New PIL Workshop Series at Nanterre University

The University of Paris Ouest Nanterre la Defense, formerly known as Nanterre or Paris X University, will host a private international law workshop series starting 29 January 2014.

One purpose of the series will be to allow exchange between practitioners and academics. The first conference will discuss **pre-nuptial agreements**. The speakers will be two practitioners, and the discussant will be an academic.

> *Le Centre de droit international de Nanterre (CEDIN) est heureux de vous convier à son premier atelier pratique en droit international privé qui aura lieu mercredi 29 janvier 2014, à 18h30 en salle F 352 sur le thème :*
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> ***L'anticipation matrimoniale : du contrat de mariage traditionnel au prenuptial agreement moderne***
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> *Ou comment en pratique l'utilisation sur mesure des outils du droit international privé – et notamment ceux des règlements européens récents – permet d'améliorer la sécurité juridique des époux et de définir, non seulement, le statut de leurs biens mais également les conséquences pécuniaires en cas de divorce, le tout dans un contexte de mobilité internationale.*
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> *Exposants :*
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> - *Me Isabelle REIN-LESCASTEREYRES (Avocat)*
> - *Me Bertrand SAVOURE (Notaire)*
>
> *Discutant : Marie-Laure NIBOYET (Professeur à l'Université de Nanterre)*
>
> *Contacts :*
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> - *CEDIN – Mme Stéphanie Millan, ingénieur d'études, cedin@u-paris10.fr – tel : 01 40 97 77 22*
> - *François de Bérard, maître de conférences en droit privé, coordinateur scientifique, deberardf@gmail.com*

En 2014 les thèmes abordés seront : L'anticipation matrimoniale : le contrat prénuptial / La saisie d'actifs d'Etats étrangers sur le sol français / L'obtention des preuves en France et à l'étranger / L'anticipation successorale.

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

Sergio Maria Carbone, Professor Emeritus at the University of Genoa, provides an assessment of party autonomy in substantive and private international law in **"Autonomia privata nel diritto sostanziale e nel diritto internazionale privato: diverse tecniche e un'unica funzione"** (Party Autonomy in Substantive and Private International Law: Different Techniques and a Single Function; in Italian).

> *The paper focuses on the techniques through which party autonomy may operate in contractual relationships with the aim of assessing that (i) such techniques are, in practice, more and more difficult to define as to their respective fields of application; (ii) irrespective of which of such different techniques is actually deployed, they all share the common objective and the unified task to accomplish, in the most exhaustive way, the plan that the parties intended to implement by executing their contract. Indeed, party autonomy may operate either as a tool for the regulation of an entire relationship or of parts thereof, or as a conflict of laws rule or, again, as a direct or indirect source of*

regulation of contractual relationships. Whatever the specific role played by party autonomy with regard to a given contract, party autonomy eventually pursues the aim of executing the parties' underlying programme, provided that the fulfillment thereof is consistent with public policy, overriding mandatory rules and with the mandatory rules of the State with which the contract is exclusively connected. In this view, it is also confirmed the gradual establishment of the so-called material considerations method with regard to private international law solutions and, in particular, to the choice of the national legal system which may come into play in determining the law applicable to contractual relationships.

Cristina Campiglio, Professor at the University of Pavia, examines the history of private international law from the Statutaries to the present day in **"Corsi e ricorsi nel diritto internazionale privato: dagli Statutari ai giorni nostri"** (History Repeating Itself in Private International Law: From the Statutaries to the Present Day; in Italian).

Private international law ("PIL") aims at pursuing its basic mission, i.e. coordinating the different legal systems and underlying legal cultures, by providing an array of practical solutions. However, no rigid recipe proves to be completely satisfying. As a matter of fact, a growing evidence is accumulating that a merely dogmatic approach is often inconclusive and that PIL implementation cannot be reduced to a mere sum of rigid techniques. Rather, it has turned into an art of its sort, where theories and legal sensibilities may be compounded time to time in different ways. Due to the difficulty (the impossibility, at times) to define a clear-cut hierarchy of values – whether arising from the national legal systems or inherent to individual rights – the legal operator has to come to terms with juridical relativism and, in the absence of any binding guidance, search the most suitable solution to the case in point. Concerning the family law field, which has been known to be the most affected by normocultural differences (i.e., differences in law which are a reflection of cultural differences), it appears that the preferred solution should be the one that assures the continuity of individual status both in time and in space. In the past few years, this need of continuity has led scholars to revaluate old legal theories and to develop a new method (the so-called recognition method), which essentially put aside conflict rules. This method has been used occasionally by the domestic legislator, who has developed a number of "receptive" choice-of-

