Issue 2012.3 Nederlands Internationaal Privaatrecht

The third issue of 2012 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* includes three interesting articles based upon contributions to commemorate the 100th anniversary of T.M.C. Asser's receipt of the Nobel Peace Prize, as well as articles on Brussels I and internet; conflict of laws, the acquired rights directives and transfer of seagoing vessels; the Kiobel v Shell case.

Hans van Loon, The Hague Conference on Private International Law: Asser's vision and an evolving mission, p. 358-361. The abstract reads:

Tobias Asser, a preeminent Dutch legal scholar comparable to the ranks of Hugo Grotius, received his Nobel Peace Prize 1911 for his ground laying work on the unification of private international law. He foresaw that in a world consisting of a variety of legal systems, international law would acquire a critically important new role: that of ordering the diversity of civil and commercial laws, not by making them all uniform, but by providing uniform rules on the conflicts of laws. Asser's vision, the international forum he envisaged, his methodology and his programme of work continue to flourish through the Hague Conference on Private International Law, an entity for which Asser laid the groundwork and which continues to provide inspiration more than 100 years after Asser received the Nobel Peace Prize for his work.

Aukje A.H. van Hoek, Managing legal diversity – new challenges for private international law, p. 362-370. The abstract reads:

In this contribution the author describes how the structural presence of private international law cases in modern society poses new challenges to private international law as a legal discipline. The literature on legal pluralism and multilevel governance is used both to provide a better understanding of the challenges and to point to possible lines of investigation. The key issues are: the difficulty of integrating non-national standard-setting in the choice of law model, the changing content of legitimate expectations and their effect on the choice of law, the need for a systemic adaptation of national legal systems to the growing

presence of foreign elements within the legal order and the role of transnational legal infrastructure in the management of legal diversity.

Alex Mills, Rediscovering the public dimension of private international law, p. 371-373. The abstract reads:

This article, which considers aspects of T.M.C. Asser's legacy in private international law, was presented as part of the Commemorative Conference celebrating the 100th anniversary of his receipt of the Nobel Peace Prize, held on 9th December 2011 at the Peace Palace in The Hague, the Netherlands. The article begins by discussing the history of private international law, presenting and contextualising Asser's public international perspective, highlighted by his foundational role in the Hague Conferences on Private International Law. It then turns to analyse the subsequent fragmentation of private international law into discrete national approaches, which have often emphasised private rights. The article then discusses recent changes in private international law in the European Union, Canada and Australia, and characterises them as a revival of a more public perspective, which presents fresh challenges for private international law. It argues that these modern developments should be understood and welcomed as at least a partial rediscovery of the 'public' dimension of private international law, and thus as signposts of a return to Asser's globalist vision.

K.C. Henckel, Conflict of laws and the Acquired Rights Directive: the cross-border transfer of seagoing vessels, p. 376-389. The abstract reads:

The exclusion of the maritime sector from six European social directives is currently under review. Among these is the Acquired Rights Directive, a directive which aims to protect employees upon a transfer of undertaking. With a primary focus on the conflict of laws, this article aims to discuss the impact of a possible repeal of a provision which excludes seagoing vessels from the Acquired Rights Directive. It is examined whether this repeal warrants a revision of the conflict of laws rules currently being employed for transfer of undertakings. The application of 'the place from which the vessel is operated and controlled' is advocated as a connecting factor for the transfer of seagoing vessels. In addition, the effects of the repeal on maritime practice are addressed.

Jan-Jaap Kuipers, Het internet en de Brussel I Verordening: een kwestie van Luxemburgse wispelturigheid?, p. 390-395. The English abstract reads:

In three different preliminary references the European Court of Justice (ECJ) was recently given the opportunity to shed more light on the interpretation of the Brussels I Regulation in the light of the emergence of the internet. The ECJ held first in Pammer & Hotel Alpenhof that Article 15 should be interpreted in a similar manner, regardless of whether a consumer contract was concluded online. In eDate Advertising & Martinez the ECJ departed from this principle of technical neutrality, however. Article 5(3) should be interpreted differently if the alleged infringement of a personality right occurred via an internet site. Six months later, in Wintersteiger, a case relating to the infringement of a trademark, the ECJ adhered to a technologically-neutral interpretation of Article 5(3). The present contribution aims to analyse to what extent the three decisions can be reconciled.

Fourth Issue of 2012's Flemish PIL E-Journal

The fourth issue of the Belgian e-journal on private international law *Tijdschrift@ipr.be / Revue@dipr.be* for 2012 was just released.

The journal is meant to be bilingual (French/Dutch), but this issue is exclusively in Dutch, except for one article in English.

