First Issue of 2013's Journal of Private International Law

The latest issue of the *Journal of Private International Law* was just released.

Reid Mortensen, Woodhouse Reprised: Accident Compensation and Trans-Tasman Integration

> *Australia and New Zealand have created a single civil judicial area, which gives all courts in each country a complete adjudicative jurisdiction and a barely qualified enforcement jurisdiction throughout the whole trans-Tasman market area. The risk of concurrent proceedings and incompatible judgments is minimised only by the power of courts to stay proceedings on the ground of forum non conveniens or when enforcing a choice-of-court agreement. The scheme rests on the 'strikingly similar' quality of the two countries' legal systems. However, New Zealand's Accident Compensation Act 2001 maintains a unique, comprehensive no-fault compensation scheme for accidents which also prohibits all court-based claims for compensation for personal injuries. It is 'strikingly dissimilar' to the common law systems of personal injuries compensation found in the Australian states. And, given that the Australian common law systems are often much more generous in the awards given for personal injuries, the New Zealand scheme has been a significant motivation for New Zealanders' forum shopping in Australia. This does not appear to have been addressed well by the new trans-Tasman scheme for civil jurisdiction. The article considers the confounding role that the Accident Compensation Act may continue to play in trans-Tasman civil jurisdiction, and its implications for the principles of forum conveniens, choice-of-law and the enforcement of personal injuries awards between Australia and New Zealand.*

Samuel Zogg, Accumulation of Contractual and Tortious Causes of Action under the Judgments Regulation

> *This article examines jurisdictional issues under the Judgments Regulation in cases where a claimant alleges to have, from one and the same incident, a contractual and a tortious cause of action, both providing for full compensation. It analyses the relationship between Article 5(1) and 5(3); particularly, whether and to what extent these provisions are mutually exclusive and whether they*

provide for accessory jurisdiction for related claims. Furthermore, the question is raised whether the claimant is free to "choose" the jurisdictional rule by skilful drafting of his claim.

As far as the claimant is free to pursue his claims in different fora, questions of how to deal with such parallel proceedings are discussed; namely, whether lis pendens exists (Article 27) and whether Article 28 applies. After termination of such proceedings, delicate res judicata issues arise; particularly whether and to what extent a judgment on one claim precludes judgment on the other and, if not, how double satisfaction may be prevented.

Rita Matulionyte, Calling for Party Autonomy in Intellectual Property Infringement Cases

This article discusses the possibility of parties choosing the applicable law for intellectual property (IP) infringements. Although party autonomy in IP cases has been explicitly denied in the Rome II Regulation, the recent worldwide academic proposals, such as ALI, CLIP, Transparency and the Joint Japanese-Korean proposal, have suggested a party autonomy rule in IP infringement cases. This paper demonstrates that, as a general matter, this approach is reasonable. It further discusses the most suitable scope and limitations of party autonomy for IP infringements.

José Velasco Retamosa, International Protection of United Nations System Emblems: Private International Law Issues

This article deals with the international protection that national and international Law grants to the United Nations system emblems. The study is carried out from a multidisciplinary perspective due to its relation with the different areas of Law, with special reference in each case to questions referred to in Private International Law. The intervention of the rules of public as well as private law supposes that the symbols and emblems that represent the international Organization and, more specifically, their protection, comes from the observation of the different areas of the legal system which range from Public and Private International Law in general to the specific regulations on industrial property rights. In this regard, when the protection transcends borders and the interest is located in more than one State, the rules of International private Law find their importance in the protection of these types of symbols and emblems.

Laurens Timmer, Abolition of *Exequatur* under the Brussels I Regulation: Ill Conceived and Premature?

On the 6 December 2012, the Council of EU Justice Ministers adopted a recast of the Brussels I Regulation. Among other changes, the recast provides for the abolition of the exequatur procedure. The changes had been proposed by the Commission in 2010, but have been significantly revised before being adopted by the European Parliament and the Council. This article examines and criticises both the adopted changes and the claims made in the political arena in regard to the necessity of these changes. The author favours the use of less radical measures to achieve the goal of abolition, which is avoiding unnecessary costs and delays in cross-border procedures within the European Union.