law rules. However, the recognition method is hard to be applied when the foreign legal institution is unknown to the local court and an adaptive transposition is required. In such an event, another aged theory can be resurrected, i.e. the substitutive method. The main goal of this contribution is on the one hand to provide evidence of the persisting relevance of the old legal theories mentioned above (some of which dating back to the seventeenth century), while suggesting on the other hand the need to give methodological rigor up, in favor of a more eclectic and efficient exploitation of the variety of methods that PIL makes available.

Carla Gulotta, Associate Professor at the University of Milano-Bicocca, addresses jurisdiction over employers domiciled abroad namely with reference to the *Mahmadia* case in **"L'estensione della giurisdizione nei confronti dei datori di lavoro domiciliati all'estero: il caso *Mahamdia* e il nuovo regime del regolamento Bruxelles I-*bis*"** (The Extension of Jurisdiction over Employers Domiciled Abroad: The *Mahamdia* Case and the New Regime under the Brussels Ia Regulation; in Italian).

After years of doctrinal debate, public consultations and normative efforts, the Recast of the Brussels I Regulation was finally adopted on 12 December 2012. Among the most innovative features of the new Regulation is the extension of the jurisdiction of EU Member States' courts towards employers not domiciled in the Union. According to the author the new rules cannot be labeled as giving raise to "exorbitant grounds of jurisdiction", nor can they be entirely understood unless they are read as the outcome of the efforts of the EU's Legislator and judges to guarantee the enforcement of European rules aimed at employees' protection in international employment cases. The article also argues that while waiting for the new Regulation to become effective, the European Court of Justice is anticipating its effects through an unprecedented wide construction of the expression "branch, agency or establishment" ex Art. 18(2) of Regulation No 44/2001. Lastly, the author suggests that the difficulties envisaged as for the recognition and the enforceability of the judgments given on the new grounds of jurisdiction might be overcome in respect of those Countries knowing similarly extensive rules of protective jurisdiction, or otherwise recurring to a principle of comity.

Rosario Espinosa Calabuig, Profesora Titular at the University of Valencia, examines the interface between the 1999 Geneva Convention on the Arrest of Ships and Regulations Brussels I and Brussels Ia in **"¿La desarmonización de la armonización europea? A propósito del Convenio de Ginebra de 12 de marzo de 1999 sobre embargo preventivo de buques y su relación con los reglamentos Bruselas I y Bruselas I *bis*"** (The Disharmonization of the European Harmonization? Remarks on the Geneva Convention of 12 March 1999 on the Arrest of Ships and Its Interface with Regulations Brussels I and Brussels Ia; in Spanish).

> *The International Convention on Arrest of Ships of 1999 came into force on September 14, 2011, and so far it has been ratified by only four EU Member States, including Spain. As the precedent Convention of 1952 – which is still in force in most of the EU Member States – the 1999 Convention prescribes rules on both international jurisdiction, and recognition and enforcement of decisions. Accordingly, the European Union seems to be the one entity having standing to ratify the 1999 Convention, at least with regard to those rules. To this effect, doubts arise about the legality of the aforementioned accession of EU Member States to the Convention but, in particular, about the EU interest in the ratification of the Convention of 1999. Such ratification ought to be encouraged by other Member States, but this is not granted at all. Still, the EU might authorize Member States to ratify the 1999 Convention as previously occurred with reference to other maritime Conventions, such as the 2001 Bunkers or the 1996 HNS. Meanwhile, the 1999 Convention is already operating in countries like Spain. Hence, conflicts arising from the non-coordination between its provisions and those of the Brussels I Regulation ought to be addressed. Among such conflicts are, for example, those arising from a provisional measure being adopted inaudita parte by different courts within the European area of justice. Furthermore, the Brussels I Regulation was recast by Regulation No 1215/2012 which will be in force as of 2015, and among other innovations abolishes exequatur. This paper aims at unfolding those conflicts which might be solved by resorting to the ECJ case-law, in particular Tatry and TNT Express.*

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

Lidia Sandrini, Researcher at the University of Milan, **"Risarcimento del danno**

da sinistri stradali: è già tempo di riforma per il regolamento Roma II?" (Compensation for Traffic Accidents: Has the Time Come to Amend the Rome II Regulation?; in Italian).