The issue includes two articles. The first seems to be presenting Belgian new statute on nationality. The second presents the new rules of arbitration of Belgian arbitral center CEPANI.

- Jinske Verhellen – Nieuwe nationaliteitswet wijzigt het Wetboek IPR
- Herman Verbist – New CEPANI rules of Arbitration in force as from 1 january 2013

In Memoriam Russell J. Weintraub

Here.

Little on Internet Defamation in the US Conflict of Laws

Laura E. Little, who is a professor of law at Temple University, has posted Internet Defamation, Freedom of Expression, and the Lessons of Private International Law for the United States on SSRN.

> *This article reviews current developments in U.S. conflict of laws doctrine pertaining to transnational internet defamation cases, including personal jurisdiction, choice of law, and recognition of judgments. To resolve personal jurisdiction and choice of law issues in internet defamation cases, U.S. courts have adapted rules from the non-internet context with relative ease. Reported cases tend to concern domestic internet disputes between U.S. entities, with few plaintiffs attracted to U.S. courts for the purpose of litigating cross-border defamation claims. Although the U.S. serves as a magnet jurisdiction for many types of litigation, two liability-defeating laws render the country inhospitable to defamation claims: (1) the U.S. Constitution's First Amendment speech protections and (2) a statute affording immunity to internet "providers or users" for information "provided by another content provider." Perhaps because of these provisions litigants are largely inspired to go elsewhere. The resulting libel tourism has prompted important U.S. developments pertaining to enforcement and recognition of foreign defamation judgments. Thus, for conflict of laws matters pertaining to internet defamation, it is judgments law that reflects the greatest activity and most profound change.*

After reviewing personal jurisdiction and choice of law trends, this article describes legal developments pertaining to internet defamation judgments. The article critiques lawmakers' adherence to First Amendment exceptionalism in regulating internet defamation judgments and identifies flaws reflected in state libel tourism statutes and the federal libel tourism statute, the SPEECH act of 2010.

The paper is forthcoming in the *Yearbook of Private International Law* (vol. 14).

ITLOS Orders Release of Argentine Ship

On December 15, 2012, one phase of the dispute between the Argentine Republic and the Republic of Ghana over the "seizure" of the Argentine frigate *ARA Libertad* while in a Ghanaian port came to an end, when the International Tribunal for the Law of the Sea (ITLOS) in Hamburg, Germany ordered Ghana to "forthwith and unconditionally release the frigate *ARA Libertad*" and to "ensure that the frigate *ARA Libertad*, its Commander and crew are able to leave the port of Tema and the maritime areas under the jurisdiction of Ghana, and … that the frigate *ARA Libertad* is resupplied to that end." (See Order of 15 December 2012).

See the posts of

- Craig H. Allen at *Opiniojuris*
- Ted Folkman at *Lettersblogatory*
- Michael Waibel at *EJIL:Talk*!

ERA-Conference on Cross-Border Insolvency Proceedings

On 18 and 19 March 2013 the Academy of European Law (ERA) will host a conference on Cross-border insolvency proceedings. The conference will shed light on the Commission's recent Proposal for a reform of the Insolvency Regulation of 12 December 2013 (see our post).

The programme reads as follows:

Monday, 18 March 2013

- 08:30 **Arrival and registration**
- 09:00 **Welcome and introduction**, *Angelika Fuchs* and *Daniel Staehelin*

Moderator: *Stefania Bariatti*

- 09:15 **The Commission's proposal for a revision of the Insolvency Regulation**, *Katja Lenzing*
- 10:00 **Discussion**

- 10:15 **Scope of the Regulation and definition of "insolvency",** *Jean-Luc Vallens*
- 11.00 **Discussion**
- 11:15 **Coffee break**

- 11:45 **Concept of COMI: case law and revision**, *Robert van Galen*
- 12:30 **Discussion**
- 13:00 **Lunch**

Moderator: *Burkhard Hess*

- 14:00 **Best practices for cross-border court-to-court communication**, *Bob Wessels*
- 14:30 **Round table: Coordination and communication between liquidators, between liquidators and courts, and court-to-court communication:** *Robert van Galen, Jennifer Marshall, Elise Latify, Jean-Luc Vallens, Bob Wessels*

- 15:45 **Coffee break**
- 16:15 **Recognition of foreign judgments and pre-insolvency proceedings**, *Reinhard Dammann*
- 16:45 **Discussion**
- 17:00 **Applicable law and the impact of insolvency on cross-border security and rights in rem**, *Jennifer Marshall*
- 17:30 **Discussion**
- 17:45 **End of the first conference day**
- 19:00 **Evening programme and dinner**

