Muir Watt on Private International Law Beyond the Schism

Horatia Muir Watt (Sciences Po Law School) has published Private International Law Beyond the Schism in the last issue of *Transnational Legal Theory*. The abstract reads:

The aim of this project is to explore the ways in which, in the absence of traditional forms of government in a global setting, the law can discipline the transnational exercise of private power by a variety of market actors (from rating agencies, technical standard-setters and multi-national agribusinesses to vulture funds). Traditionally, the cross-border economic activities of non-state actors fall within the remit of an area of the law known as 'private international law'. However, despite the contemporary juridification of international politics, private international law has contributed very little to the global governance debate, remaining remarkably silent before the increasingly unequal distribution of wealth and authority in the world. By abandoning such matters to its public international counterpart, it leaves largely untended the private causes of crisis and injustice affecting such areas as financial markets, environmental protection, pollution, the status of sovereign debt, the bartering (or confiscation) of natural resources and land, the use (and misuse) of development aid, (unequal) access to food, the status of migrant populations, and many more. On the other hand, public international law itself, on the tide of managerialism and fragmentation, is now increasingly confronted with conflicts articulated as collisions of jurisdiction and applicable law, among which private or hybrid authorities and regimes now occupy a significant place. According to the genealogy of private international law depicted here, the discipline has developed, under the aegis of the liberal divides between law and politics and between the public and the private spheres, a form of epistemological tunnel-vision, actively providing immunity and impunity to abusers of private sovereignty. It is now more than time to de-closet private international law and excavate the means with which, in its own right, it may impact upon the balance of informal power in the global economy. This means both quarrying the new potential of human rights in the transnational sphere, and rediscovering the specific savoir-faire acquired over many centuries in the

recognition of alterity and the responsible management of pluralism. In short, adopting a planetary perspective means reaching beyond the schism between the public and private spheres and connecting up with the politics of international law.

Book on the Brussels I Review Proposal

A new book on the Brussels I Review Proposal was just published. It is edited by Eva Lein, who is the Herbert Smith Senior Research Fellow in Private International Law at the British Institute for International and Comparative Law.

The Brussels I Review Proposal Uncovered includes the following contributions:

Foreword: The Right Hon the Lord Mance

1. The Brussels I Review Proposal – An Overview (Pamela Kiesselbach)

2. A Neverending Story? Arbitration and Brussels I: The Recast (Jonathan Harris and Eva Lein)

3. The Application of the Brussels I Regulation to Defendants Domiciled in Third States: From the EGPIL Proposal to the Commission Proposal (Alegría Borrás)

4. The Brussels I Regulation in the International Legal Order: Some Reflections on Reflectiveness (AlexanderLayton)

5. Choice Of Court Agreements in the Review Proposal for the Brussels I Regulation (Ulrich Magnus)

6. Lis Pendens and Third States: The Commission's Proposed Changes to the Brussels I Regulation (Pippa Rogerson)

7. The Proposed Recast of Rules on Provisional Measures under the Brussels I Regulation (Michael Bogdan)

8. Free Movement of Judgments in the EU: Knock Down the Walls but Mind the Ceiling (Andrew Dickinson)

9. The Brussels I Review Proposal: Challenges for the Lugano Convention? (Andreas Furrer)

10. Protection Against the Abuse of Law in the Brussels I Review Proposal? (Luboš Tichý)

11. The Revision of the Brussels I Regulation: A View from the Hague Conference (Marta Pertegas)

As announced earlier, a book launch reception will take place on June 27 at the BIICL.

Kiobel–The Plot Thickens

What does a plaintiff do when the United States Government originally supports your case and then, after the Supreme Court requests further briefing, comes out against you? That is the question that the plaintiffs in *Kiobel v. Royal Dutch Petroleum* are facing today. As previously reported here, the United States Supreme Court initially granted certiorari in *Kiobel* on the questions of whether (1) the issue of corporate civil tort liability under the Alien Tort Statute, 28 U.S.C. § 1350, is a merits question or instead an issue of subject matter jurisdiction; and (2) corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide or may instead be sued in the same manner as any other private party defendant under the ATS for such egregious violations. After oral argument, the Court took the atypical step of ordering reargument and asked for briefing on the following question: "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring

within the territory of a sovereign other than the United States."

