Private International Law and Policies of Migration Law (Paper on SSRN)

Professor Veerle Van Den Eeckhout, who teaches private international law at the Universities of Antwerp and of Leiden, has just published an article entitled "Private International Law Questions that Arise in the Relation between Migration Law (in the Broad Sense of the Word) and Family Law: Subjection of PIL to Policies of Migration Law?" on SSRN. Click here to download.

Abstract:

> In many analyses of international family law attention is exclusively given to "cultural" aspects; the analysis of rules of international family law is often embedded in the debate on the collision of cultures. But in analyses of international family law a so-called socio-economic component can be distinguished, certainly if international family law is studied in interaction with migration law: in regulating mobility, residence, nationality and social security issues – at present sensitive areas -, one is inevitably confronted with the intricacies of PIL – for example, the recognition of a foreign marriage or of a foreign judgment containing a change of age of a foreigner (both typical issues of PIL) could be decisive in evaluating a residence claim or a retirement claim. Awareness of this impact of international family law apparently functions as a catalyst on various levels: in parallel with current "two-track policies" in migration law, a double-track policy is also emerging in the process of dealing with international family law. On the one hand, the European Union has "brought in" international family law as an instrument to stimulate the freedom of movement of European citizens: the awareness that mobility of European citizens within the European Union can be influenced by the way people weigh the pros and cons of its impact on the regulation of their family life, spurs the elaboration of a liberal international family law. On the other hand, when international family law issues involve non-European foreigners, national authorities sometimes tend to use international family law rules in such a way as to prevent non-European migrants from claiming residence, social security and nationality. Thus, if one examines the

"economic" component of international family law, both the so-called European context (mobility of European citizens and their family members within Europe, whereby principles as free movement of persons, non-discrimination of EU citizens and European citizenship are crucial) and the so-called non-European context (migration from non-European countries) should be examined – with attention for the shaky dividing line which seems to exist between the two, as well as the double-track policy which, when comparing dynamics, seems to develop (trends to liberalisation in a European context versus opposite trends in a non-European context). An analysis of the "instrumentalization" of PIL requires a) research into the foundations of PIL b) as well as research into PIL's "hinge-function". There is a need to lay down the scientific foundations for future developments in this area through the identification of a series of mechanisms, the critical analysis of the legitimacy and side-effects of current practices and the exploration of future scenarios.

German Federal Supreme Court Rules on Jurisdiction over US Credit Rating Agency

In a decision of 13 December 2012 the German Federal Supreme Court had to deal with the question (among others) of whether (and under what conditions) German courts have jurisdiction to hear claims of German investors against American based US credit rating agencies for losses suffered in the aftermath of the 2008 financial crisis. In the case at hand a German citizen with habitual residence in Germany had filed a lawsuit against the American based US credit raging agency Standard & Poor's. Relying on the defendant's favourable ratings he had purchased Lehman securities from a Dutch Lehman subsidiary in March 2008 and had suffered a loss of € 30.000,00 when Lehman became bankrupt in September 2008.

The court of first instance, the Landgericht Frankfurt am Main, declined to hear

the case for lack of jurisdiction over the US based defendant. The Court of Appeal, the Oberlandesgericht Frankfurt am Main, in contrast, found that German courts were competent to hear the case based on § 23 of the German Code of Civil Procedure. According to this provision a person or company may be sued in the place where assets belonging to that person or company are located – provided that these assets are not negligible and provided that there is a sufficient connection to Germany. The court held (1) that the defendant had assets in Germany because it made a yearly six-digit profit out of German subscription contracts and (2) that there was a sufficient connection to Germany because the plaintiff had his habitual residence in Germany (and was a German citizen). In its decision of 13 December 2012 the German Federal Supreme Court essentially followed the Court of Appeal (in view of the issue of jurisdiction). It emphasized that § 23 of the German Code of Civil Procedure was meant to protect local plaintiffs and, therefore, allowed plaintiffs with habitual residence in Germany to sue foreign persons or companies with assets in Germany without further requirements.

The full decision can be downloaded here (in German).

