US Court Threatens European Holders of Argentinian Bonds

In October 2012, the U.S. Court of Appeals for the Second Circuit interpreted the *pari passu* clause contained in Argentinian bonds as meaning that all bondholders would be treated as least equally with any other external creditor. As a consequence, U.S. courts issued an injunction ordering Argentina to treat equally bondholders who had refused to participate in previous debt restructuring, and thus directing that whenever Argentina would pay on the bonds or other obligations that it issued when it restructured its debt, it would also have to make a "ratable payment" to plaintiffs who hold initial defaulted bonds.

Plaintiffs included NML Capital, a creditor which refused to participate in the debt restructuring and instead sued Argentina in U.S. Courts for defaulting on the bonds it holds. Readers will recall that NML won and has since then sought to enforce the U.S. judgments throughout the world, and that Argentina could sometimes resist enforcement on the ground of its sovereign immunity.

Assisting Argentina in Evading the Injunction

On August 23rd, 2013, the same U.S. Court of Appeals addressed another issue: whether bondholders who participated in the restructuring, and that Argentina is happy to pay, might be held in contempt of court if they actually accepted payment.

The injunction only directs Argentina to treat equally bondholders. Bondholders, therefore, are not parties to the injunction. However, as third parties, they might still be found to be in contempt of court if they assisted Argentina in evading the injunction, i.e. in accepting payment when Argentina would not pay NML.

Many of those third parties being based abroad, in particular in Europe, they challenged that they could be reached even indirectly by the injunction.

Due Process

The first argument that comes to mind was of course that the U.S. court might lack jurisdiction over these third parties. Put differently, the injunction could not

have an extraterritorial effect. The Court postponed the resolution of the issue by ruling that it had not issued any injunction against the third parties, and that its jurisdiction over them was thus irrelevant. It would only become so when a third party would be brought to the court in contempt proceedings. It would then be a proper party to the contempt proceedings, and could raise any defense it would want, including of course lack of jurisdiction.

Remarkably, before getting into this discussion, the Court had denied third parties the right to intervene in the proceedings and to become parties. This was because, the Court ruled, their "interests were not plausibly affected by the injunction"… Third parties are, the Court held,

> *creditors, and, as such, their interests are not plausibly affected by the injunctions because a creditor's interest in getting paid is not cognizably affected by an order for a debtor to pay a different creditor. If Argentina defaults on its obligations to them, they retain their rights to sue.*

The foreign creditors were thus denied the right to appeal, but the Court deigned to admit them to offer comments as amici curiae.

Interestingly enough, while being denied the right to become parties to the proceedings, third parties were allowed to ask the court for clarification on the scope and meaning of the injunction, so that they could know whether any given action would be a breach.

The result is that third parties may participate in the US proceedings as long as they comply, but they may not if they are unpolite and intend to disagree.

An interesting question is whether this would be regarded as comporting with procedural fairness on the other side of the Atlantic, and whether a European court would find that the US jugdment finding a third party in contempt for any action taking place before it would have been given the right to be heard violates procedural public policy.

New Edition of Loussouarn, Bourel and Vareilles-Sommieres´ Private International Law

The 10th edition of the French manual of Loussouarn, Bourel and Vareilles-Sommieres on private international law was published a few weeks ago.

The book was first published in 1928 by Lerebours-Pigeonniere. Yvon Loussouarn and Pierre Bourel, who both taught at Paris II University, took over in 1970 for the first, and 1977 for the second. Pascal de Vareilles-Sommieres, who is a professor at Paris I university, was associated to the 9th edition, and has updated alone the book for the 10th.

More information is available here.