Martina Melcher, (Mutual) Recognition of Registered Relationships via EU Private International Law

An ever growing number of bi-national couples and increased population mobility together with highly heterogenous national substantive and conflict rules regarding couple relationships, such as same-sex marriage or registered partnerships, inevitably lead to limping relationships, different legal effects and disparate decisions. In addition to practical difficulties for such couples, the non-recognition of already registered relationships likely infringes their fundamental freedom of movement and human rights. For these reasons, the current article argues that registered relationships with cross-border effects should be recognised as such outside their state of origin. An analysis of several options to recognise those relationships shows that unified conflict rules are best suited to achieve this purpose. Whereas automatic recognition appears to be particularly attractive as it would not require the Member States to adopt new rules, such an instrument could not replace conflict rules altogether, but would only add to the legal complexity. In contrast, an EU regulation on the law applicable to registered relationships would create a comprehensive set of unified rules, thus guaranteeing an equal legal treatment of the relationship independent from the location of the competent court within the EU.In order to ensure the recognition of an already registered, or somehow formalised, relationship in another Member State, the article favours the place of registration as the main connecting factor for questions on the establishment, the personal legal effects and the dissolution of such couple relationships.

Other possible connecting factors, such as domicile, nationality or habitual residence, are discussed as well. Furthermore the potential necessity to limit the registration of aliens in order to confine system shopping and fraus legis is assessed. Finally, the article also tackles the problem of a possible refusal of recognition based on grounds of public policy and evaluates some arguments that have been brought forward in this context in national legal systems.

Fabrício Bertini Pasquot Polido, Review Article: How Far Can Private International Law Interact with Intellectual Property Rights? A Dialogue with Benedetta Ubertazzi's book *Exclusive Jurisdiction in Intellectual Property*

Zhang on Enforcement of Foreign Judgments in China

Wenliang Zhang has published Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the "Due Service Requirement" and the "Principle of Reciprocity" in the last issue of the *Chinese Journal of International Law*.

Nowadays, recognition and enforcement of foreign judgments in China is gaining in practical significance. However, a "great wall" seems to have been erected against recognition and enforcement of foreign judgments in China. To make a breakthrough, the essentials for achieving recognition and enforcement of foreign judgments in China must be unveiled from a practical perspective rather than for purpose of purely theoretical analyses. Investigation into the representative cases in this regard shows that there are two requirements that are of Chinese courts' first and foremost concern, namely the "principle of reciprocity" and the "due service requirement". Special attention should be paid to both requirements informing the aforesaid cases. Satisfaction of these two requirements may well bring an anticipated recognition and enforcement of foreign judgments in China. As a necessity, applicants and foreign courts must enrich their knowledge of the Chinese law and judicial practice in this respect.

Hague Conference Seeks to Hire New Legal Officer

The Permanent Bureau of the Hague Conference on Private International Law is seeking to recruit a new Legal Officer.

> *He or she will have a law degree (Master of Laws, J.D., or equivalent), good knowledge of private international law as well as familiarity with comparative and civil law and will work primarily in the areas of international family law, child protection, and international litigation and be part of the legal team, under the direction of two First Secretaries supporting the relevant Hague Conventions and projects.*
>
> *Duties will include comparative law research, preparation of research papers and other documentation, organisation and preparation of materials for publication, including The Judges' Newsletter on International Child Protection, assistance in the preparation of and participation in conferences, seminars and training programmes, and such other work as may be required by the Secretary General from time to time.*
>
> *The successful applicant will preferably be a French native speaker, or if not, will have full bilingual abilities in French, written and spoken language. He or she should have excellent knowledge of English. Knowledge of a third language (in particular Spanish) is an asset. He or she will be sensitive to different legal cultures. Experience in publishing / editing is a plus. He or she should work well in a team, be able to work in more than one area of law, and respond well to time-critical requests. Additional legal or academic work experience would be an advantage.*
>
> *Type of appointment and duration: one-year contract, possibly renewable.*
>
> *Starting date: 1 September 2013.*
>
> *Grade (Hague Conference adaptation of Co-ordinated Organisations scale): A/1*

subject to relevant experience.

Deadline for applications: 31 May 2013.