Kiobel and the Question of Extraterritoriality (Paper)

With this work written in English (click here to access the document), Professor Zamora Cabot continues his already wide and prolific research on the *Alien Tort Claims Act* (hereinafter, ATCA) of the United States, and on its application. In this paper the author focuses on a decisive issue: the question of extraterritoriality that is being discussed in the *Kiobel* case. The author declares that the way this question is being presented -i.e., whether the United States is exceeding its competences vis-á-vis public international law from the point of view of extraterritoriality, related to imposition or legal imperialism- is completely wrong. The United States is not acting against the Law of Nations and the debate on this issue is actually unfounded. To support his opinion, after some previous

considerations in the introductory Part of this work, Professor Zamora Cabot brings up several cases sustaining the aforementioned negative. Most specifically, in Section II, and just as an *aide-mémoire*, the author highlights three milestones in the field of international economic sanctions: Section 301 *et seq*. of the *United States Trade Act of 1974* and its application, the *Siberian Gas Pipeline* case and the renowned *Cuban Embargo* case which comprises some important elements, such as the *Helms-Burton Act*. In his opinion, based on a long personal research, the opponents to the ATCA are trying to place it into a controversial and troubled field, taking advantage of the negative memory sparked off by the real conflicts of extraterritoriality, as exemplified by the U.S. international sanctions regime.

In Section III, the author, in line with the original interpretation made by the United States Court of Appeals for the Second Circuit in its seminal case *Filártiga*, argues that the cases on the application of the ATCA are based on special torts, for which the mechanics and approaches of Private international law do play a significant role. Evaluating the set of jurisdictional and legislative competences (jurisdiction to adjudicate and jurisdiction to prescribe) of the United States confronted with the Law of Nations, and regarding its practice, the author declares that those competences can be exercised without problems, just as the United States courts are repeatedly reflecting in their jurisprudence while deciding other kinds of international tort cases. This does not imply denying the special features of the ATCA cases, mainly defined by two facts: first, the need of contrasting the consistency with the *Jus Cogens* of the conducts underlying these cases,to confirm if the reservation of jurisdiction to adjudicate in favor of the federal courts as dictated by the ATCA is justified; second, the possibility for the federal courts to base their decisions *on federal common law*, to the extent that it has integrated the mandates of Public international law.But it is worth noting, in any case, that these special torts do not lead to exclusion, but to the opportunity to make Private international law and Public international law to cooperate, which always ennobles both of them.

Finally, in Section IV, Professor Zamora Cabot concludes his research with this idea: if the United States Supreme Court decides in the *Kiobel* case against the brilliant jurisprudence generated by the ATCA in that country, which is in favor of the Human Rights and which constitutes a magnificent example for the international community, the fight to protect them will continue. And it will do so before the State Courts inside the United States, as well as before many other

courts across the length and breadth of the globe. Actually, the international community is becoming more sensitive and mindful, and numerous initiatives are being taken, especially regarding cases based on human rights violations committed by multinational corporations.

European Parliament Conference on Civil Law and Justice

A workshop on civil law and justice will take place next Wednesday, 23 January, at the European Parliament, entitled "**Do EU citizens enjoy free movement**". The opening panel will present the latest developments in the case-law of the Court of Justice on civil law, with a special focus on EU citizenship; the Irish Presidency planning for the area of civil law will follow. Session I will address Private International Law from a general point of view, comprising among others the intervention of our editor Xandra Kramer on the study (downloadable here) "Current gaps and future prospects in European private international law: towards a code of private international law?". Session II will focus on family and succession law, therefore on topics such as the questions left unresolved in Regulation 650/2012 (Prof. Burkhard Hess of the Max Planck Institut Luxembourg), the rules governing surrogacy in the EU Member States (Laurence Brunet, London School of Economics), the cross-border implications of the legal protection of adults (Phillipe Lortie and Maja Groff, from the Hague Conference on Private International Law, and Richard Frimston, Solicitor, Russell-Cook Solicitors, Member of the Society of Trust and Estate Practitioners), or the legal basis for the way forward in the field of family law (Aude Fiorini, Dundee Law School). In Session III, consecrated to civil status, the speakers will address fraud with respect to civil status (Duncan Macniven, President of The International Commission on Civil Status, former Registrar General for Scotland), together with day-to-day matters in cross-border relationships, such as the challenges for civil registrars in circumventing problems stemming from the legal vacuum in as far as civil status documents are concerned (Dr Bojana Zadravec, Vice-President of European Association of Registrars).

