2013 Summer Seminar in Urbino

The Faculty of Law of the University of Urbino will host this summer its 55th Seminar of European Law.

Many of the courses taught over the two weeks of the seminar (19-31 August 2013) will deal with conflict issues. Although courses can be taught in English, this is a franco-italian seminar where courses are typically taught in French or Italian, with a translation in the other language.

Speakers are leading academics and practitioners, including Professors Bertrand Ancel, Tito Ballarino, Luigi Mari and Cyril Nourissat.

The full programme can be found here.

Three New Papers of Professor Veerle Van Den Eeckhout

Professor Veerle Van Den Eeckhout , who teaches private international law at the Universities of Antwerp and of Leiden, has just published three new papers on SSRN.

The first one is entitled “The Instrumentalisation of Private International Law: Quo Vadis? Rethinking the “Neutrality” of Private International Law in an Era of Globalisation and Europeanisation of Private International Law”. The abstract reads as follows:

> Private International Law is known as a very abstract, legal-technical and inaccessible discipline. Yet it is striking that PIL issues are conspicuously often interwoven with a number of heated, topical socio-legal debates, see for example 1) the debate on transnational corporate social responsibility, 2) the debate on posting of employees from Eastern to Western Europe, 3) the debate on residency and social-security entitlements of foreigners based on

family relationships. Although at first glance the role of PIL in discussions about how these subjects should be regulated may seem rather modest, on further consideration it turns out to be crucial how the PIL questions that can be recognised are (or are not) identified and addressed. PIL is a "silent force". If one looks closer, it is clear that PIL often even functions as a hinge between legal branches in these debates – e.g. between migration law and family law. But scholars – both PIL-lawyers and lawyers from other disciplines – have, so far, essentially left unexplored the PIL-issues of these debates.

Meanwhile, recent developments show that PIL is, occasionally, "instrumentalised" in a policy-related way, both by European and national authorities. There are, for example, tendencies on a Dutch national level to make PIL subservient to migration policy, ultimately transforming PIL into an instrument of restrictive migration policy. PIL could, thus, function as the "Achilles heel" of the legal protection of migrants. In several areas, there is pressure on PIL "from outside". The question arises how the phenomenon of instrumentalisation of PIL – in its various forms – must be valued from the perspective of PIL: the PIL of European countries has of old been set up as a neutral reference system; the classical PIL paradigm implies that, independent of any legal political consideration or policy objective, the law applied to an international relationship is the law most closely connected to that legal relationship. Recognition of ongoing dynamical developments in the sense of instrumentalisation of PIL c.q. attempts to instrumentalise PIL thus raises a number of fundamental questions in respect of essential characteristics of PIL and the interaction of PIL with other branches of law: an analysis of the "instrumentalisation" of PIL requires a) research into the foundations of PIL b) as well as research into PIL's "hinge-function". Both where it concerns situations governed by European PIL rules and where it concerns situations that are not (yet) governed by European PIL rules, the question arises what position PIL should take in the forces at play and to what extent PIL can or should still adopt a "neutral" position. Could PIL be modelled, for example, into an instrument in the fight against international environment pollution, or into an instrument to guarantee labour protection?

In this project, all three above-mentioned debates will be analysed as "case-studies". The project thus includes several broad and complex themes, all of them with major international relevance and national relevance for each of the

EU-countries, in a context of globalisation, in order to make it possible to come to a general, over-all view: the overall ambition of the project is to arrive – through the thorough analysis of these cases and the exploration of future scenarios for each of them – at more synthetic insights on a) the essential characteristics of PIL itself and b) the characteristics of PIL in its hinge-function, in interaction with other disciplines. There is at present a very great need for a further and thorough study of each of the case studies as such, but as the case-studies have been well-selected, it will ultimately be possible to achieve a theoretical model and a typology.

Click here to download.

Two other, shorter papers entitled "The Role of Private International Law in Achieving Social Justice" and "New Possibilities for Argumentation in International Labour Law and Corporate Liability Coming Up?", can be downloaded clicking here and here.

The Max Planck Institute Luxembourg has been inaugurated

It is my great pleasure to announce that the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law has been officially inaugurated. The Opening Ceremony took place on Wednesday in Luxembourg in the presence of the Grand Duke Henri, the Luxembourgian Prime Minister Jean-Claude Juncker, the Minister for Higher Education and Research of Luxembourg, the German Ambassador, the State Secretary at the Federal Ministry of Education and Research, Germany, and the President of the Max Planck Society. The event was attended by more than 150 prominent persons from the ECJ, the Luxembourgian University and the academia of different countries. The following authorities addressed their Opening Remarks :

- Professor Peter Gruss, President of the Max Planck Society
- Ms Martine Hansen, Minister for Higher Education and Research, Luxembourg
- Ms Cornelia Quennet-Thielen, State Secretary at the Federal Ministry of Education and Research, Germany
- Professor Rolf Tarrach, President of the University of Luxembourg
- Ms Viviane Reding, Vice-President of the European Commission and Commissioner for Justice, Fundamental Rights and Citizenship (by means of a video message).