Hague Academy, Summer Programme for 2014

Private International Law

Second Period: 28 July-15 August 2014

General Course

4-15 August

Arbitration and Private International Law: George A. BERMANN, Columbia University School of Law

Special Courses

28 July-1 August

* Renvoi *in Private International Law – The Technique of Dialogue between Legal Cultures:* Walid KASSIR, Université Saint-Joseph

Legal Certainty in International Civil Cases: Thalia KRUGER, University of Antwerp

* *Circulation of Cultural Property, Choice of Law and Methods of Dispute Resolution:* Manlio FRIGO, University of Milan

4-8 August

Maintenance in Private International Law, Recent Developments: Christoph BENICKE, University of Giessen

* *The International Adoption of Minors and Rights of the Child:* María Susana NAJURIETA, University of Buenos Aires

11-15 August

Limitations on Party Autonomy in International Commercial Arbitration: Giuditta CORDERO-MOSS, University of Oslo

* *International Air Passenger Transport:* Olivier CACHARD, University of Lorraine

*in French, with English translation.

Mariottini on U.S. Jurisdiction in Products-Liability in the Wake of McIntyre

Cristina M. Mariottini (MPI Luxembourg) has posted U.S. Jurisdiction in Products-Liability in the Wake of McIntyre: An Impending Dam on the Stream-of-Commerce Doctrine? on the Working paper series page of the Max Planck Institute Luxembourg.

> *By granting certiorari in McIntyre v. Nicastro (in which the New Jersey Supreme Court found personal jurisdiction over the manufacturer), the U.S. Supreme Court acknowledged the need to tackle the question of the stream-of-commerce doctrine, and particularly the issues left open by the lack of a majority opinion in Asahi. Nonetheless, on 27 June 2011, a – once again – deeply divided U.S. Supreme Court handed down its opinion in McIntyre, holding that, because a machinery manufacturer never engaged in activities in New Jersey with the intent to invoke or benefit from the protection of the State's laws, New Jersey lacked personal jurisdiction over the company under the Due Process Clause.*
>
> *Drawing a parallelism with the European provisions and case-law on specific jurisdiction in products-liability and providing an overview of the first reactions of the lower U.S. courts to this judgment, this article illustrates how in McIntyre the U.S. Supreme Court marked a strong narrowing down of the stream-of-commerce doctrine, and failed to provide a comprehensible framework for practitioners and lower courts faced with specific in personam jurisdiction questions.*

The paper is forthcoming in A. Lupone, C. Ricci, A. Santini (eds), *The right to safe food towards a global governance*, Giappichelli, Torino, 2013.

Schwartz on Aiding and Abetting Jurisdiction in the US

Julia Schwartz has posted 'Super Contacts': Invoking Aiding and Abetting Jurisdiction to Hold Foreign Nonparties in Contempt of Court on SSRN.

> *Under Federal Rule of Civil Procedure 65(d), district court injunctions are binding on nonparties who have notice of the order and are in active concert with the enjoined parties. Every court to address the issue has held that nonparties residing in other US jurisdictions can be held in contempt for aiding and abetting the violation of an injunction, even when they have no other contacts with the forum. Courts have held that a nonparty's assistance in the violation of an injunction creates a "super contact" with the forum, which is sufficient to establish personal jurisdiction. Despite consensus regarding the nationwide scope of injunc-tions, whether a foreign nonparty who aids and abets the violation of an injunction can be held in contempt without any connection to the forum state remains unresolved.*
>
> *Because international law concerning the enforcement of US judgments abroad is un-settled, this Comment proposes an alternative approach to determining whether a foreign nonparty who aids and abets the violation of an injunction should be subject to the court's contempt power. There are two justifications for asserting jurisdiction over foreign nonpar-ties who knowingly assist an enjoined party in violating an injunction. First, a court's asser-tion of "aiding and abetting jurisdiction" over a nonparty would be similar to conspiracy ju-risdiction, which courts invoke to hold foreign defendants without connection to the forum liable for the in-forum actions of their coconspirators. This approach would allow courts to establish jurisdiction whenever the substantive elements of aiding and abetting liability are met. Second, there is precedent for the enforcement of court orders against foreign nonparty subsidiaries in the discovery context. Courts considering whether a foreign nonparty subsidi-ary is bound by a discovery order assess the burdens that would result from compliance with the order and whether the order was evaded in good faith based on a conflict between the countries' laws. These cases indicate that contempt sanctions should issue when a nonparty purposefully evades a district court injunction and there is no compelling burden justifying the evasion.*

This student note is forthcoming in the *Chicago Law Review*.

