Third Issue of 2013's Journal of Private International Law

The latest issue of the *Journal of Private International Law* contains the following articles:

Richard Garnett, Coexisting and Conflicting Jurisdiction and Arbitration Clauses

> *It is increasingly common for parties to an international contract to include both jurisdiction and arbitration clauses. While in some cases the clauses can be reconciled by principles of contractual interpretation, in other circumstances a true conflict between the clauses exists. The main contention of this article is that it is not appropriate, as many common law courts appear to have done, to resolve such a conflict by choosing arbitration over litigation based on some presumed superiority of the arbitral process. Instead, courts should adopt an evenhanded approach and apply a version of the 'more appropriate forum' test.*

Pippa Rogerson, Problems of the Applicable Law of the Contract in the English Common Law Jurisdiction Rules: The Good Arguable Case

> *English law as the applicable law of the contract is a basis for jurisdiction in English service out cases (ie cases involving foreign defendants that are not covered by the Brussels I Regulation or the Lugano Convention). It is also a factor in the exercise of jurisdiction. In both instances the determination of the applicable law and the assessment of its relevance raise difficult legal and practical questions. The courts use the "good arguable case" test to resolve those difficulties. Many recent decisions illustrate that the test is insufficiently clear. This article discusses those questions. It concludes that the differences between the existence and the exercise of jurisdiction have been overlooked. Further it suggests that the problem lies in the competing objectives underlying the decision on jurisdiction.*

Uglješa Grušic, The Right to Strike Versus Fundamental Economic Freedoms in the English Courts, Again: Hiding Behind the "Public Law Taboo" In Private International Law

> *This article notes the High Court's decision in British Airways Plc v Sindicato Espanol de Pilotos de Lineas Aeras, a case concerning the relationship between the right to strike and fundamental economic freedoms guaranteed by the TFEU. The court declined jurisdiction on the ground that the case involved the*

enforcement of foreign public law, thus falling outside the scope of the European rules of adjudicatory jurisdiction. By analysing the CJEU case-law on the concept of "civil and commercial matters", and the nature and detailed rules on which the claim in BA v SEPLA was based, this article concludes that the High Court was wrong in hiding behind the "public law taboo" in PIL. The discussion, in turn, underlines the relevance of PIL for the relationship between the right to strike and fundamental freedoms and, more generally, the role of this discipline in the EU legal framework.

Verity Winship, Personal Jurisdiction and Corporate Groups: *Daimlerchrysler AG v Bauman*

This article proposes a framework for understanding what is at stake in the US Supreme Court's upcoming decision in DaimlerChrysler AG v Bauman. Argentine plaintiffs sued a German corporation in US courts, alleging violations of the Alien Tort Statutes. The outcome and consequences of the Supreme Court's decision depend on how the Court analyses three aspects of personal jurisdiction. The first is the extent to which a subsidiary's contacts with a forum state can be attributed to the corporate parent. The second is whether the contacts are so extensive that the court may exercise jurisdiction over a defendant for any cause of action, even one unrelated to the contacts. The third is whether jurisdiction is "reasonable". The opinion promises to provide either much-needed guidance about jurisdictional attribution within corporate groups, or an example of the discretionary, policy-driven analysis of when jurisdiction is reasonable in the context of multinational businesses.

Chukwuma Okoli, The Significance of the Doctrine of Accessory Allocation As a Connecting Factor Under Article 4 of the Rome I Regulation

The doctrine of accessory allocation is given special significance as a connecting factor by the framers of Rome I Regulation (through Recitals 20 and 21) in utilising the escape clause and principle of closest connection under Article 4. This article analyses the application of the doctrine under the Rome Convention; the possible reasons why the framers of Rome I gave the doctrine special significance; the nature of inquiry a Member State court would be faced with in applying the doctrine especially in very closely related contracts such as back-to-back contracts; and the dilemma faced by the court in determining the quantum of weight to attach to the application of the doctrine as it relates to displacing the main rule(s). The author concludes by stating that there is need for more clarity on the significance of the doctrine of accessory allocation as a

connecting factor under Article 4 of Rome I.

Sharon Shakargy, Marriage by the State or Married to the State? on Choice of Law in Marriage and Divorce

The paper suggests reshaping the choice of law rules for marriage and divorce and basing them on the parties' will rather than on the will of the parties' home country. The paper discusses the evolution of choice-of-law in matters of marriage and divorce in relation to that of substantive marriage law in Western legal systems prior to WWII and today. It argues that the early view of marriage and divorce as matter of state concern was reflected in the choice of law rules. However these current rules have not internalized changes that have occurred in the way national laws treats marriage today, according to which marriage is regarded far more as a private matter. The paper therefore agues that while in the early period there was a close correlation between the substantive regulation of marriage and divorce and the choice-of-law rules in this field, this correlation no longer exists. In order to re-establish the correlation between substantive law and the choice of law rules, the paper identifies leading theoretical features of modern-day marriage law, including the principle of party autonomy. The paper concludes by suggesting ways of incorporating the modern view of marriage and divorce in choice of law.