After these Welcome speeches, the Institute was presented by Professor Wolfgang Schön, Vice-President of the Max Planck Society, and by the Executive Director of the Institute, Professor Burkhard Hess.

The Opening Ceremony was preceded by an Opening Symposium on "Dispute Resolution and Law Enforcement in the Financial Crisis", held on Tuesday with the participation of Professor Eddy Wymeersch (University of Ghent), Professor David Skeel (University of Pennsylvania), Professor Stefania Bariatti (University of Milan) and Professor Paolo Giudici (Free University of Bozen-Bolzano), as well as Professor Burkhard Hess (Executive Director of the Institute) and Professors Verica Trstenjak and Marco Ventoruzzo (External Scientific Members of the Institute).

The MPI Luxembourg has the ambition to promote research at the highest international standard. Its activity in this regard has already commenced and will go on with a carefully designed programme of lectures and seminars announced at the website of the Institute (www.mpi.lu). The Library, *noyau dur* of the Institute already established in the fall of 2012 is already open to researchers from other academic institutions.

All the best to the new Institute.

Ancel, Marion and Wynaendts on One Sided Jurisdiction Clauses

Marie Elodie Ancel (Université Paris Est), Lea Marion and Laurence Wynaendts (Clifford Chance Paris) have posted Reflections on One-Sided Jurisdiction Clauses in International Litigation (About the Rothschild Decision, French Cour de Cassation, 26 September 2012) on SSRN. It is the English version of a paper published in a French law journal.

> *By criticising the "potestative nature" of one-sided jurisdiction clauses, the Rothschild decision may be construed as imposing on litigants perfect equality in their access to justice. This decision therefore threatens many of our jurisdiction clauses. In fact, if clauses that give one party unfettered discretion to choose where to sue have to be set aside, the other type of one-sided jurisdiction clauses, those that are simply dissociative, should be upheld as long as they do not substantially disadvantage one of the parties.*

Ontario Court Refuses to Hear Chevron/Ecuador Enforcement Action

As many of you know, in 2011 several residents of Ecuador won a judgment in the courts of that country against Chevron Corporation for some $18 billion. In 2012 the successful plaintiffs sued Chevron Corporation and Chevron Canada Ltd. in Ontario, seeking to have the Ecuadorian judgment enforced there. The defendants brought a motion challenging the Ontario court's jurisdiction to hear the action. The Ontario Superior Court of Justice has now released its decision, siding with the defendants. The decision has not yet been posted on CanLII but is available here. The plaintiffs' lawyer has publicly indicated that his clients will

appeal.

Key aspects of the decision have been summarized by Roger Alford on the Opinio Juris website (here).

Articles on the SCC's Van Breda v Club Resorts

Things have been pretty quiet on the conflict of laws front in Canada over the past several months. But lower courts and academics have been working to understand the new framework for taking jurisdiction set out in April 2012 by the Supreme Court of Canada in *Van Breda v Club Resorts* (available here).

Several useful articles have now been written about this decision:

Tanya Monestier, "(Still) a 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2013) 36 Fordham International Law Journal 396

Vaughan Black, "Simplifying Court Jurisdiction in Canada" (2012) 8 Journal of Private International Law 411

Joost Blom, "New Ground Rules for Jurisdictional Disputes: The *Van Breda* Quartet" (2012) 53 Canadian Business Law Journal 1

Brandon Kain, Elder Marques & Byron Shaw, "Developments in Private International Law: The 2011-12 Term – The Unfinished Project of the *Van Breda* Trilogy" (2012) 59 Supreme Court Law Review (2d) 277

In addition, two reference works contain discussion and analysis of the case: Walker, *Castel & Walker: Canadian Conflict of Laws*, 6th ed looseleaf (Markham, ON: LexisNexis Butterworths, 2005–) and Black, Pitel & Sobkin, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act.*

The former is a looseleaf and the most recent releases discuss the case in detail. The latter is a text which was published after the case was decided.

New French Book on European Divorce Law

A commentary of European private international law instruments applicable in divorce proceedings was just published by the University of Burgundy (CREDIMI) under the supervision of Professor Sabine Corneloup.