As reported yesterday, Petitioners filed their supplemental brief arguing that in at least some circustances the ATS can be applied extraterritorially. Late yesterday, the United States Government filed its supplemental amicus brief.

All I can say is "Wow!" In its initial brief, the United States urged reversal of the Second Circuit and argued that "[c]ourts may recognize corporate liability in actions under the ATS as a matter of federal common law." In other words, the Government believed the plaintiffs deserved their day in court and should not be precluded from suing corporations. Now, the Government has changed its position. In its supplemental brief, it urges partial affirmance and explains that the Court should not "fashion a federal common-law cause of action" on the facts of this case where "Nigerian plaintiffs are suing Dutch and British corporations for allegedly aiding and abetting the Nigerian military and police forces in committing [crimes] in Nigeria."

But, that isn't all. The Government goes on to argue that courts should apply forum non conveniens and exhaustion doctrines at the beginning of ATS cases to limit the filing of ATS cases in the United States where the U.S. nexus is slight. In the brief's conclusion, the SG reiterated its view that corporations are amenable to suit, by explaining that the Second Circuit should still be reversed on that point. But, that point, in the SG's view, is now secondary.

Notably, one name and department that appeared on the initial amicus brief does not appear on the supplemental brief–Harold Koh and the State Department.

So, what can we make of this? Reading betwen the lines, my sense is that the SG's office and perhaps the Executive Branch generally saw the writing on the wall based on the Court's oral argument and rebriefing order that ATS litigation was going to be shut down based on extraterritoriality–a position the Bush Administration had previously argued. Not wanting to go that far, the SG's office tried to give the Court comfort that cases with no U.S. nexus would not be filed here and other doctrines like forum non conveniens and exhaustion would keep those cases out of U.S. courts. What are we to make of Harold Koh and the State Department's absence? It sounds like there might be some disagreement between the SG's office and the State Department on approach. What would the State Department's argument be, I wonder?

It will be interesting to see what the Defendant/Respondents make of all of this.

The New Face of Brussels I

On June 27, the British Institute for International and Comparative Law will hold a conference on the Recast of the Brussels I Regulation from 5 to 6:30 pm.

> *The Brussels I Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is one of the key instruments of European Private International Law. It is currently undergoing a review process.*
>
> *Various changes have been suggested by the European Commission in the Review Proposal, some of them have been subsequently amended in the legislative process. This event focuses on the latest news from Brussels on the text of the recast.*
>
> *In addition, the event will highlight and debate several important recent Brussels I decisions.*
>
> *Participants:*
> *Robert Bray, European Parliament*
> *Professor Jonathan Harris, King's College London; Serle Court*
> *Professor Andrew Dickinson, University of Sydney; Clifford Chance, London*
> *Professor Marta Recejo, University of Santiago de Compostela*

The conference will be followed by a book launch reception for The Brussels I Review Proposal Uncovered, edited by Dr Eva Lein, the Herbert Smith Senior Research Fellow in Private International Law at the Institute.

Extraterritorial Application of U.S. Law–Two Recent Developments

This past week has seen two interesting developments in cases regarding the extraterritorial application of U.S. law. First, as detailed here, District Court Judge Donneta Ambrose rejected Alcoa's claims that a recent civil RICO suit should be dismissed under Rule 12(b)(6) because it amounted to the inappropriate extraterritorial application of U.S. RICO law. As Judge Ambrose's decision recognizes, it is one of many recent decisions regarding the extraterritorial application of RICO. Recent decisions confirm that the Morrison decision, see here, applies to RICO. The question is whether on the facts of a given case the plaintiffs are seeking an extraterritorial application of the RICO statute or merely seeking civil liability for what amounts to domestic conduct. District Courts appear to be divided on the appropriate analysis. Some courts focus on whether the enterprise is foreign or domestic (as does Judge Ambrose) and other courts focus on whether the location of the alleged racketeering activity is in the United States. Put a slightly different way, district courts seem to be conducting a version of a conducts (enterprise) and effects (location of racketeering activity) test–a test which was rejected in the securities context in Morrison. Given the differing rationales, appellate review certainly seems warranted.

The second development is the continuing saga of Kiobel, which has previously bee highlighted on this blog. Petitioners/Plaintiffs have now filed their supplemental briefing arguing that the Alien Tort Statute applies, at least in some circumstances, to conduct occuring in a foreign sovereign's territory. Further briefing by Respondent/Defendant is expected by August 1.