Applications should be made by e-mail, with Curriculum Vitae, letter of motivation and at least two references, to be addressed to the Secretary General, at: secretariat@hcch.net*.*

ASIL International Legal Theory Interest Group Symposium on the Rise of Non-State Law

See below for an announcement regarding an extremely interesting conference on Non-State Law next week in Washington, DC

Symposium of the International Legal Theory Interest Group, titled "The Rise of Non-State Law"
May 2, 2013, 8:30 a.m. – 5:15 p.m.
ASIL Headquarters, Tillar House – 2223 Massachusetts Avenue, NW
Washington, DC 20008

Trends in legal philosophy, international law, transnational law, law & religion, and political science all point towards the increasing role played by non-state law in both public and private ordering. Indeed, numerous organizations, institutions, associations and groups have emerged alongside the nation-state, each purporting to provide their members with rules and norms to govern their conduct and organize their affairs. This International Legal Theory Interest Group Symposium aims to explore this Rise of Non- State Law by bringing together experts on international law, transnational law, legal theory and political philosophy to consider the growing impact of non-state law.

For full details, see this announcement (ASIL Flier).

BIICL Conference on Unilateral Jurisdiction and Arbitration Clauses

The British Institute of International and Comparative Law will hold a seminar on Unilateral Jurisdiction and Arbitration Clauses, Valid or Not? on Wednesday 8 May 2013 from 17:15 to 19 pm.

> *This seminar examines so-called unilateral or asymmetric dispute resolution clauses, which oblige only one of the parties to bring their case in a specific court, while the other is free to select between different fora. Recently, the French Cour de Cassation has decided that this type of clause is invalid. Since, the validity of one-way jurisdiction clauses has been debated in various countries. The debate includes the question how hybrid arbitration clauses are to be assessed.*
> *Speakers will discuss the French Supreme Court's decision; the views of different Member States on the interpretation of Art. 23 Brussels I Regulation; the future of unilateral jurisdiction clauses; and the interpretation of hybrid arbitration clauses.*

Chair:
Craig Tevendale, Partner, Herbert Smith Freehills

Speakers:
Professor Gilles Cuniberti, University of Luxemburg
Dr Maxi Scherer, Special Counsel, WilmerHale; Senior Lecturer, Queen Mary (London)
Professor Matthias Lehmann, University of Halle-Wittenber

For more information, see here.

ECJ Strikes Down Mandatory Use of Language in Contracts

On the basis of a 'Letter of Employment' dated 10 July 2004 and drafted in English, Mr Las, a Netherlands national resident in the Netherlands, was employed as Chief Financial Officer for an unlimited period by PSA Antwerp, a company established in Antwerp (Belgium) but part of a multinational group operating port terminals whose registered office is in Singapore. The contract of employment stipulated that Mr Las was to carry out his work in Belgium although some work was carried out from the Netherlands.

When he was dismissed, Mr Las challenged the validity of the Letter of Employment on the ground of a 1973 Belgian Decree on Use of Languages, which provides:

> *Article 1 – This decree is applicable to natural and legal persons having a place of business in the Dutch-speaking region. It regulates use of languages in relations between employers and employees, as well as in company acts and documents required by the law.*
>
> *Article 2 – The language to be used for relations between employers and employees, as well as for company acts and documents required by law, shall be Dutch.*
>
> *Article 10 – Documents or acts that are contrary to the provisions of this Decree shall be null and void. The nullity shall be determined by the court of its own motion. (…) A finding of nullity cannot adversely affect the worker and is without prejudice to the rights of third parties. The employer shall be liable for any damage caused by his void documents or acts to the worker or third parties.*

Is this Belgian Decree contrary to the freedom of movement of workers in the European Union?

Yes it is, the Grand Chamber of the European Court held on April 16th in Anton Las v. PSA Antwerp NV (case C 202/11).

This is because "*such legislation is liable to have a dissuasive effect on non Dutch speaking employees and employers from other Member States and therefore constitutes a restriction on the freedom of movement for workers*."

Of course, the Court held, the "*objective of promoting and encouraging the use of Dutch, which is one of the official languages of the Kingdom of Belgium, constitutes a legitimate interest which, in principle, justifies a restriction on the obligations imposed by Article 45 TFEU.*"

But this legislation is not proportionate to those objectives. " *[P]arties to a cross-border employment contract do not necessarily have knowledge of the official language of the Member State concerned. In such a situation, the establishment of free and informed consent between the parties requires those parties to be able to draft their contract in a language other than the official language of that Member State*."

Ruling:

> *Article 45 TFEU must be interpreted as precluding legislation of a federated entity of a Member State, such as that in issue in the main proceedings, which requires all employers whose established place of business is located in that entity's territory to draft cross-border employment contracts exclusively in the official language of that federated entity, failing which the contracts are to be declared null and void by the national courts of their own motion.*

HCCH Family Law Briefings, March 2013

The *International Family Law Briefings* of the Hague Conference are quarterly updates provided by its Permanent Bureau regarding the work of the Hague

Conference in this field.