Leibkuechler on the First Ruling of the Chinese Supreme Court on PIL

Peter Leibkuechler (Max Planck Institute Hamburg) has posted Erste Interpretation des Obersten Volksgerichts zum neuen Gesetz über das Internationale Privatrecht der VR China (The Supreme People's Court's Interpretation No. 1 on the Private International Law Act of the PRC) on SSRN.

In January 2013 the Supreme People's Court (SPC) published its first judicial interpretation on the 2010 Private International Law Act. The main aims of this Interpretation are to clarify the meaning of several rules, to facilitate judicial practice and to enhance legal security in private international law contexts. In order to achieve this, the Interpretation contains rather detailed provisions, often directly addressing certain issues that raised concerns among the courts when applying the Private International Law Act.

In addition, the SPC went beyond simple explanation and also created a number of rules that could not be found in the Act. These cases mostly concern issues that had been discussed by the legislator and among academia before the enactment of the Private International Law Act, but which were finally not included.

The article will show that despite several points of critique, the SPC has successfully engaged in finding solutions to existing deficiencies or potential problems in the Private International Law Act.

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Note: Downloadable document is in German.

Another Alien Tort Statute Case Dismissed and a Preliminary Scorecard

As readers of this blog are aware, the United States Supreme Court in the recent case of *Kiobel v. Royal Dutch Petroleum* applied the presumption against extraterritoriality to limit the reach of the Alien Tort Statute. In short, the Court held that the ATS did not apply to violations of the law of nations occurring within the territory of a foreign sovereign.

Today, the United States Court of Appeals for the Second Circuit issued an opinion in the case of *Balintulo v. Daimler AG* holding that the *Kiobel* decision barred a class action against Daimler AG, Ford Motor Company, and IBM Corporation for alleged violations of the law of nations in selling cars and computers to the South African government during the Apartheid era. Rather than dismiss the case itself, the Second Circuit remanded the case to the district court to entertain a motion for judgment on the pleadings. This case is important because it rejected the plaintiffs' theory that "the ATS still reaches extraterritorial conduct when the defendant is an American national." Slip op. at 20. It is also important because it explains that "[b]ecause the defendants' putative agents did not commit any relevant conduct within the United States giving rise to a violation of customary international law . . . the defendants cannot be *vicariously liable* for that conduct under the ATS." Slip op. at 24.

This case as well as the Ninth Circuit's recent decision in *Sarei v. Rio Tinto* (similarly dismissing an ATS suit) would seem to point to substantial contraction

in ATS litigation. But, not so fast.

A federal disctrict court in Massachussettes recently let an ATS case go forward notwithstanding *Kiobel* where it was alleged that a U.S. citizen in concert with other defendants took actions in the United States and Uganda to foment "an atmosphere of harsh frighenting repression against LGBTI people in Uganda." *Sexual Minorities Uganda v. Lively*, 2013 WL 4130756 (D. Mass. Aug. 14, 2013). According to the district court, "*Kiobel* makes clear that its restrictions on extraterritorial application of American law do not apply where a defendant and his or her conduct are based in this country." This statement is plainly at odds with the Second Circuit decision.

Similarly, a federal district court in D.C. recently held that an ATS case could go forward that involved an attack on the United States Embassy in Nairobi.. *Mwani v. Bin Laden*, 2013 WL 2325166 (D.D.C. May 29, 2013). This was so because, according to the district court, "[i]t is obvious that a case involving an attack on the United States Embassy in Nairobi is tied much more closely to our national interests than a case whose only tie to our nation is a corporate presence here. . . . Surely, if any circumstances were to fit the Court's framework of "touching and concerning the United States with sufficient force," it would be a terrorist attack that 1) was plotted in part within the United States, and 2) was directed at a United States Embassy and its employees." This case is now on appeal.