Tuesday, 19 March 2013

Moderator: *Paul Omar*

- 09:15 **Recent CJEU case law on related actions and the interplay with the Brussels I Regulation**, *Burkhard Hess*
- 09:45 **Discussion**
- 10:00 **Relationship between main and territorial proceedings in the light of Bank Handlowy**, *Gabriel Moss*
- 10:30 **Discussion**
- 10:45 **Coffee break**
- 11:15 **The EU Insolvency Regulation and the relationship to third countries**, *Michael Veder*
- 11:45 **Discussion**
- 12:00 **Round table: Insolvency within multinational enterprise groups,** *Reinhard Dammann, Gabriel Moss, Michael Veder*
- 13:00 **Concluding remarks and open issues**, *Stefania Bariatti*
- 13:15 **Lunch and end of the conference**

More information is available on ERA's website.

Commission's Proposal for Amending the Insolvency Regulation

The European Commission released on December 12 its Proposal for amending the 1346/2000 Regulation on Insolvency Proceedings.

The Commission summarizes its Proposal as follows:

> *• Scope: The proposal extends the scope of the Regulation by revising the definition of insolvency proceedings to include hybrid and pre-insolvency proceedings as well as debt discharge proceedings and other insolvency proceedings for natural persons which currently do not fit the definition;*
>
> *• Jurisdiction: The proposal clarifies the jurisdiction rules and improves the procedural framework for determining jurisdiction;*
>
> *• Secondary proceedings: the proposal provides for a more efficient administration of insolvency proceedings by enabling the court to refuse the opening of secondary proceedings if this is not necessary to protect the interests of local creditors, by abolishing the requirement that secondary proceedings must be winding-up proceedings and by improving the cooperation between main and secondary proceedings, in particular by extending the cooperation requirements to the courts involved;*
>
> *• Publicity of proceedings and lodging of claims: The proposal requires Member States to publish the relevant court decisions in cross-border insolvency cases in a publicly accessible electronic register and provides for the interconnection of national insolvency registers. It also introduces standard forms for the lodging of claims;*
>
> *• Groups of companies: The proposal provides for a coordination of the insolvency proceedings concerning different members of the same group of companies by obliging the liquidators and courts involved in the different main proceedings to cooperate and communicate with each other; in addition, it gives the liquidators involved in such proceedings the*

procedural tools to request a stay of the respective other proceedings and to propose a rescue plan for the members of the group subject to insolvency proceedings.

Burbank on Outsourcing the Treaty Function

Stephen Burbank (University of Pennsylvania Law School) has posted Whose Regulatory Interests? Outsourcing the Treaty Function on SSRN.

> *In this article I describe the status quo in the area of foreign judgment recognition, with attention to the tension between domestic interests and international cooperation. Precisely because the future of the status quo is in doubt, I then consider current proposals for change, particularly the effort to implement the Hague Choice of Court Convention in the United States. Prominent among the normative questions raised by my account is whose interests, in addition to the litigants' interests, are at stake – those of the United States, those of the several states, or those of interest groups waving a federal or state flag. A related question is whether, if the uniformity we seek is to be found in state rather than federal law, we can be, and be seen by other countries to be, serious about international cooperation. I describe in some detail the sequence of events that led to the Uniform Law Commissioners ("ULC") becoming involved in the process of drafting legislation to implement the Choice of Court Convention. I also explore reasons why the ULC has been successful in securing the lion's share of attention for its preferred approach to implementation, which the ULC calls "cooperative federalism," but which has come to resemble cooperative redundancy. Recounting how, and offering suggestions why, the ULC ultimately rejected a package of compromises proposed by the State Department's Legal Adviser, even though almost all compromises were in favor of the ULC, I conclude with observations about the ULC's ambitions in the international arena. My argument is that, if the ULC*

> *were successful in taking over the negotiation or implementation of private international law treaties, international cooperation would be if not a fortuity, then not a priority, because we would have regressed to a position of privileging not just federal but state law uniformity over international uniformity. And the state law we privileged would be anything but "indigenous."*

The article is forthcoming in the *New York University Journal of International Law and Politics* in 2013.

London Conference on the Brussels I Recast

Reed Smith LLP will host a conference organized by the *Journal of Private International Law* on the Brussels I Regulation Recast on February 7th in London.