> *There are approximately a million divorces in the European Union each year, of which 140 000 have an 'international' element. 13% of European couples are bi-national and the trend is increasing, due especially to the freedoms of movement. The European Union has adopted two regulations in the area of divorce which are meant to simplify the life of EU citizens: regulation n° 2201/2003 « Brussels II bis » and regulation n° 1259/2010 « Rome III ». The scope of application of these rules on private international law covers not only 'European spouses', but also Third States nationals if at least one of the spouses has his/her habitual residence within a Member State. As the national divorce laws of the Member States have not been harmonized, considerable differences are remaining not only regarding the substantial but also the procedural aspects of divorce. There is not even a consensus on the very concept of marriage, as shows the current debate on same-sex marriage. In such a context of major differences between the national divorce laws of the Member States, the EU regulations on Private international law have a fundamental role to play.*
>
> *The book is conceived as a commentary, article by article, of the regulations Brussels II bis and Rome III. It is written in French or in English, according to the authors. A comprehensive analysis of comparative law precedes the commentary itself, in order to provide practitioners with the necessary information to deal with an international divorce. The national divorce laws of six Member States are presented: Germany, Belgium, France, Spain, Italy and*

Portugal. The book concludes with transversal thoughts on the most important issues the European Divorce Law is currently facing.

With the contributions of :

Alegría Borrás, Hubert Bosse-Platière, Maria Novella Bugetti, Christelle Chalas, Sabine Corneloup, Alain Devers, Christina Eberl-Borges, Marc Fallon, Aude Fiorini, Estelle Gallant, Cristina González Beilfuss, Urs Peter Gruber, Petra Hammje, Rainer Hausmann, Natalie Joubert, Marco Jung, Paul Lagarde, Elena Lauroba Lacasa, François Leborgne, Yves-Henri Leleu, Luís de Lima Pinheiro, Eric Loquin, Alberto Malatesta, Françoise Monéger, Horatia Muir Watt, Valérie Parisot, Carlo Rimini, Thomas Simons, Miguel Teixeira de Sousa.

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. La création d'un marché européen du divorce, par Éric LOQUIN

More information is available here.

ADR and ODR for (Cross-Border) Consumer Contracts

On 22 April 2013 Council of the European Union adopted a Directive on Alternative Dispute Resolution (ADR) and a Regulation on Online Dispute Resolution (ODR) for (cross-border) consumer contracts. Building on two proposals of the European Commission of November 2011 the two instruments are meant to improve the cross-border enforcement of consumer rights. The official press release reads as follows (footnotes omitted):

> *The Council today adopted a directive on Alternative Dispute Resolution (ADR) and a regulation on Online Dispute Resolution (ODR) (PE-CONS 79/12 and PE-CONS 80/12). The new system, which is part of the "Single Market Act" package, will provide for simple, fast and low-cost out-of-court settlement procedures designed to resolve disputes between consumers and traders arising from the sales of goods and services. It will ensure the establishment of ADR schemes where none exist today. These will fill current gaps in coverage and ensure that consumers are able to take their disputes to an ADR. In addition, it establishes a common framework for ADR in the EU member states by setting out common minimum quality principles in order to ensure that all ADR entities are impartial, transparent and efficient. Existing national ADR schemes should be able to continue to operate within the new framework. The ADR system will be supplemented by an ODR mechanism involving the setting up of a European online dispute resolution platform (this will be an interactive website free of charge in all languages of the Union2).*
>
> *As a general rule, the outcome of an ADR procedure should be made available within a period of three months from the date on which the ADR entity has received the complaint file. ADR schemes, also known as "out-of-court mechanisms", already exist in many countries to help consumers involved in disputes which they have been unable to resolve directly with the trader. They have been developed differently across the EU and the status of the decisions adopted by these bodies differs greatly. The new directive will apply to domestic and cross-border disputes submitted by consumers against traders in almost all areas of commercial activity across the EU, including to online transactions, which is particularly important when consumers shop across*

borders. Member states will have two years to incorporate the new provisions into their national legislation.

Ringe on Regulatory Competition in Corporate Law in the European Union

Wolf-Georg Ringe, Professor of International Commercial Law at the Copenhagen Business School, has posted a paper on charter competition in European Union on SSRN ("Corporate Mobility in the European Union – A Flash in the Pan? – An Empirical Study on the Success of Lawmaking and Regulatory Competition"). The paper is available here. The official abstract reads as follows:

This paper discusses new data on regulatory competition in European company law and the impact of national law reforms, using the example of English company law forms being used by German start-ups. Since 1999, entrepreneurs have been allowed to select foreign legal forms to govern their affairs. The data show that English limited companies have been very popular with German entrepreneurs in the first years of the last decade, but also document a sharp decline from early 2006 onwards. This decline casts doubt over the claim that the German company law reform from November 2008 had 'successfully fought off' the use of foreign company forms. Moreover, by contrasting the German data with the corresponding developments in Austria, the paper further demonstrates that the latter jurisdiction sees a similar decline without having reformed its company law. Instead of exclusively relying on law reform as the causal reason for declining foreign incorporation numbers, the paper offers a number of alternative or complementary explanations for the striking developments. The findings are important for our understanding of (defensive) regulatory competition and successful lawmaking.