Elena Rodríguez-Pineau, Book Review: Brauchen Wir Eine Rom O-verordnung? (Do We Need a Rome 0 Regulation?)

Fourth Issue of 2013´s Belgian PIL E-Journal

The fourth issue of the Belgian bilingual (French/Dutch) e-journal on private international law *Tijdschrift@ipr.be / Revue@dipr.be* was just released.

It includes a case comment by Patrick Wautelet (Liège University) on jurisdiction in same sex divorce proceedings (*Dissolution d'un mariage entre personnes de*

même sexe: le for de nécessité comme réponse à l'impossibilité de divorcer?)

Back to the Federal District Court for One Alien Tort Statute Case

On December 19, 2013, the United States Court of Appeals for the Ninth Circuit issued an order in the case of *Doe I v. Nestle USA, Inc*. vacating a federal district court's dismissal of Plaintiffs' ATS claim and remanding for further proceedings. The case has been around for some time and relates to allegations of slave labor performed on plantations in the Ivory Coast in 2005. Nestle was sued by Malian children who allegedly were forced to labor on plantations that produced cocoa that was later purchased by Nestle. The suit alleged that Nestle was aware of the conditions on the plantations but nevertheless bought the cocoa. Plaintiffs did not argue that Nestle engaged in any acts of forced labor or violence. Instead, Plaintiffs argued that Nestle was liable for violations of international law under the Alien Tort Statute, specifically for aiding and abetting forced labor and child labor violations in purchasing the cocoa.

The district court had dismissed the case finding that corporations cannot be liable for violations of international law and finding that Plaintiffs had failed to plausibly plead that Nestle knew or should have known that the wrongful acts were being committed. In vacating the district court's decision and remanding for further proceedings, the Ninth Circuit explained

"In light of intervening developments in the law, we conclude that corporations can face liability for claims brought under the Alien Tort Statute. . . . Additionally, the district court erred in requiring plaintiff-appellants to allege specific intent in order to satisfy the applicable purpose *mens rea* standard. Furthermore, we grant plaintiff-appellants leave to amend their complaint in light of recent authority regarding the extraterritorial reach of the Alien Tort Statute and the *actus reus* standard for aiding and abetting. Kiobel, 133 S. Ct. at 1669; *Prosecutor v. Charles Ghankay Taylor,* Case No. SCSL–03–01–A Judgment, at ¶ 475 (SCSL

Sept. 26, 2013) ("[T]he *actus reus* of aiding and abetting liability is established by assistance that has a substantial effect on the crimes, not the particular manner in which such assistance is provided."); *Prosecutor v. Perisic,* Case No. IT–04–81–A Judgment, at ¶ 36 & n.97 (ICTY Feb. 28, 2013) (holding that "specific direction remains an element of the *actus reus* of aiding and abetting," but noting that "specific direction may be addressed implicitly in the context of analysing substantial contribution")."

It will be interesting to see how the plaintiffs respond and what the district court ultimately does in this case.

Van Den Eeckhout on Schlecker (Dutch Version)

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

> *In the Schlecker case (12 September 2013, C-64/12), the Court of Justice decides that Article 6(2) of the Rome Convention must be interpreted as meaning that, even where an employee carries out the work in performance of the contract habitually, for a lengthy period and without interruption in the same country, the national court may, under the concluding part of that provision, disregard the law of the country where the work is habitually carried out, if it appears from the circumstances as a whole that the contract is more closely connected with another country.*

The author analyses the Schlecker case, commenting the special/ordinary character of Article 6 Rome Convention compared to Articles 3 and 4 Rome Convention, the special/ordinary character of the Schlecker case and the relevance of the decision for cases of international employment in which issues of freedom of movement/freedom of services are addressed as well as for cases of international tort in which article 4(3) Rome II regulation might be relevant.

Note: Downloadable document is in Dutch.