Programme:

Chair: Professor Trevor Hartley, LSE

1.30 pm – 2.00 pm: Overview of the revision of the Brussels I Regulation

- Oliver Parker**,** Legal Adviser, UK Ministry of Justice

2.00 pm – 2.30pm: Choice of Court Agreements: Reversal of *Gasser*, etc

- Alex Layton QC**,** 20 Essex Court Chambers, London

2.30 pm – 3.00 pm: The Relationship between Arbitration and Brussels I Revised

- Dr George Panagopoulos**,** Reed Smith, Piraeus and London

3.00 pm – 3.30 pm: Question and answer and discussion of the first three talks

3.30 pm – 4.00 pm: Coffee/Tea Break

Chair: David Warne, Partner, Reed Smith LLP

4.00 pm – 4.30pm: The Abolition of Procedural Exequatur and Retention of Public Policy

- Professor Paul Beaumont**,** University of Aberdeen

4.30 pm – 5.00 pm: Conflicts of Jurisdiction with Third States

- Professor Jonathan Harris, Serle Court; King's College London

5.00 pm – 5.30 pm: Extension of Jurisdiction to Third State Defendants and other changes to Brussels I

- Dr Karen Vandekerckhove, European Union Commission

5.30 pm – 6.00 pm: Question and answer and discussion of the last three talks

6.00 pm: Drinks Reception

Registration: The event is free but has a limited number of places and therefore you need to register in advance to guarantee a place on a first come first served basis. Please email events@reedsmith.com to register, including the event title "The Brussels I Regulation Recast" in the subject line of the email. **Update: the limit has been reached, any new registrant will be put on the waiting list.**

Location: Reed Smith LLP, The Broadgate Tower, 20 Primrose Street, London EC2A 2RS

ECJ Rules on Secondary Insolvency Proceedings

On November 22nd, the European Court of Justice delivered its judgment in *Bank Handlowy w Warszawie SA v. Christianapol sp. z o.o.* (Case C-116/11).

The reference was made in the context of proceedings relating to the opening of insolvency proceedings, in Poland, further to an application made by Bank Handlowy w Warszawie SA and PPHU 'ADAX'/Ryszard Adamiak, in respect of Christianapol sp. z o.o., a company governed by Polish law in respect of which rescue proceedings (*procédure de sauvegarde*) had previously been opened in France.

The main proceedings opened in France had a protective purpose. Article 3(3) of the Insolvency Regulation provides that any secondary proceedings opened subsequently must be winding-up proceedings. This raised two problems.

Do protective proceedings preclude winding-up secondary proceedings?

The first was whether it would be logical to allow the opening of secondary liquidation proceedings when insolvency officials are trying to rescue the business in the country of the main proceedings. Should it follow that, in such a case, the opening of main proceedings precludes the opening of secondary proceedings?

The ECJ rules that neither Article 27, nor Article 3(3) makes any distinction according to the purpose of the main proceedings, and that therefore secondary proceedings may always be opened. They are to be liquidation proceedings, but the Regulation affords various tools allowing the insolvency official appointed in the main proceedings to influence the evolution of the secondary proceedings.

The European lawmaker is currently considering reforming the Insolvency Regulation and allowing secondary proceedings, whenever opened, to be protective in character.

What if the main proceedings are pre-insolvency proceedings?

The second issue was that the French proceedings were not technically speaking insolvency proceedings. They were pre-insolvency proceedings. *La procédure de sauvegarde* is available if the business meets financial difficulties, but the debtor needs not be insolvent.

A preliminary issue was whether such proceedings fell within the scope of the Regulation. France has put them on the Annex. The Court underlines it, but insists that the merits of the inclusion in the Annex were not the subject matter of any question referred to the Court. As a consequence, it is to be considered that *Sauvegarde* was an insolvency proceedings in the meaning of the Regulation.

The problem, however, was that the French court had not, by definition, ruled on whether the business was insolvent. Could the Polish court rule on the issue, then? The ECJ decides that it may not.

Holding:

1. *Article 4(2)(j) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, as amended by Council Regulation (EC) No 788/2008 of 24 July 2008, must be interpreted as meaning that it is for the national law of the Member State in which insolvency proceedings have been opened to determine at which moment the closure of those proceedings occurs.*

2. *Article 27 of Regulation No 1346/2000, as amended by Regulation No 788/2008, must be interpreted as meaning that it permits the opening of secondary insolvency proceedings in the Member State in which the debtor has an establishment, where the main proceedings have a protective purpose. It is for the court having jurisdiction to open secondary proceedings to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, in keeping with the principle of sincere cooperation.*

3. *Article 27 of Regulation No 1346/2000, as amended by Regulation No 788/2008, must be interpreted as meaning that the court before which an application to have secondary insolvency proceedings opened has been made cannot examine the insolvency of a debtor against which main proceedings have been opened in another Member State, even where the latter proceedings have a protective purpose.*