Conference Announcement:

Collective Redress in Cross-Border Context

Conference on Collective Redress in the Cross-Border Context
In the framework of the Henry G. Schermers Fellowship Programme<http://www.hiil.org/henry-g-schermers-fellowship>, held this year by Professor S.I. Strong, the Hague Institute for the Internationalisation of Law (HiiL) and the Netherlands Institute of Advanced Studies (NIAS)<http://www.nias.nl/Pages/NIA/2/764.bGFuZz1FTkc.html> announce a workshop on the theme 'Collective Redress in the Cross-Border Context: Arbitration, Litigation and Beyond.'
The workshop aims to explore the various means that can be used to resolve collective legal injuries that arise across national borders. The types of dispute resolution mechanisms to be discussed range from class and collective arbitration, mass arbitration and mass claims processes, class and collective litigation, and large-scale settlement and mediation. The workshop will bring together practitioners, academics, and representatives of non-governmental organisations, all of whom have an interest and expertise in public and private resolution of collective redress in the international realm.

For the first time, NIAS and HiiL are offering a works-in-progress conference in association with the Henry G. Schermers workshop. This conference is designed to allow practitioners and scholars who are interested in this area of law to discuss their work and ideas in the company of other experts in the field.

Confirmed speakers for the Schermers workshop include:
* Jan Willem Bitter, Simmons & Simmons LLP/Netherlands Arbitration Institute (The Netherlands) * Christian Borris, Freshfields/German Arbitration Institute (Germany) * Laura Carballo Piñeiro, University of Santiago de Compostela (Spain) * Christopher R. Drahozal, University of Kansas (USA) * Gregory A. Litt, Skadden, Arps, Slate, Meagher & Flom LLP (USA) * Daan Lunsingh Scheurleer, NautaDutihl (The Netherlands) * Gerard Meijer, Nauta Dutihl/Erasmus University Rotterdam/PRIME Finance (The Netherlands) * Rachel Mulheron, University of London, Queen Mary (UK) * Victoria Orlowski, ICC International Court of Arbitration (France) * Geneviève Saumier, McGill University (Canada) * Garth Schofield, Permanent Court of Arbitration (The

Netherlands) * S.I. Strong, Henry G. Schermers Fellow, HIIL/NIAS, University of Missouri (USA)
The three-day event will be held June 20-22, 2012, at the NIAS site in Wassenaar, twenty minutes outside of the Hague. The events are free to the public, but registration is required. For more information on the event, including the full programme for both the Schermers workshop and works in progress event, see the HiiL website at: http://www.hiil.org/events/hiil-nias-workshop-collective-redress. Questions may also be directed to Professor S.I. Strong at strongsi@missouri.edu<mailto:strongsi@missouri.edu>.

Verschraegen on Private International Law in Austria

Bea Verschraegen, Internationales Privatrecht - ein systematischer Überblick, Manz, Wien 2012

Bea Verschraegen, Professor for Comparative Law at the University of Vienna, has recently published a textbook on Private International Law in Austria. It provides an up-to date presentation of the applicable rules and regulations and, thereby, fills a long-lasting gap in the Austrian literature on Private International Law. The official announcement reads as follows:

> *A new systematic presentation of Private International Law for study and practice has just been published by Bea Verschraegen (Professor for PIL and Comparative Law at the University of Vienna). The entire body of significant*

PIL for Austria is examined, including relevant European and international law. With it, Bea Verschraegen also handles recent innovations in conflict of laws, for instance the Rome III Regulation, the European Maintenance Obligations regulations and the 2007 Hague Maintenance Convention.

Bea Verschraegen's work contributes in particular to European integration and the corresponding changes to the fundamentals of conflicts of law. The book is intended as a reference guide from questions related to Private International Law to European and Austrian law. Therefore, the more detailed section is positioned at the beginning of the book for ease of reference, followed by the more general section thereafter.

The book comprises the following chapters:

I. Detailed Section:

- *Law of Persons*
- *Family law*
- *Law of Succession*
- *Law of Contractual Obligations*
- *Law of Non-Contractual Obligations*
- *Property law*
- *Company law*
- *Competition law (Trade law and anti-trust law)*
- *Intellectual Property law*

II. General Section

A full table of contents and a preview is available on the publisher's website.