ERA Conference on Cross Border Succession

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

Thursday, 20 March 2014
I. THE SUCCESSION REGULATION
Chair: Christian Hertel

09:15 Scope of application and international conventions that take precedence over the Regulation (Guillermo Palao Moreno)
09:45 Discussion
10:00 Which court is competent to decide cross-border succession cases? Which law is to be applied? (Jonathan Harris)
10:45 – 11:00 Discussion

Chair: Jonathan Harris

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

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

12:30 – 12:45 Discussion

II. CROSS-BORDER INHERITANCE TAX ISSUES
Chair: Patrick Delas

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

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

14:45 Discussion
15:00 Possible measures to avoid double taxation in cross-border successions (Niamh Carmody)
15:30 Discussion

15:45 WORKSHOP (with tea & coffee)
Drafting testamentary dispositions in the light of the Succession Regulation and diverging tax regimes (Patrick Delas & Richard Frimston)
16:45 – 17:30 Results of the workshop and discussion

Friday, 21 March 2014

III. INTERPLAY WITH OTHER AREAS OF LAW
Chair: Richard Frimston

09:15 The impact of matrimonial property on succession law (Patrick Wautelet)
09:45 Discussion

10:00 Company law, trusts and succession disputes (Paul Matthews)
10:30 – 10:45 Discussion

11:15 Proof of succession in land registration proceedings (Kurt Lechner)
11:45 Discussion

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

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

13:15 Lunch and end of the conference

Mullenix on Reach of American Courts

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

> *In this 2013-14 term the Supreme Court will again return to its personal jurisdiction jurisprudence in two interesting cases: DaimlerChrysler AG v. Bauman, and Walden v. Fiore. While the Walden appeal asks the Court to revisit its "effects" and "purposeful direction" tests for a state's ability to assert jurisdiction over a non-resident defendant, DaimlerChrysler's appeal raises the sexier and more compelling issue of personal jurisdiction in the context of so-called F-cubed cases: lawsuits brought in an American court by foreign plaintiffs suing foreign defendants, based on events that took place in some foreign country.*
>
> *In recent years the Court twice has manifested its distaste for F-cubed litigation in American courts, repudiating such litigation based on a lack of subject matter jurisdiction of the U.S. courts to adjudicate such disputes. If the combined Kiobel and Morrison decisions have not completely destabilized the reach of American courts over transnational disputes, then the Court this term has the opportunity to hammer a final nail in this coffin by addressing subject matter jurisdiction's twin doctrine: that of personal jurisdiction.*
>
> *This term's DaimlerChrysler case, the third time in as many years where the Court will evaluate whether American courts may assert personal jurisdiction over non-resident foreign defendants for injuries occurring either in the United States, or on foreign soil. Based on the Court's general trend declining to allow the extraterritorial reach of American courts over foreign nationals as a matter of subject matter jurisdiction, it seems unlikely that the Court will reverse*

course and embrace an expansive doctrine of extraterritoriality in the guise of personal jurisdiction jurisprudence.

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

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

Jurisdiction of Greek courts in insurance matters – A follow up on FBTO Schadeverzekeringen NV (C-463/06)

By Apostolos Anthimos.

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

A number of rulings of the Greek Supreme Court have been rendered within the last five years on the issue of jurisdiction in matters relating to insurance, as stipulated in Regulation 44/2001, Arts 9(1)(b) and 11(2). To be precise, seven decisions of Areios Pagos have applied the findings of the ECJ in the case *FBTO*

Schadeverzekeringen NV v Jack Odenbreit. In a nutshell, the line of the European Court, according to which "*the reference in Article 11(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to Article 9(1)(b) of that regulation is to be interpreted as meaning that the injured party may bring an action directly against the insurer before the courts for the place in a Member State where that injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State*", has been followed literally, unlike 1st & 2nd instance decisions, where motions to declare the court as lacking jurisdiction had prevailed (see Athens CoA 5419/2007, Theory & Practice of Civil Law 2008, 956, Athens CoA 392/2008, Hellenic Justice 2009, 838, Athens CoA 7270/2007, 5152/2008, 6364/2009 & 2352/2010 [unreported]). Admittedly, for some of the instance rulings, it was not possible to take into account the fresh news coming from Luxemburg, given the fact that they were tried or published before December 13, 2007 (the publication date of the ECJ ruling).

The Supreme Court took a firm stance on the matter, starting from 2009. In a series of decisions (2163/2009, Civil Procedure Law Review 2010, 68, 599/2010, unreported, 640/2010, Commercial Law Review 2010, 640, 487/2011, Civil Procedure Law Review 2011, 468, 37/2012, Chronicles of Private Law 2012, 449, and 442/2013, not yet reported) the Court reiterated the ruling of the ECJ and reversed all 2nd instance decisions. The exception to the rule was the decision Nr. 379/2013 (not yet reported): In this case, the Supreme Court denied the cassation (appeal), because the German foreign company proved that the appellant was not a resident of Greece. In light of the unambiguous wording of the European Court in the *FBTO* case, namely that the injured party may bring an action directly against the insurer before the courts for the place in a Member State where (s)he is domiciled, the CoA judgment was reaffirmed.