> *This article addresses Regulation EC No 864/2007 in so far as it deals with traffic accidents, at the aim of investigating whether there is an actual need for amendments to the rules applicable in this field. It is submitted that the coordination between the Regulation and the Motor Insurance Directives can be achieved through the interpretation of the different legal texts in the light of their respective scopes and objects. On the contrary, the impact of the application of the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents definitely needs to be addressed by the EU legislator, in order to ensure the consistency of the solutions in the European judicial area. Finally, with regard to the interpretation of specific connecting factors provided for by the Regulation, it appears that most of the difficulties highlighted by Scholars and faced by judges are due, on one hand, to an inaccurate drafting, and, on the other hand, to the lack of explicit and detailed solutions with regard to general problems, such as the treatment of foreign law, the law applicable to the preliminary questions, and characterization.*

Luigi Pintaldi, Law Graduate, **"Il contrasto tra lodi arbitrali e decisioni dei giudici degli Stati dell'UE nel regolamento (CE) n. 44/2001 e nuove prospettive"** (The Conflict between Arbitral Awards and EU Courts Decisions under Regulation No 44/2001 and New Perspectives; in Italian).

> *This article addresses the exclusion of arbitration from the scope of Regulation EC No 44/2001, as interpreted by the Court of Justice of the European Union in the well-known case West Tankers. In West Tankers the Court maintained that the validity or the existence of an arbitration agreement determined as an incidental question comes within the scope of the Brussels Regulation when the subject-matter of the dispute comes within the scope of it. This unsatisfactory result raised the issue of recognition and enforcement of a judgment from a Member State in conflict with an arbitral award recognised and enforced in another Member State. The recognition and enforcement of a judgment may be refused in conformity with paragraphs 3 and 4 of Article 34 affirming that the arbitral award is treated like a judgment with res judicata effects. Alternatively, the recognition and enforcement of a judgment may be refused in accordance*

with the paragraph 1 of Article 34 stating that the New York Convention prevails over the Brussels I Regulation. Recently, the precedence of the New York Convention was explicitly provided by paragraph 2 of Article 73 and Recital 12 of the new Brussels I Regulation, i.e., Regulation EU No 1215/2012. The exclusion of arbitration was retained by the new Brussels I Regulation with further details: in fact, the ruling rendered by a Court of a Member State as to the validity or the existence of an arbitration agreement now falls within the scope of application of the Regulation, regardless of whether the Court decided on this as a principal issue or as an incidental question. In the light of the new Brussels regime, it seems clearer that the question whether a judgment from a Member State shall be recognized and enforced when it is in conflict with an arbitral award is left to each national law and international conventions.

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale.

PhD scholarship in European conflict of laws at University of Antwerp

The Universty of Antwerp ofers a position for a PhD candidate in the field of European conflict of laws. The candidate will research “the specific character, principles and objectives of European conflict of laws”. The research project is funded by the Research Foundation – Flanders (FWO) for a period of four years starting as soon as possible, but at the latest on 1 September 2014.

For more information see the vacancy on the University of Antwerp’s website.

Fourth Issue of 2013's Revue critique droit international privé

The next installment of the *Revue critique de droit international privé* will contain four articles.

-Petra Hammje on the New French Conflict of Law rules on Same Sex Marriage.

> *Changing radically the conception of marriage in the French civil code without proposing a global vision of the family, the French law of 17th May 2013 asserts a firm will, in respect of cross-border relationships, to encourage the conclusion of same-sex unions whether through the adoption of a « commited » conflicts rule relating to the creation of the union (formal and substantive validity) or through the generous recognition of unions celebrated abroad. However, the law remains silent on the international effects of such unions, often prohibited elsewhere, both in respect of the effects of marriage between spouses and in respect of the access to parent-child relationships through adoption or surrogacy arrangements.*

-Symeon Symeonides on The Hague Principles on the law applicable to international contracts.