Should Brussels I Have Been Applied in "Land Berlin"? Some Thoughts on the Judgment of the ECJ from April 11th, As. C- 645/11

Many thanks to Polina Pavlova for sharing her comments on this recent ECJ ruling, first in our (MPI) weekly Referentenrunde and now here. Paulina Pavlova is research fellow of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law.

On April 11th, the ECJ rendered what at first sight appears to be a non-controversial judgment on the scope of application of the Brussels I Regulation. Whether the decision in the case C-645/11, *Land Berlin v. Ellen Mirjam Sapir and Others* is indeed as consistent as it might seem, is, however, highly questionable.

Mr. Busse owned a plot of land in East Berlin. During the Third Reich he was persecuted under the NS regime and was forced to sell the land to a third party in 1938. Later on, the plot was expropriated by the German Democratic Republic and became part of a larger, State-owned, parcel of land. After the German reunification, the ownership of this land transferred to the Land Berlin and the Federal Republic of Germany.

In 1990, the *Vermögensgesetz* (Law on Property) provided for the possibility that such expropriated land be returned to the original owner. Ten successors of Mr. Busse domiciled in four different States then applied for a return of the land which once belonged to Mr. Busse. However, in 1997, fulfilling this request became impossible since the Land Berlin and the Federal Republic of Germany sold the whole parcel to an investor. This was allowed by the *Investitionsvorranggesetz* – a Law on priority for investments in the case of claims for return under the Law on Property. As compensation, the successors

were entitled to receive the corresponding proceeds of the sale or the market value of the property.

The competent authority ordered the Land Berlin to pay the respective share of the proceeds to Mr. Busse's successors. However, the Land Berlin unintentionally transferred the entire amount of the sell price to their lawyer instead of paying only the amount corresponding to the share of Mr. Busse in the big parcel of land. The Land Berlin then brought an action before the *Landgericht Berlin* against the successors of Mr. Busse and their lawyer in order to recover the overpayment. The claim was based on unjust enrichment against the successors and on tort against the lawyer.

As far as the merits are concerned, the defendants claim to be entitled to the whole amount they received alleging that the parcel had been sold under value anyway. More important for us is whether the *Landgericht Berlin* has jurisdiction over the defendants who are not domiciled in Germany but in the UK, Spain and Israel. This question concerns the application of the Brussels I Regulation and more specifically its Article 6 (1). The case went through all instances and finally to the *Bundesgerichtshof* which referred three questions to the ECJ on: (1) the notion of "civil matters" in the sense of Article 1 of the Brussels I Regulation, (2) the criteria of a close connection as required in Article 6 (1) and (3) the applicability of the latter provision to defendants not domiciled in a Member State. With regard to the specific case the ECJ basically gave a "Yes-Yes-No" answer.

Let me briefly comment the Court's interpretation in a reversed order, starting from the third question.

Third State defendants and Article 6 (1)? To the question of applicability of Article 6 (1) to defendants not domiciled in a Member State the Court answered with a clear "No", thus confirming not only the unambiguous wording but also the prevailing view in legal literature.

A close connection? As far as the second question is concerned, the ECJ basically ruled the *Land Berlin* case fulfills the criterion of the close connection as required in Article 6 (1). Although the Court always lays emphasis on the need of a strict interpretation of this rule, recent case-law has shown the opposite trend. With this in mind, the new decision can hardly

be qualified as groundbreaking. This, however, cannot be said for the interpretation of the notion of civil matters in *Land Berlin*.

A civil matter? With regard to the (preliminary) question of whether a case as the one described falls under the concept of "civil and commercial matters" in the sense of Article 1 (1) of the Brussels I Regulation, the ECJ recalled its relevant judgments stating that the regulation is not applicable only when a public authority is acting in the exercise of its public powers. In the Court's view, the Land Berlin did not act in the exercise of such powers. The main argument in the reasoning seems to be that the Law on Property and the Law on Investment that are governing the compensation process apply equally to both private persons and public authorities. What is more, the court explains, in order to recover the overpayment, the Land Berlin has to bring an action before a civil court on the basis of a provision of the German Civil Code (Paragraph 812, unjust enrichment). All these circumstances lead the ECJ to the conclusion that we have a civil matter within the meaning of the Regulation despite the involvement of a public authority and the administrative proceedings preceding the compensation.