Two final comments on the situation in Greece: First, it is no coincidence that all cases were tried before the courts of the capital. As it is well known, articles 9 & 11 Regulation 44/2001 deal with the issue of international jurisdiction, leaving the venue of the court to be decided pursuant to domestic law provisions. Apparently the claimants (i.e. their lawyer) made use of Article 6.1 Brussels I Regulation, in conjunction with Article 37.1 Greek Code of Civil Procedure, in order to establish the venue of the Athens court. In particular, by filing a claim against both the foreign insurance company and its agent in Greece (it is common ground that all

agents of foreign enterprises are situated in the capital), the Athens court become territorially competent by virtue of a joinder of parties. Second, no decision has been yet rendered on the merits, thus leaving ample space for speculation about the problems that Greek courts will eventually face in terms of applicable law [see in this respect *Jayme*, Der Klägergerichtsstand für Direktklagen am Wohnsitz des Geschädigten (Art. 11 Abs. 2 i.V.m. Art. 9 EuGVO): Ein Danaergeschenk des EuGH für die Opfer von Verkehrsunfällen, in: Grenzen überwinden – Prinzipien bewahren, Festschrift für Bernd von Hoffmann zum 70. Geburtstag (2011), p. 656-663, and *Fuchs*, Internationale Zuständigkeit für Direktklagen, IPRax 2008, p.104-107].

US Supreme Court Hears New Hague Abduction Case

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

> *The Supreme Court heard arguments on December 11 in Lozano v. Alvarez, a case raising issues regarding "equitable tolling" under Article 12 of the Hague Child Abduction Convention. (For background, please see our previous post.) The Court makes available both an audio recording of the oral arguments and the transcript.*
>
> *An analysis of the arguments by Amy Howe of SCOTUSblog is available here. SCOTUSblog also has links to the briefs filed in the case , including amicus briefs filed by the United States and by the Mexican Association for Abducted and Missing Children, the International Academy of Matrimonial Lawyers (IAML), Reunite International Child Abduction, the National Center for Missing and Exploited Children, A Child Is Missing, Inc., and the Domestic Violence Legal Empowerment & Appeals Project (DV LEAP).*

Coffee on Extraterritorial Financial Regulation

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

> *Systemic risk poses a classic "public goods" problem. All nations want systemic stability, but most would prefer that other nations pay for it, allowing them to "free ride." Moreover, because global financial institutions can park their higher risk operations almost anywhere, some nations can profit from regulatory arbitrage by keeping their regulatory controls laxer than in the more financially developed nations (which bear the principal share of the costs from financial contagion). As a result, the free riders do not need to internalize the full costs of systemic risk, but profit from imposing costs on others.*
>
> *Under these conditions, all the preconditions for a "tragedy of the commons" are satisfied, because (i) the nations that profit from regulatory arbitrage cannot be excluded from offering under-regulated markets, and (ii) they do not need to internalize the costs they impose on others. While the "tragedy of the commons" literature has been much used in environmental law and related fields, it applies equally well to international financial markets. The solution to this problem lies in finding ways to tax the free riders or otherwise subject them to stronger controls. But here is exactly where current "soft law" approaches to international financial regulation fail. Because "soft law" is almost by definition non-binding and unenforceable, it cannot control a financial services industry that wishes to pursue highly profitable, higher risk strategies.*
>
> *Aspirational theorists of international "soft law" thus misconceive the problem. To expect "soft law" to be kinder and gentler than formal law and to give every nation an equal voice is to prescribe the essential conditions for a "tragedy of the commons."*
>
> *Instead, as this article argues, only the major financial nations have the right*

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

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

Colangelo on Extraterritorial Jurisdiction

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

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

questions are probably better addressed in reverse order, that is: What type of "jurisdiction" is at issue? And, is its exercise "extraterritorial"?

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

The proliferating phenomenon of extraterritoriality across diverse fields has thus far resisted trans-substantive and systematic analysis. Yet the legal and practical stakes of resolving a mounting array of extraterritorial jurisdiction issues have never been higher. This Article seeks to approach extraterritoriality as a fundamentally singular phenomenon with myriad doctrinal manifestations instead of a scattershot smattering of discrete legal issues in isolated areas. My principal aim in doing so is to help legal thinkers and decision makers not only to resolve extraterritoriality issues but also to comprehend how their resolutions fit within a larger jurisprudence on increasingly important questions of when and how the United States may exercise legal power beyond U.S. borders.

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