> *This Article discusses the Hague Principles on Choice of Law for International Contracts, a new soft-law instrument recently adopted by the Hague Conference of Private International Law. They will apply to "commercial" contracts only, specifically excluding consumer and employment contracts. For this reason, the Principles adopt a decidedly liberal stance toward party autonomy, exemplified inter alia by a strong endorsement of non-state norms. Such a liberality would be unobjectionable, indeed appropriate, if a contract's "commerciality" alone would preclude the disparity of bargaining power that characterizes consumer and employment contracts. The fact that—as franchise contracts illustrate—this is not always the case makes even more necessary the deployment of other mechanisms of policing party autonomy. The Principles provide these mechanisms under the rubric of public policy and mandatory rules, but their effectiveness is not beyond doubt.*

> *The Principles are intended to serve as a model for other international or national instruments and as a guide to courts and arbitrators in interpreting or supplementing rules on party autonomy. Like other international instruments, the Principles are as good as the consensus of the participating delegations would allow. But the real test of success for these Principles depends not on academic approbation but on their reception by contracting parties, courts, and arbitrators. While it is too early to tell whether the Principles will pass this test, there is reason for optimism.*

-Dieter Martiny on the PIL dimensions of the 2010 agreement between France and Germany on a new optional matrimonial property regime.

– Horatia Muir Watt on the follow-up to Kiobel (the case of Sexual Minorities v. Lively).

Once More Unto the Breach of Extraterritorial Discovery under Section 1782

We've discussed on this site in the past the various nuances and pervasive disagreements among the U.S. federal courts regarding the scope of discovery in aid of foreign tribunals under 28 U.S.C. § 1782. The longest-running dispute is whether that statute can be used in aid of arbitral tribunals, and the scholarship on this question is rich. (See here, and here.). Another disagreement, however, just won't go away, but hasn't garnered nearly as much public attention: that is, whether the statute can reach documents held outside the United States.

Before the holidays, the Southern District of New York decided *In re Application of Kreke Immobilien KG* (S.D.N.Y. 2013), a case brought in U.S. court under § 1782 to obtain documents from Deutsche Bank for use in a German litigation. Deutsche Bank argued that the court had to deny the application because the

documents in question were not kept in the United States. To be sure, the statute does not impose such a limitation, but citing Judge Rakoff's decision in *In re Godfrey*, 526 F. Supp. 2d 417 (S.D.N.Y. 2007), Judge Buchwald held that the statute does indeed bar extraterritorial discovery. She therefore denied the application.

Judge Rakoff decided five years ago that the Supreme Court in Intel "implicitly assumed that evidence discoverable under § 1782(a) would be located in the United States." But the evidence of that implicit assumption is merely dictum: "nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, *available in the United States*, may be unobtainable absent § 1782(a) aid." (emphasis added). "Available in the United States," however, could mean simply that the evidence is obtainable via legal process in the United States; it need not mean that the evidence is physically located in the United States. And this seems the better reading given the metaphysical problem of determining exactly where a document is "located." I'm not the only one to espouse that view; Ted Folkman's recent post on the Kreke Immobilien decision seems to agree.

As Judge Buchwald noted, the federal courts are deeply split on this issue. Some courts have followed Judge Rakoff's decision in *Godfrey* and read § 1782 narrowly. *See, e.g., In re Sarrio S.A.*, No. 9-372, 1995 WL 598988 (S.D.N.Y. Oct. 11, 1995); *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 194, fn. 5 (S.D.N.Y. 2006); *Norex Petroleum Ltd. v. Chubb Ins. Co. of Can.*, 384 F. Supp. 2d 45 (D.D.C. 2005). Other courts, however, read the statute more naturally, and hold that a court's power under § 1782 is coextensive with the Federal Rules. Indeed, this is what the penultimate sentence of § 1782(a) says (stating that discovery should generally proceed "in accordance with the Federal Rules of Civil Procedure"). Under those Rules, a person under subpoena in the United States can be compelled to produce all documents within his "possession, custody or control," *see* Fed. R. Civ. P. 45(a)(1)(A)(iii), "even if the documents are located abroad," *Tequila Centinela, S.A. de C.V. v. Bacardi & Co. Ltd.*, 242 F.R.D. 1, 12 (D.D.C. 2007) (emphasis added); *see also Cooper Indus., Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984). On this basis, a number of federal courts in recent years have ordered Section 1782 discovery of documents located outside the United States when the person is found there. *See, e.g, In re Eli Lilly & Co.*, No. 3:09MC296 (AWT), 2010 WL 2509133, at *4 (D. Conn. June 15, 2010); *In re*