As convincing as it may seem, this reasoning is far from solid.

To start with, the Court's view on the scope and purpose of the two laws governing the compensation process, the Law on Property and the Law on Investment, seems questionable. While the scope of the laws is not limited to cases involving the ownership of State entities – they can indeed apply when both the previous and the actual owners are private persons, what is completely left aside by the Court is the *purpose* these legislative acts actually seek to achieve and the *nature* of their subject matter. The provisions ensure the compensation for the expropriation of the lawful owner taken place in the circumstances of a totalitarian regime. Even where the State has not (directly) acquired the property, the loss of ownership can still be considered as equal to such an expropriation since it was facilitated by the rules of the regime. What is more, both acts envisage special administrative proceedings preceding the claim for compensation, and even the establishment of special public bodies competent to deal with the multiplicity of restitution cases. And finally, and most importantly, restitution and compensation for expropriation connected with the specificity of a political regime are *per se* matters deeply rooted in the relationship between the private individual and the State.

Furthermore, the Court brings the argument that the restitution of the overpayment is not a part of the administrative procedure foreseen in the above-mentioned laws. It is not entirely clear whether the ECJ aims at a distinction between the overpayment and the sum which the Land Berlin actually wanted to transfer or between the (over)payment and its restitution. As to the first assumption (which seems less probable), it has to be pointed out that a mistake in an administrative procedure cannot result into the transformation of a public administrative matter into a civil one. With regard to the second interpretation, whether the restitution of a payment is a civil matter or not, is a question necessarily linked to the nature of the payment itself. In a nutshell: Payment, *over*payment and recovery of overpaid amount necessarily share the same legal nature when it comes to ascribing them to the public or the private domain.

The rather supplementary argument of the ECJ concerning the jurisdiction of the Civil courts on the overpayment recovery claims in the aforementioned context is also misleading as it clearly contradicts to established case-law. As the Court rightfully noted in *Lechouritou and others* (paragraph 41), the civil nature of the proceedings previewed in national law is entirely irrelevant when it comes to qualifying a claim for the purpose of Article 1 of the Regulation. From *Lechouritou* (paragraphs 36 f.) we can conclude that it is the nature of the claim, the context it derives from and the acts at the origin of the damage pleaded that are decisive for the qualification of the claim as falling in or outside of the scope. While it is beyond doubt that the questions in the main proceedings of *Lechouritou* – State immunity in the context of armed forces activities during the Second World War – demonstrate a much stronger link to a State related matter, the reasoning of this judgment nonetheless offers clear criteria that can be (or rather should have been) applied to the *Land Berlin* case.

The last point in the reasoning of *Land Berlin* that merits examination is the question of the legal basis of the claim – a factor to which the Court itself seems to ascribe a significant importance. The action for recovery of the overpayment is based on Paragraph 812 (1) of the German Civil Code: a rule governing restitution in cases of unjust enrichment which applies to both private persons and public authorities. However, it seems arbitrary to consider a claim as a civil matter simply because a national legislator has

anchored the general provision on unjust enrichment in the Civil Code without distinguishing between public and private cases. This rather technical approach adopted in *Land Berlin* promotes another, very controversial consequence: It results in the general inclusion of claims based on unjust enrichment into the scope of the Regulation irrespective of their true nature. Unjust enrichment as such, however, cannot exist outside of a context, whether it is a contractual one, a tortious one or – for the sake of this debate – an administrative one.

As a conclusion, a critical view on this note seems appropriate: Is the position stated here one too deeply rooted in the German understanding of a civil matter that disregards the need of an independent, autonomous definition of the Regulation's scope? While the compensation for expropriations during the NS regime is in Germany indeed framed in an administrative procedure and strongly differs from the civil context, might the European legislator still consider it as a civil matter?

I would argue that this is not the case. The core elements that deserve attention from a EU perspective are: the subject matter of the action and the legal relationships between the parties (*LTU*, paragraph 4; *Lechouritou*, paragraph 30; *Henkel*, paragraph 29). There is no rule under which restitution claims necessarily constitute a civil issue, nor is every action brought before a civil court by all means subject to the Regulation's jurisdiction rules. Therefore, with regard to the aforementioned specifics of the *Land Berlin* case, the judgment sets an alarming trend: Following *Land Berlin*, the Brussels I Regulation risks to eventually apply to subject matters it never meant to govern.