Tang on Consumer Collective

Redress in European PIL

Zheng Sophia Tang (Leeds University) has posted Consumer Collective Redress in European Private International Law on SSRN.

> *Collective redress is a cost-sharing and procedure-consolidating mechanism. In the area of consumer litigation, it is introduced primarily to compensate the weakness of expensive and time-consuming court proceedings in small claims in order to increase consumers' access to justice. Consumer contractual claims are characterised as of small value, which largely discourages individual consumers from resorting to judicial action to protect their legal rights. Collective redress combines separate consumer claims against the same defendant based on the similar circumstances into one single action. It is helpful to resolve the litigation difficulty, to promote consumers' access to redress and to improve good commercial performance. A recent survey shows 76% of European consumers would be more willing to defend their rights in court if they could join other consumers. It is also believed that collective redress could offer businesses an opportunity to resolve an issue once rather than having repeated proceedings.*
>
> *The concept of collective redress is not new. Some common law countries, such as US, Canada and Australia have already established mature and widely used 'class action' mechanism, which enables one or more individuals to bring an action on behalf of putative claimants against the same defendant. Each putative claimant is presumed to consent being presented in the action and being bound by the judicial decision, unless he actively gives notice to opt out. The US-style class action does not exist in Europe, though the revised versions with similar elements exist in the Netherland and Sweden. Currently, thirteen Member States have adopted collective redress mechanisms for consumer claims. Although practices in these countries vary largely, they could be generally categorised into three groups: (1) group action, where exactly defined claimants bring actions in one procedure to enforce their similar claims together. Each group litigant is a party in the litigation; (2) representative action, where an organisation, an authority or an individual brings actions on behalf of a group of individuals, who are not the real party of the litigation; (3) test case procedure, under which mass individual claims are filed, and a leading decision is given to one case, which decides the common factual and legal*

issues of similar legal actions, and serves as an example for other similar cases.

Collective redress in Europe is at an experimental stage and the existing collective redress mechanisms in most Member States are largely domestic tools, the effect of which is primarily limited to domestic claims. There is no common standard in the EU as to the functioning and regulation of collective actions. With the consumer-oriented culture, increasing consumers' access to justice has attracted much attention. In its Consumer Policy Strategy for 2007-2013, the European Commission announced that it would consider the feasibility of an EU initiative on collective action in protecting consumers' access to justice. In November 2008, the European Commission has published a Green Paper on Consumer Collective Redress, which provides four proposals for the possible development of consumer collective redress in Europe, two of which might be of particular interest to conflicts lawyers: (1) to require Member States having a collective redress mechanism to open up the mechanism to consumers from other Member States (option 2 of the Green Paper), and (2) to initiate a non-binding or binding EU measure to ensure that a collective redress judicial mechanism exists in all Member States (option 4). The European Commission specifically points out that these two options with clear cross-border features could generate conflict of laws difficulties.

This research focuses on the jurisdiction problems in cross-border collective redress in Europe. The European jurisdiction rules have two characteristics: firstly, protective jurisdiction is available for consumer contractual claims. Section 4 of the Brussels I Regulation provides that if a contract falls within the protective scope, a consumer is always entitled to sue a business defendant in the consumer's domicile. This approach is incompatible with the nature of cross-border collective redress, where consumers may come from different Member States. Secondly, special jurisdiction rules are designed according to the 'classification' of the claim. There is no special jurisdiction rule designated for the 'collective redress' (Art 6 concerns multiple defendants instead of multiple claimants) and it is necessary to see whether any of the existing jurisdiction provisions can be properly applicable to a collective action.

These characteristics determine the difficulties to apply the Brussels rules in cross-border collective redress. In a representative action, the representative individual(s) or association brings the lawsuit on behalf of all represented consumers, where the real litigating party is the representative instead of the

represented consumers. If the protective jurisdiction does not apply, one needs to study whether the action is a matter relating to contract under Art 5(1). There is no doubt that each putative claimant that has been represented has a contractual claim, but should Article 5(1) require the existence of a contractual claim between the 'litigating parties?' Even if the group action is classified as a matter relating to contract, applying the jurisdiction rules of Article 5(1) can be difficult in a representative action where the goods are delivered to, or services are provided for, consumers domiciled in different Member States.

