 28. Starlight cross-appeal on the Article 28 point.

JUDGMENT

Subject to the possibility of a reference to the CJEU on some limited questions, the Supreme Court unanimously allows the CMI's and LMI's appeal. Lord Clarke gives the lead judgment, with which Lord Sumption and Lord Hughes agree. Lord Neuberger agrees adding a short judgment of his own. Lord Mance agrees with the result.

REASONS FOR THE JUDGMENT

Article 27

Article 27 must be construed in its context. The purpose of Article 27 is to prevent the courts of two Member States from giving inconsistent judgments and to preclude, so far as possible, the non-recognition of a judgment on the ground that it is irreconcilable with a judgment given by the court of another Member State [23, 27].

In the case of each cause of action relied upon, it is necessary to consider whether the same cause of action is being relied upon in the Greek proceedings. In doing so, the defences advanced in each action must be disregarded [29]. The essential question is whether the claims in England and Greece are mirror images of each other and thus legally irreconcilable [30]. There are three heads of claim in England: indemnity, exclusive jurisdiction and release [32].

None of the causes of action relied upon in the Greek proceedings has identity of cause or identity of object with the CMI's claim for an indemnity. The subject matter of the claims is different. The Greek proceedings are claims in tort (or its Greek equivalent) and the claims in England are claims in contract. As to object, that of the Greek proceedings is to establish a liability under Greek law akin to tort, whereas the object of the CMI's claim is to establish a right to be indemnified in respect of such a liability and to claim damages for breach of the exclusive jurisdiction clauses [34].

The same is true of the CMI's claims in respect of the exclusive jurisdiction clauses in the settlement agreement and/or in the insurance policies [36]. The causes of action based upon an alleged breach of the settlement agreement are not the same causes of action as are advanced in Greece [37].

The same is also true of the claims based on the release provisions in the CMI settlement agreement [40]. The Greek claims are claims in tort and the English proceedings are contractual claims. The factual bases for the two claims are entirely different. Moreover, the object of the two claims is different [41]. The Supreme Court is unanimous that that is the position with regard to the claims for damages for breach of the release provisions in the settlement agreements. However, in so far as the insurers claim declarations, while the majority reaches the same conclusion, Lord Mance reaches a different conclusion on the basis that the claims for declarations in the two jurisdictions are mirror images of each other. The court unanimously decides that, unless the insurers abandon those claims for declarations, the relevant question should be referred to the CJEU for an opinion [59].

In the event, the CMI have now abandoned their claims for declarations based on the release provisions and it is not necessary to refer the question to the CJEU. It follows that the CMI's appeals under Article 27 are allowed. The position of the LMI is essentially the same as in the case of the CMI [55]. If the LMI do the same within the time permitted, their appeals will also be allowed under Article 27. A similar position has been reached in respect of LMI's submission that the appeals under Article 27 should have been rejected by the Court of Appeal as being too late [123].

Article 28

The discretion to stay claims under Article 28 is limited to any court other than the court first seised [74]. On the assumption that the English court is second seised for the purposes of Article 28, the question arises whether the actions should be stayed as a matter of discretion [91]. The circumstances of each case are of particular importance but the aim of Article 28 is to avoid parallel proceedings and conflicting decisions. In a case of doubt it would be appropriate to grant a stay [92]. However, the natural court to consider the issues raised by CMI and LMI is the High Court in England because they raise contractual questions governed by English law and because it is at least arguable that the

parties have agreed that they should be decided by the High Court, where the proceedings are more advanced than in Greece [96]. The decision of the judge in refusing a stay under Article 28 is upheld and the cross-appeal is dismissed [97, 125].

References in square brackets are to paragraphs in the judgment.