Gemeinshcaftspraxis Dr. Med. Schottdorf, No. Civ. M19-88 (BSJ), 2006 WL 3844464, at *5 (S.D.N.Y. Dec. 29, 2006); *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 957 n.3 (D. Minn. 2007); *In re Minatec Fin. S.À.R.L.*, No. 1:08-CV-269 (LEK/RFT), 2008 WL 3884374, at *4 n.8 (N.D.N.Y. Aug. 18, 2008).

Even courts who have come down between this split of authority have still applied Section 1782 and Rule 45 to reach electronically stored information accessible from within this District. In *In re Veiga II*, 746 F. Supp. 2d 8, 25 (D.D.C. 2010), Judge Kollar-Kotelly (who also decided Norex five years earlier) outlined the "split of authority" on the geographic scope of Section 1782; "assum[ed] there is no absolute bar to the discovery of documents located outside the United States"; but nevertheless "exercise[d] [her] discretion to decline to order the production of [physical] documents abroad." When she did so, however, she still required the Respondent to produce all materials "located within the United States, a category that includes electronically stored information accessible from within this District." *Id*. at 26 (emphasis added). Decisions like this prudently avoid the metaphysical question of where electronic materials are "located," and still give effect to the complementary reach of Rule 45 and Section 1782.

Ultimately, this may be a question for the Supreme Court; but until then, it illustrates the sometimes-difficult intersection of judicial restraint and liberal statutory intent when it comes to extraterritorial issues.

Book on Rome Regulations and Maritime Law

For all interested in the maritime conflict of laws there is a book titled **Regulations Rome I and Rome II and Maritime Law** available here. This book is published by Giappichelli Editore and comes as a result of an EU funded project. Editors are Evangelos Vassilakakis, Nikolay Natov and Reuben Balzan and the contents include:

Introduction.

I. Regulations (EC) n. 593/2008 on the law applicable to contractual obligations ("Rome I") and (EC) n. 864/2007 on the law applicable to non-contractual obligations ("Rome II") (C. Esplugues Mota, G. Palao Moreno, C. Azcárraga Monzonís – Spain).
II. Marine insurance contracts under the Rome I and Brussels I Regulations: c?nflict of laws and jurisdiction issues (E. Vassilakakis, V. Kourtis – Greece).
III. The discipline of maritime transport contracts under the Rome I and Brussels I Regulations: conflict of laws and jurisdictional issues (I. Queirolo, C. Cellerino – Italy).
IV. Collisions and maritime salvage (Reuben Balzan, Keith A. Borg, Carlos Bugeja – Malta).
V. Maritime environmental delict/tort (N. Natov, B.a Musseva, V. Pandov, D. Sarbinova, Z.i Ianakiev, I. Kirchev, M. Stankov – Bulgaria).

Symeonides on Choice of Law in American Courts in 2013

Dean Symeon C. Symeonides (Willamette University – College of Law) has posted Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey on SSRN. It is, as usual, to be published in the American Journal of Comparative Law. Here is the abstract:

> *This is the Twenty-Seventh Annual Survey of American choice-of-law cases. It is written at the request of the Association of American Law Schools Section on Conflict of Laws and is intended as a service to fellow teachers of conflicts law, both in and outside the United States. Its purpose remains the same as it has been from the beginning: to inform, rather than to advocate.*
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> *This Survey covers cases decided by American state and federal appellate courts from January 1 to December 31, 2013, and posted on Westlaw by midnight, December 31, 2013. Of the 1,354 cases that meet these parameters, the Survey focuses on those cases that may contribute something new to the*

development or understanding of conflicts law—and, particularly, choice of law. This Survey is longer than the Surveys of any of the previous 26 years because 2013 produced more, and more noteworthy, cases than any of the previous years. The following are some of the highlights:

** Five decisions of the U.S. Supreme Court holding, respectively, that: (1) The Alien Tort Statute does not apply to conduct and injury occurring entirely in another country; (2) Section 3 of the Defense of Marriage Act (DOMA), which defines "marriage" for federal law purposes so as to exclude same-sex relationships, is unconstitutional; (3) The Federal Arbitration Act trumps the provisions of the Sherman Antitrust Act; (4) The "first sale" doctrine as codified in the Copyright Act applies to copies of copyrighted works lawfully made abroad and first sold abroad; and (5) The National Voter Registration Act preempts an Arizona law that sets more stringent standard for proof of citizenship when registering to vote.*
** A sixth Supreme Court decision explaining the methodology that federal courts should use when evaluating venue challenges in cases involving choice-of-forum clauses.*
** Two federal appellate decisions involving piracy off the Somali coast, and several decisions involving the extraterritorial reach of federal statutes in civil and criminal cases.*
** Several state court decisions striving to protect consumers, employees, and other weak parties through the few cracks left by the Supreme Court's decisions on arbitration and choice-of-forum clauses.*
** An assortment of interesting cases involving products liability, other cross-border torts, economic torts, and other tort conflicts.*
** A case holding that enforcement of a Japanese tort judgment against a California Church is not "state action" triggering constitutional scrutiny under the Constitution's Free Exercise clause, and is not repugnant to the public policy.*
** A case holding that one state's dismissal of an action on statute of limitation grounds is a dismissal "on the merits," barring a second action on the same claim in another state.*
** A case defining "habitual residence" and "wrongful" removal or retention of a child under the Hague Convention on Child Abduction.*

2014 ASIL Private International Law Paper Prize

The American Society of International Law is currently accepting submissions for this year's Private International Law prize. The prize is given annually for the best text on private international law written by a young scholar. Essays, articles, and books are welcome, and can address any topic of private international law, can be of any length, and may be published or unpublished, but not published prior to 2013. Submitted essays should be in the English language. Competitors may be citizens of any nation but must be 35 years old or younger on December 31, 2013. They need not be members of ASIL.

This year, the prize will consist of a $500 stipend to participate in the 2014 or 2015 ASIL Annual Conference, and one year's membership to ASIL. The prize will be awarded by the Private International Law Interest Group based upon the recommendation of a Prize Committee. Decisions of the Prize Committee on the winning essay and on any conditions relating to this prize are final.

Submissions to the Prize Committee must be received by March 15, 2014. Entries should be submitted by email in Word or pdf format. They should contain two different documents: a) the essay itself, without any identifying information other than the title; and b) a second document containing the title of the entry and the author's name, affiliation, and contact details.

Submissions and any queries should be addressed by email to Private International Law Interest Group Co-Chairs Rahim Moloo (rahim.moloo@nyu.edu) and Ralf Michaels (michaels@law.duke.edu). All submissions will be acknowledged by e-mail.

ECJ Rules on Jurisdiction in Exclusive Distribution Contracts

On 19 December 2013, the Court of Justice of the European Union delivered its ruling in Corman-Collins SA v. La Maison du Whisky SA (case 9/12).

The main issue before the Court was whether an exclusive distribution agreement is a contract for the supply of services for the purpose of Article 5(1)(b) of the Brussels I Regulation.

The Court held that it is.