In group action or test case procedure, each consumer is the real litigant and could individually enforce the decision. Since the Brussels I Regulation does not provide specific jurisdiction rules for these mechanisms, it is necessary for a court to consider jurisdiction over the claim of each consumer in the collective action. A consumer in a contract that falls within the scope of protective jurisdiction is entitled to sue a business defendant either in the court of the defendant's domicile or in the court of the consumer's domicile. According to this rule, where the consumers are domiciled in more than on Member State, only the courts of the defendant's domicile could have jurisdiction. The courts of any one of the consumers' domicile can only hear the action brought by the claimant consumer who has his domicile within this country.

It is concluded that under the current Brussels I Regulation, cross-border consumer collective redress can only be brought in the court of a defendant's domicile, unless all the consumers are domiciled in one Member State. However, it does not mean that the current approach is definitely a barrier to cross-border collective redress. On one hand, it brings disadvantages to those consumers domiciled in a country where very few consumers have transactions with the business and it prevents collective action from being brought where a business's commercial activities are spreading over many Member States and the number of consumers in each State is not high. On the other hand, it brings certainty to business defendants, especially small and medium sized companies, and reduces litigation costs. The research will continue to analyse the socio-economic impact of the current jurisdiction rule, and to consider whether it is necessary to reform the Brussels I Regulation by introducing an innovative provision specifically for collective redress.

The paper was published in the *Journal of Private International Law* in 2011.

Actio Pauliana and More (in Spanish)

Dr. Laura Carballo-Piñeiro, from the University of Santiago de Compostela (Spain) has just published two new articles. The first one, entitled *Acción pauliana e integración europea: una propuesta de ley aplicable (Actio Pauliana* and European Integration: A Proposal Regarding Applicable Law), has appeared in the last number of the *Revista Española de Derecho Internacional;* the abstract reads as follows:

> "The *actio pauliana* is a *rara avis* within Private Law, the principle of which is to uphold sound private relationships. The principle, however, is called into question by acts of fraudulent transfer – the challenging of a valid and effective act in order to recover a creditor's losses involves two conflicting interests that makes identification of the law applicable to the *actio pauliana* a difficult question to remedy. This paper deals with this longstanding problem by examining new EU conflict of laws instruments, which provide the basis for determining the allocation of a debtor's insolvency among his creditors"

The second contribution, *Protección de inversores, acciones colectivas y Derecho internacional privado (Investor Protection, Collective Redress and Private International Law),* is to be found in the *Revista de Sociedades,* 2011 (July-December). Here is the abstract:

> The financial crisis has increased claims on grounds of false or mistaken information given to investors in order to capture capital. Many of them are brought before the United States' jurisdiction seeking for the advantages provided by the securities class actions, which allow to decide in an only proceeding claims involving multiple investors, including the ones resident in other countries. Economic procedural reasons are pushing other States, like Germany or the Netherlands, to introduce some kind of collective remedy as well. This paper aims at presenting how these procedural mechanisms work as well as at addressing the situation of collective justice for investors in Spain,

at the moment just restricted to the investor characterized as consumer. Besides, the already depicted internationalization of markets demands to tackle traditional issues of Private international law, i.e. the criteria on international jurisdiction to interpose a collective action in investment matters, the applicable law to such matters and recognition and enforcement of decisions, maybe the most pressing issue taking into account possible foreign claims against Spanish companies or in which Spanish investors are included. Eventually, this paper closes with the interest of evolving in Spain a collective action comprehending all kind of investors, an issue which could be finally decided by an European instrument, on which the European Commission is actively working.

Basedow on the Optional Instrument of European Contract Law

Jürgen Basedow, Director of the Max-Planck-Institute for Comparative and International Private Law Hamburg, has posted "The Optional Instrument of European Contract Law: Opting-in through Standard Terms – A reply to Simon Whittaker" on SSRN. The paper can be downloaded here. The abstract reads as follows:

> *In a paper recently published (The Optional Instrument of European Contract Law and Freedom of Contract, ERCL 7 (2011) 371 – 388 at p. 388), Simon Whittaker has criticized the "reduction of an individual consumer's protection" resulting from the adoption of an optional instrument on European contract law such as the one now contemplated by the European Commission (the "Optional Instrument"). The article contains a number of propositions which will not be*

tackled here. This comment is confined to consumer contracts and to a pertinent key assumption of Whittaker: that a standard term exercising the option in favour of the Optional Instrument would be subject to judicial review under Directive 93/13 on unfair contract terms in consumer contracts.