The Briefings for March are now available:

Content March 2013

- Introduction
- The 2007 Hague Child Support Convention: an update
    - Entry into Force
    - Caseworker's Practical Handbook
    - Electronic Country Profile
    - Explanatory Report in Spanish
    - Heidelberg Global Maintenance Conference: March 2013
    - New 2007 Child Support Convention. Materials developed to assist Judges and the General Public
    - Fundraising continues for iSupport, the future electronic case management, communications and fund transfer system under the 2007 Convention
- The 1993 Hague Intercountry Adoption Convention: an update
    - Meeting of an Expert Group on the financial aspects of intercountry adoption (8–9 October 2012)
    - Working Group to develop a common approach to preventing and addressing illicit practices in intercountry adoption cases
    - Francophone Workshop on the 1993 Hague Intercountry Adoption Convention, (Dakar, Senegal, 27–30 November 2012)
- Special Commission on the practical operation of the Apostille Convention (The Hague, 6-9 Novembe 2012)
- UNICEF Conference on the Theory and Practice of Child Protection Systems (New Delhi, India, 13–16 November 2012)
- Opening of the Centre for Private International Law of the Hague Conventions in Niš, Serbia
- The Hague Children's Conventions: Status Update

Mr Bernasconi New Secretary General of Hague Conference

Mr Christophe Bernasconi was appointed new Secretary General of the Hague Conference on Private International Law effective July 1st, 2013. He will succeed Hans van Loon, who will retire on June 30th.

A biography of Mr Bernasconi, who joined the Conference in 1997 as Secretary, is available here.

Supreme Court to Hear Another ATS Case

Following on the heels of the Supreme Court's decision in *Kiobel* (highlighted here), the Court today granted certiorari in the case of *DaimlerChrysler AG v. Bauman, et al.* In granting cert., the Supreme Court will either resolve the cryptic reference in Chief Justice Roberts's opinion for the Court that "mere corporate presence" cannot suffice to avoid the presumption against extraterritoriality, or it might resolve the case purely on personal jurisdiction grounds. If the former, we will know significantly more about how much the ATS will be contracted. If the latter, we will know much more about agency and affiliate jurisdiction, which is an area of increasing importance in transnational litigation.

To be clear, here is the Question Presented in *Daimler*:

Daimler AG is a German public stock company that does not manufacture or sell products, own property, or employ workers in the United States. The Ninth Circuit nevertheless held that Daimler AG is subject to general personal jurisdiction in California—and can therefore be sued in the State for alleged human-rights violations committed in Argentina by an Argentine subsidiary against Argentine residents— because it has a different, indirect subsidiarythat

distributes Daimler AG-manufactured vehicles in California. It is undisputed that Daimler AG and its U.S. subsidiary adhere to all the legal requirements necessary to maintain their separate corporate identities. The question presented is whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State.

While this case is before the Court on the personal jurisdiction question, the Court would, I think, also be able to decide the broader ATS question, assuming, as in *Kiobel*, the Court treats the question as one going to jurisdiction and not the merits.

In related ATS news, the Court today also vacated and remanded *Rio Tinto PLX, et al. v. Sarei, et al*. to the Ninth Circuit for further proceedings in light of the *Kiobel* decision.

Dickinson on Harmonisation of Forum Non Conveniens Test in Australian and Trans-Tasman Proceedings

Andrew Dickison (University of Sydney) has posted Harmonisation of the Forum Conveniens Tests in Australian and Trans-Tasman Proceedings: A Discussion Paper on SSRN.

> *This discussion paper, written as part of the ongoing consultation by the Commonwealth Attorney-General's Department in relation to the possible reform of Australia's private international law rules (and available also on the consultation website), considers whether the statutory tests applied by Australian courts in deciding whether decline jurisdiction in favour of another*

Australian court on what may broadly be described as "appropriate forum" (forum conveniens) grounds, should be harmonised with the newly adopted regime in Part 3 of the Trans-Tasman Proceedings Act 2010 (Cth) governing decisions to decline jurisdiction in favour of a court in New Zealand. The creation of a harmonised forum conveniens regime for all Australian and Trans-Tasman cases has been put forward as one element of the broader review of rules of jurisdiction, choice of court and choice of law rules mandated by the Standing Committee on Law and Justice in its meeting held on 12-13 April 2012.