To be clear, these cases are in the minority of the post-*Kiobel* decisions. By my count, it appears that 12 courts have dismissed ATS cases on extraterritoriality grounds and that the two cases higlighted above are the only courts to push the boundaries of the "touch and concern" language in *Kiobel*.

As always with ATS litigation, it will be interesting to see how the case law develops.

Second Issue of 2013's Journal of Private International Law

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

Sixto Sánchez-Lorenzo, Common European Sales Law and Private International Law: Some Critical Remarks

> *The Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales constitutes an attempt to avoid transaction costs caused by legal diversity within the European Union. However, the character and scope of CESL rules, together with their complex interaction with European conflict-of-laws rules and the substantive acquis, leads to a scenario of legal uncertainty. This means that the intended objective will not be achieved and, in certain cases, that consumer protection is sacrificed in favour of traders' interests. In order to illustrate this critical conclusion, this article analyses the character and scope of CESL rules. Secondly, the application of CESL rules is considered in cases of an express or implied choice of law and in the absence of such a choice. Finally, further reflections will focus on the application of overriding mandatory rules and on the seminal question of the applicable law to interpret contracts.*

Gregor Christandl, Multi-Unit States in European Union Private International Law

> *When in private international law reference is made to a multi-unit State, the question arises which one of the various territorial legal regimes applies to the specific case. With the predominance of territorial connecting factors in EU private international law, this question will become more important in the near future, given that territorial legal regimes will increasingly have to be applied also to non-nationals of multi-unit States. An analysis of the provisions on reference to multi-unit-States in the EU Succession Regulation as well as in previous EU-Regulations on private international law shows a lack of continuity and coherence which reveals that there may be insufficient awareness of the different features of the three models that can be identified for solving the problem of multi-unit-States in private international law. By offering a system of these basic models, this Article puts the provisions on multi-unit-States of the EU Succession Regulation under critical review and pleads for a general, simple and coherent solution with the hope of improving future EU private international law legislation on this point.*

Tena Ratkovic, Dora Zgrabljicrotar, Choice-of-Court Agreements under the Brussels I Regulation (Recast)

In court proceedings commenced after 10 January 2015 the choice of court agreements in the European Union will be regulated by the new Brussels I Regulation (recast). The amendments introduced by the Recast aim to increase the strength of party autonomy as well as predictability of the litigation venue. Therefore, several changes have been made – the requirement that at least one party has to be domiciled in a Member State was abandoned for choice of court agreements, the substantive validity conflicts rule and a rule on severability have been introduced. Most importantly, the rules on parallel proceedings have been altered. This article examines those modifications and discusses their effect on the European Union courts' desirability as a place for litigation.

Peter Arnt Nielsen, Libel Tourism: English and EU Private InternationalLaw

Libel tourism, which is much related to the UK, is caused by a mixture of factors, such as the law applicable, national and European rules of jurisdiction, national choice of law rules, and case law of the CJEU. These issues as well as aspects of recognition and enforcement of libel judgments in the US and EU are examined. Proposals for reform and legislative action in the EU are made. The effect of the Defamation Act 2013 on libel tourism, in which the UK attempts to strike a better balance between freedom of expression and privacy and to deal with libel tourism, is examined.

Stephen Pitel, Jesse Harper, Choice of Law for Tort in Canada: Reasons for Change

In 1994 the Supreme Court of Canada in Tolofson v Jensen adopted a new and controversial choice of law rule for tort claims. Under that rule, the law of the place of the tort applies absolutely in interprovincial cases and applies subject only to a narrow exception in international cases. The approaching twentieth anniversary of this important decision is an appropriate time to consider how the rule is operating. In particular, the rule needs to be assessed in light of (a) calls for legislative reform from the Manitoba Law Reform Commission, (b) the European Union's adoption of the Rome II Regulation for choice of law in non-contractual obligations, (c) the ongoing operation of a competing rule under Quebec's civil law and (d) the application of the rule by Canadian courts since 1994. This article will assess Canada's tort choice of law rule and analyse the desirability of reform, looking in particular at the rigidity of the rule, the scope of its exception and possible alternative rules.