> *37 As to whether an exclusive distribution agreement may be classified as a contract for the 'supply of services' within the meaning of the second indent of Article 5(1)(b) of the Regulation, it must be recalled that, according to the definition given by the Court, the concept of 'services' within the meaning of that provision requires at least that the party who provides the service carries out a particular activity in return for remuneration (Case C-533/07 Falco Privatstiftung and Rabitsch [2009] ECR I-3327, paragraph 29).*
>
> *38 As far as the first criterion in that definition, namely, the existence of an activity, it is clear from the case-law of the Court that it requires the performance of positive acts, rather than mere omissions (see, to that effect, Falco Privatstiftung and Rabitsch, paragraphs 29 to 31). That criterion corresponds, in the case of an exclusive distribution agreement, to the characteristic service provided by the distributor which, by distributing the grantor's products, is involved in increasing their distribution. As a result of the supply guarantee it enjoys under the exclusive distribution agreement and, as the case may be, its involvement in the grantor's commercial planning, in particular with respect to marketing operations, factors in respect of which the national court has jurisdiction to make a ruling, the distributor is able to offer clients services and benefits that a mere reseller cannot and thereby acquire, for the benefit of the grantor's products, a larger share of the local market.*
>
> *39 As to the second criterion, namely the remuneration paid as consideration for an activity, it must be stated that it is not to be understood strictly as the payment of a sum of money. Such a restriction is neither stipulated by the very*

general wording of the second indent of Article 5(1)(b) of the Regulation nor consistent with the objectives of proximity and standardisation, set out in paragraphs 30 to 32 of the present judgment, pursued by that provision.

40 In that connection, account must be taken of the fact that the distribution agreement is based on a selection of the distributor by the grantor. That selection, which is a characteristic element of that type of agreement, confers a competitive advantage on the distributor in that the latter has the sole right to sell the grantor's products in a particular territory or, at least the very least, that a limited number of distributors enjoy that right. Moreover, the distribution agreement often provides assistance to the distributor regarding access to advertising, communicating know-how by means of training or yet even payment facilities. All those advantages, whose existence it is for the court adjudicating on the substantive action to ascertain, represent an economic value for the distributor that may be regarded as constituting remuneration.

41 It follows that a distribution agreement containing the typical obligations set out in paragraphs 27 and 28 above may be classified as a contract for the supply of services for the purpose of applying the rule of jurisdiction in the second indent of Article 5(1)(b) of the Regulation.

Final ruling:

1. Article 2 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, where the defendant is domiciled in a Member State other than that in which the court seised is situated, it precludes the application of a national rule of jurisdiction such as that provided for in Article 4 of Law of 27 July 1961 on Unilateral Termination of Exclusive Distribution Agreements of Indefinite Duration, as amended by the Law of 13 April 1971 on Unilateral termination of distribution agreements.

2. Article 5(1)(b) of Regulation No 44/2001 must be interpreted as meaning that the rule of jurisdiction laid down in the second indent of that provision for disputes relating to contracts for the supply of services is applicable in the case of a legal action by which a plaintiff established in one Member State claims, against a defendant established in another Member State, rights arising from an exclusive distribution agreement, which requires the contract binding the

parties to contain specific terms concerning the distribution by the distributor of goods sold by the grantor. It is for the national court to ascertain whether that is the case in the pbefore it.

Liste on Kiobel and the Politics of Space

Philip Liste (Humboldt and Hamburg Universities) has posted Transnational Human Rights Litigation and Territorialized Knowledge: Kiobel and the 'Politics of Space' on SSRN.

In Kiobel v. Royal Dutch Petroleum Dutch and British private corporations were accused of having aided and abetted in the violation of the human rights of individuals in Nigeria. A lawsuit, however, was brought in the United States, relying on the Alien Tort Statute — part of a Judiciary Act from 1789. In its final decision on the case, the US Supreme Court has strongly focused on 'territory.' This usage of a spatial category calls for closer scrutiny of how the making of legal arguments presupposes 'spatial knowledge,' especially in the field of transnational human rights litigation. Space is hardly a neutral category. What is at stake is normativity in a global scale with the domestic courtroom turned into a site of spatial contestation. The paper is interested in the construction of 'the transnational' as space, which implicates a 'politics of space' at work underneath the exposed surface of legal argumentation. The 'Kiobel situation' as it unfolded before the Supreme Court is addressed as example of a broader picture including a variety of contested elements of space: a particular spatial condition of modern nation-state territoriality; the production of 'counter-space,' eventually undermining the spatial regime of inter-state society; and the state not accepting its withering away. The paper will ask: How are normative boundaries between the involved jurisdictional spaces drawn? How do the 'politics of space' work underneath or beyond the plain moments of judicial decision-making? How territorialized is the legal knowledge at work and how

does territoriality work in legal arguments?

The paper is forthcoming in *Transnational Legal Theory*, Vol. 4, 2013.