Click here for the whole programme.

Venue: Room JAN4Q2, European Parliament, Brussels.

Madrid PIL Seminar, April 2013

The final program of the International Seminar on Private International Law, organised by Prof. Fernández Rozas and Prof. De Miguel Asensio, taking place next April in Madrid, has already been released. The meeting will gather together speakers from different countries and legal cultures, including South and North America and Asia, for an in-depth discussion of a variety of the most recent developments in Private International Law. Click here to access the document.

Vacancies at the University of Freiburg

At the Department of Law of the **Albert-Ludwigs-University Freiburg im Breisgau** (Germany), **four vacancies** have to be filled at the future chair for **civil law, particularly conflict of laws and comparative law (designated chairholder: Prof. Dr. Jan von Hein)**, from April 1st, 2013 with

legal research assistants (salary scale E 13 TV-L, personnel quota 50%)

limited for 2 years.

The assistants are supposed to support the organizational and educational work of the future chairholder, to participate in research projects of the chair as well as to teach their own courses (students' exercise). Applicants are offered the opportunity to obtain a doctorate.

The applicants are expected to be interested in the chair's main areas of research. They should possess an above-average German First State Examination (at least "vollbefriedigend") or a foreign equivalent degree. In addition, a thorough knowledge of German civil law as well as conflict of laws, comparative law and/or international procedural law is a necessity. Severely handicapped persons will be preferred provided that their qualification is equal.

Please send your application (Curriculum Vitae, certificates and, if available, further proofs of talent) to Prof. Dr. Jan von Hein, Institut für ausländisches und internationales Privatrecht, Abt. III, Peterhof, Niemensstr. 10, D-79098 Freiburg (Germany) no later than February 15th, 2013.

As the application documents will not be returned, we kindly request you to submit only unauthenticated copies. Alternatively, the documents may be sent as a pdf-file via e-mail to ipr3@jura.uni-freiburg.de.

Further information is available at the institutes website.

Academic Association for International Procedural Law (Meeting)

A meeting of the Academic Association for International Procedural Law (**Wissenschaftliche Vereinigung für Internationales Verfahrensrecht)** will take place from Wednesday 20 to Saturday 23 March 2013 in Passau (Germany) and Linz (Austria). Apart from the working sessions, dedicated to current issues of recognition of foreign judgments and to the European rules on cross-border debt recovery, the participants will also have the opportunity to visit some cultural sites. The General Assembly of the Association will be held on Friday afternoon.

Registration is open for members and guests of the Association. For more

information and online-registration please refer to: www.jura.uni-passau.de/2442.html.

Click here for the program.

Note: Unless otherwise indicated presentations will be in German.

Issue 2012.4 Netherlands Private International Law on Family Law

The fourth issue of 2012 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht,* includes seven articles dedicated to the topic 'Party autonomy in international family law.'

Maarja Torga, Party autonomy of the spouses under the Rome III Regulation in Estonia – can private international law change substantive law?, p. 547-554. The abstract reads:

At the moment Estonia is preparing to join Council Regulation (EU)No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (hereafter: Rome III Regulation). Article 5 of the Rome III Regulation gives limited party autonomy to the spouses in divorce matters. However, regardless of the applicable law chosen by the parties, under Article 13 of the Rome III Regulation the Estonian courts would not have to grant a divorce if Estonian substantive law does not deem the marriage in question to be valid for the purpose of divorce proceedings. The present article evaluates the discretion of the Estonian judges to rely on Article 13 of the Rome III Regulation and the alternative courses of action for the spouses in order to avoid the application of the said provision. By using the Rome III Regulation as an example, the author takes the position that the extension of party autonomy in one field of Estonian private international law should lead to a gradual expansion of party autonomy in other fields of Estonian law, which at the moment is rather conservative in its treatment of non-traditional forms of marriage.