Henning Grosse Ruse-Khan, A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging Between Intellectual Property, Trade, Investment and Health

The idea of employing conflict-of-laws principles to address competing rationalities in international law is unorthodox, but not new. Existing research focusses on inter-systemic conflicts between different areas of international law – but has stopped short of proposing concrete conflict rules. This article goes a step further and reviews the wealth of private international law approaches and how they can contribute to applying rules of another, 'foreign' system. Against the background of global intellectual property rules and their interfaces with trade, investment, health and human rights, the dispute over plain packaging of tobacco products serves as a test case for conflict-of-laws principles. It shows how these principles can provide for concrete legal tools that allow a forum to apply external (ie foreign) rules – beyond interpretative concepts such as systemic integration. The approach hence is one way to take account of the pluralism of global legal orders with significant overlaps and intersections.

Fordham CLIP on Internet Jurisdiction in England and the U.S.

Joel Reidenberg, Jamela Debelak, Jordan Kovnot, Megan Bright, N. Cameron Russell, Daniela Alvarado, Emily Seiderman and Andrew Rosen (Fordham CLIP) have posted Internet Jurisdiction: A Survey of Legal Scholarship Published in English and United States Case Law on SSRN.

This study provides a survey of the case law and legal literature analyzing jurisdiction for claims arising out of Internet activity in the United States. A companion study, released simultaneously, explores similar issues as they are treated in the German legal system. The goal of the report is to identify trends in legal literature and case law and to serve as a comprehensive, objective resource to assist scholars and policy-makers looking to learn about the issues of jurisdiction on the Internet.

The U.S. study shows that most academic scholarship discusses all three aspects of jurisdiction law — personal jurisdiction, choice of law and

jurisdiction to enforce — within the individual articles. In addition, the literature treats a noticeably wide variety of legal areas — including, for example, analyses of specific cases, particular issues related to e-commerce, and the regulation of online speech — but overall, does not appear to have a consensus on an approach or solution that cuts across the varied areas of law addressed by the scholarship. Thus, in effect, a review of academic scholarship shows that Internet jurisdiction is as varied as the legal issues and fields of law it permeates.

With respect to U.S. case law, Fordham CLIP's research indicates that issues surrounding Internet jurisdiction gravitate toward the Ninth Circuit and the Second Circuit more so than other federal circuits. Moreover, contrary to the body of academic literature, the research demonstrates that U.S. courts predominantly adjudicate matters of personal jurisdiction in Internet cases rather than other subsets of jurisdiction, and that Internet jurisdiction issues trend toward intellectual property and defamation cases. Lastly, the case law shows that, although the Zippo and Calder decisions remain the clear, predominant legal standards and tests for Internet jurisdiction matters, when and how these rules are applied by U.S. courts lacks uniformity.

Fordham CLIP on Internet Jurisdiction in Germany

Desiree Jaeger-Fine, Joel Reidenberg, Jamela Debelak and Jordan Kovnot (Fordham CLIP) have posted Internet Jurisdiction: A Survey of German Scholarship and Cases on SSRN.

In late June 2013, Fordham CLIP completed a study, "Internet Jurisdiction: A Survey of German Scholarship and Cases." This project provides a survey of the case law and legal literature analyzing jurisdiction for claims arising out of Internet activity in Germany. A companion study, released simultaneously, explores similar issues as they are treated in the United States. The goal of the

report is to identify trends in legal literature and case law and to serve as a comprehensive, objective resource to assist scholars and policy-makers looking to learn about the issues of jurisdiction on the Internet with a focus on the German legal system and relevant EU laws.

The research survey shows that, although various trends can be identified within German and EU case law, no consensus on the treatment of international jurisdiction can be ascertained. Although the academic literature demonstrates awareness of the problems and pitfalls in Internet-related cases, clear solutions are seldom offered. Moreover, notwithstanding German Federal Supreme Court and European Court of Justice decisions that have set the stage for further development, the research indicates that the coexistence of German and European Law, as well as the presence of separate subject matter-specific legal regimes, preclude the identification of any real consensus views.