German Society of International Law: 33rd Bi-annual Conference

From 13 to 16 March 2013 the German Society of International Law will host its 33rd bi-annual at the University of Lucerne in Switzerland. The conference will focus on the "Hybridisation of legal systems" on the one hand and "Immunity" on the other. The list of speakers include Daniel Thürer, Paul Richli, Andreas Paulus, Nina Dethloff, Thomas Giegerich, Ingeborg Schwenzer, Heike Krieger, Andreas Ziegler, Stefan Talmon and Haimo Schack,

More information is available here (in German).

De Werra on ADR as a Default Method for IP Disputes

Jacques de Werra, who is a professor of law at the University of Geneva, has posted Can Alternative Dispute Resolution Mechanisms Become the Default Method for Solving International Intellectual Property Disputes? on SSRN.

> *This essay explores how the use of alternative dispute resolution (ADR) mechanisms can be promoted to solve international IP disputes. It presents the case of internet domain name dispute resolution and focus particularly on the Uniform Domain Name Dispute Resolution Policy (UDRP) and the way in which this policy has been adopted as a model by legislators. On this basis, it analyzes how, and under what conditions, other types of IP ADR systems can be developed in light of the UDRP, and will explore whether ADR systems can become the default method for solving international IP disputes.*

The paper was published in the *California Western International Law Journal* in 2012.

International Commercial Arbitration: A Guide for U.S. Judges

The U.S. Federal Judicial Center has just published a new monograph entitled "International Commercial Arbitration: A Guide for U.S. Judges." The text, which was written by Professor S.I. Strong of the University of Missouri, provides readers with information on the intricacies of international commercial arbitration and the various ways that U.S. courts may become involved in the process. The book is part of the Federal Judicial Center's International Litigation Series and helps further the Federal Judicial Center's statutory mission of providing research and education to the U.S. federal judiciary. The text, which is broken down on a motion-by-motion basis, provides judges as well as practitioners with a useful introduction to international commercial arbitration practice in the United States. The book is available in both hard copy and electronic form, and copies can be downloaded for free from the Federal Judicial Center's website (here).

German Federal Court Rules on Jurisdiction Clauses and Mandatory Rules

Beatrice Deshayes is a member of the Paris and the Cologne bars and a partner at Hertslet, Wolfer and Heintz, Paris.

On September 5th, 2012, the German Federal Court (BGH) upheld the

inapplicability of a jurisdiction clause in an agency contract that gave jurisdiction to the Courts of Virginia to rule on the agent's right to indemnity after termination of the agency contract.

The dispute arose out of an agency contract between an American firm and a German commercial agent acting in several European countries. The contract provided for the exclusive jurisdiction of the Courts of Virginia and for the application of US laws. It also provided for an exclusion of indemnity in case of termination of the contract.

Arguing that the Courts of Virginia would apply solely their own law, the Court of Appeal of Stuttgart refused to enforce the jurisdiction clause, stating that doing so would lead to the rejection of the claim for indemnity and to an obvious violation of Art. 17 and 18 of Directive 86/653 EEC. The defendant wanted to submit a request for a preliminary ruling before the ECJ, however the BGH ruled that there was no need for such a request.

Th BGH ruled that there is no doubt that Directive 86/653 gives the possibility to "refuse to recognize" such a clause, as:

- the law chosen by the parties (here, the law of Virginia) does not provide for mandatory indemnity or compensation for the agent after termination of the contract;
- the foreign court will not apply the mandatory provisions of European and German law, and will reject the agent's claim.

The BGH stated that such refusal of recognition protects the international mandatory scope of these provisions, as defined by the ECJ in the *Ingmar* decision dated November 9th, 2000 (C-381/98).

Another issue raised durig the litigation was whether the partial ineffectiveness of the jurisdiction clause shall lead to the incompetence of the US courts for the entire litigation. In addition to an indemnity based on the termination of the agency contract, the agent had claimed for unpaid commission stemming from the contract. The defendant wanted the BGH to ask the ECJ for an additional preliminary ruling regarding the jurisdiction clause: if it was considered partially ineffective because of the above mentioned reasons, would it have to be invalidated for the whole in order to guarantee the "effet utile"?

The BGH ruled that this question must only be discussed on the basis of German law, as Art. 17-19 of Directive 86/653 EEC concern only the claim for indemnity after termination of contract and not the right for pending commissions.

This seems to be a very strict but coherent approach to the jurisdiction question by the BGH and may lead to the non-application of foreign jurisdiction clauses in many cases when agents carry out their activity in Europe.

Aligning Human Rights and Investment Protection

Transnational Dispute Management has a new issue forthcoming, on *Aligning Human Rights and Investment Protection*. This issue is edited by Professor Dr. Ursula Kriebaum (University of Vienna) and analyses how national courts and international tribunals may operate in the fields of human rights law, and take into account the developments occurring in the other realm. With private international lawyers and international litigators eagerly awaiting the United State's Supreme Court's decision in *Kiobel*–which is just the latest example of a national court applying international norms–this issue is a welcome addition to discipline.

Private International Law Bibliography

With thanks to Symeon Symeonides, see here for a bibliography of recent books and articles.

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.