Ilaria Viarengo, The role of party autonomy in cross-border divorces, p. 555-561. The abstract reads:

The Rome III Regulation allows spouses to choose the law applicable to their divorce. This choice represents a relevant change for a field which is traditionally regulated by provisions from which the parties cannot derogate. First of all, the article analyses the reasons that justify optio juris *in the case of international divorce. The article furthermore examines the* optio juris *functioning and, in particular, it focuses on ways of assuring the full awareness of the parties and limitations to the choice. Although the Netherlands does not take part in the adoption of the Rome III Regulation, there are scenarios in which Dutch citizens might be affected by it, given that the Regulation has a 'universal' character. Finally, the article examines the role of the parties' will in determining the law which is applicable to the financial consequences of the divorce and in particular in the conclusion of prenuptial agreements.*

Janeen M. Carruthers, Party autonomy and children: a view from the UK, p. 562-568. The abstract reads:

This article examines the extent to which children, in proceedings affecting their transnational legal affairs, are entitled to express their views, and in what manner, at what time, and to what effect. Attention is paid to international standards set out in the United Nations Convention on the Rights of the Child, and to particular rules contained in international instruments such as Brussels II bis and the 1980 Hague Abduction Convention, and in unharmonised areas such as international family relocation. The influence which children increasingly may exert through the expression of their will is distinguished from the device of party autonomy as that concept generally is understood in private international law. The article shows that implementation of the policy of respecting children's views varies among legal systems, rendering important the matter of forum.

Anna Wysocka, How can a valid *profession iuris* be made under the EU succession Regulation? p. 569-575. The abstract reads:

In the near future, the Succession Regulation will unify international succession law in the EU. Containing rules which have a universal nature, starting from August 17, 2015 it will almost entirely replace international succession rules which are currently in force in the Member States. The Succession Regulation

allows for a professio iuris*, which may be made even now as long as it complies with certain requirements. Which laws may be designated as applicable? In what form should a* professio iuris *be made? Which law applies to the material validity of the* professio iuris*? Must the choice of law be clearly expressed or may it be tacit? May it be modified or revoked? What if the* professio iuris *turns out to be invalid? The above questions are answered by comparing the provisions of the Succession Regulation with the Hague Convention, as well as domestic laws of countries currently allowing for* professio iuris*.*

Csongor István Nagy, What functions may party autonomy have in international family and succession law? An EU perspective, p. 576-586. The abstract reads:

The article examines, from an EU perspective, what functions and considerations may justify party autonomy in the fields of international family and succession law. The article argues that in family and succession law the main function of party autonomy should be to tackle the uncertainties related to the applicable law (predictability), to protect vested rights and to ensure the operation of the country-of-origin principle. It is also submitted that this function is less relevant regarding matters connected to legal systems that contain uniform choice-of-law rules, like the Member States of the EU. Furthermore, the article also argues that in the EU the mutual recognition of the choice-of-law rules of the Member States may also justify party autonomy, especially in family and succession law.

Maria Hook, Party autonomy – yes or no? The 'commodification' of the law applicable to matrimonial property relations, p. 587-596. The abstract reads:

The party autonomy principle has met with some success in matrimonial property law, having been embraced, albeit with restrictions, by most civil law countries, but eschewed by the relevant statutory regimes of common law countries such as England and Australia. This article argues that the rationale for extending party choice to matrimonial property disputes is in need of re-examination. In particular, it submits that insufficient attention has been paid to the mechanism behind the party autonomy rule – the choice of law contract – and proposes a contractual framework of evaluation, founded on the choice of law agreement as a self-sufficient contract. This framework is used to determine whether, in the area of matrimonial property law, objective choice of law rules are mandatory in nature – that is, whether they seek to give effect to public policies that ought not be the subject of party choice. By importing contractual theory into the choice of

law process, this article hopes to offer a principled alternative to the traditional, often narrowly-focused approach that has been taken to party autonomy in this area.

Sagi Peari, Choice-of-law in family law: Kant, Savigny and the parties' autonomy principle, p. 597-604. The abstract reads:

This article offers an explanation for the emerging popularity of the parties' autonomy principle in the area of family law. It will be argued that Friedrich Carl von Savigny's divergence from Kant in the area of family law is what underlies the reluctance of different jurisdictions to implement the parties' autonomy principle in this area. Accordingly, the adoption of this principle in the area of family law reflects a complete reversion of Savigny's choice-of-law theory to its Kantian roots.

Kono and Jurcys on International Jurisdiction over the Cloud

Toshiyuki Kono and Paulius Jurcys (Kyushu University) have posted International Jurisdiction over Copyright Infringements in the Cloud on SSRN.

> *The emergence of the Internet, and more recently cloud computing, has tremendous technological, economic, social as well as cultural effects. Such technological development certainly affects legal framework and calls for careful assessment whether, and, if so how, the existing legal principles and doctrines should be adjusted. Despite the fact that cloud-based technologies have swiftly coated almost every aspect of communication, the discussion regarding its legal implications has been very fragmentary.*
>
> *This paper focuses on a rather specific aspect concerning the intersection of private international law and intellectual property rights in the cloud environment. Although the Internet is one of the most economically rewarding markets for the exploitation of the intellectual property, the ubiquity of the*

world wide web is also associated with a number of risks. One of the risks which should be considered by right holders and intermediaries operating in the digital environment concerns potential litigation over the exploitation of intellectual property rights before a court of a foreign state. In private international law terms, this risk is known as international jurisdiction: in disputes between the parties from different states or disputes involving foreign subject matter, which court should adjudicate the case? Under what conditions should a national court of one state exercise its jurisdiction and decide a multi-state dispute? National laws usually contain certain rules or principles which guide the courts in deciding whether the jurisdiction should be asserted or not (e.g., defendant's residence or commitment tortious acts in the forum state).

The exercise of jurisdiction in multi-state intellectual property disputes has been subject to great controversies. Even the most distinguished courts in various countries stumbled when dealing with intricate quandaries involving cross-border exploitation of intellectual property rights. The exercise of jurisdiction over multi-state disputes involving territorially limited intellectual property rights has become even more complex with the advancement of digital communication technologies. Some of the underlying difficulties are discussed in this chapter which starts with a short illustration how cloud computing affects the exploitation of intellectual property assets. This discussion is followed by a closer analysis of the main principles which are employed by the courts across the Atlantic in deciding when to assert jurisdiction over multi-state intellectual property disputes. The fourth section poses a more general question of whether the existing legal framework is apt for the disputes involving cloud-related controversies. Finally, the activities which have been conducted by a special Committee under the auspices of the International Law Association are discussed.

Symeonides on Choice of Law in American Courts in 2012

Dean Symeon C. Symeonides (Willamette University – College of Law) has posted Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey on SSRN. It is, as usual, to be published in the *American Journal of Comparative Law* (Vol. 61, 2013). Here is the abstract:

This is the Twenty-Sixth Annual Survey of American Choice-of-Law Cases. It is intended as a service to fellow teachers and students of conflicts law, in the United States and abroad.

Of the 4,300 cases decided in 2012 by state and federal courts, this Survey reviews 1,225 appellate cases, focusing on those cases that may contribute something new to the development or understanding of conflicts law, particularly choice of law. Highlights include:

- *Numerous cases exemplifying the valiant efforts of state courts, and some lower federal courts, to protect consumers, employees, and other presumptively weak parties from the Supreme Court's ever-expanding interpretation of the Federal Arbitration Act;*
- *A few cases enforcing choice-of-law clauses unfavorable to their drafters, and many more cases involving deadly combinations of choice-of-law and choice-of-forum clauses;*
- *Several interesting products liability cases, and other tort conflicts, including maritime torts and workers' compensation claims by professional football players;*
- *The first appellate case interpreting the recent amendments of the anti-terrorism exception to the Foreign Sovereign Immunity Act (FSIA);*
- *The first cases holding unconstitutional the Defense of Marriage Act (DOMA);*
- *A Massachusetts case holding that an undissolved Vermont same-sex union was an impediment to a subsequent same-sex marriage in Massachusetts;*
- *An Arizona case holding that a Canadian same-sex marriage was against Arizona's public policy, but — unlike other cases — also holding*

that the trial court had jurisdiction to annul the marriage and divide the parties' property;

- *The first case in decades upholding a foreign marriage by proxy;*
- *A case upholding, on First Amendment grounds, an injunction against Oklahoma's "Anti-Shari'a" Amendment; and*
- *A case refusing to recognize a Japanese divorce, custody, and child support judgment rendered in a bilateral proceeding because the husband did not receive notice of a subsequent guardianship proceeding.*