Liber Amicorum for Athanassios Kaissis

A Liber Amicorum was published earlier this year to celebrate the 65th birthday of Athanassios Kaissis, who is a professor at the Law Faculty of Aristotle University of Thessaloniki.

It includes the following contributions.

Konsolidierung des Europäischen Zivilverfahrensrechts
Jens Adolphsen

Das Anti-Counter-Feiting Trade Agreement vom 3.12.2010 – Zivilrechtliche Maßnahmen und deren Durchsetzung
Hans-Jürgen Ahrens

Unvereinbare Entscheidungen, drohende Rechtsverwirrung und Zweifel an der Kernpunkttheorie – Webfehler im Kommissionsvorschlag für eine Neufassung der Brüssel I-VO?
Christoph Althammer

Der österreichische Zivilprozess – bemerkenswerte Schwerpunkte der Reformen im neuen Jahrtausend
Oskar J. Ballon

Gibt es ein europäisches Rechtsschutzbedürfnis?
David-Christoph Bittmann

Der amicus curiae und die alten Formen der Beteiligung Dritter am Rechtsstreit. Neue Tendenzen nach brasilianischem Recht
Antonio Cabral

Die tödliche Verletzung im Deliktsrecht
Michael Coester

Der Erfüllungsort im internationalen Zivilprozessrecht
Dagmar Coester-Waltjen

Das neue schweizerische Arrestrecht – ausgewählte Probleme
Tanja Domej

Die Europäisierung des internationalen Zuständigkeitsrechts in Gütersachen
Anatol Dutta / Frauke Wedemann

Der Anspruch auf Rückforderung unbegründeter Zahlungen bei der Bankgarantie auf erstes Anfordern
Dietmar Ehrlich

Ausgewählte praxisrelevante Fragen in deutsch-algerischen Erbrechtsfällen
Omaia Elwan

Internationale Notzuständigkeit im polnischen Internationalen und Europäischen Zivilverfahrensrecht
Tadeusz Ereci?ski / Karol Weitz

Bruchstellen des internationalen Haftungsrechts in Europa bei vertragsnahen Pflichtverletzungen
Hilmar Fenge

Zum Begriff des gewöhnlichen Arbeitsortes i.S.d. Art. 19 Abs. 2 lit. a EuGVVO insb. bei der Verrichtung der arbeitsvertraglichen Tätigkeit an Bord eines Schiffes
Thomas Garber

Zur geplanten Reform des Gerichtsvollzieherwesens in Deutschland
Hans Friedhelm Gaul

Gerichtsstandsvereinbarung und Pflichtverletzung
Martin Gebauer

Europaweite Beachtlichkeit ausländischer Urteile zur internationalen Unzuständigkeit?
Reinhold Geimer

Der Streitgegenstand – eine Einheit in Vielfalt
Peter Gottwald

Vertraulichkeit im Zusammenhang mit Schiedsverfahren

Ulrich Haas

Juristisches Strukturdenken bei Goethe
Fritjof Haft

The notarial order for payment procedure as a Hungarian peculiarity
Viktória Harsági

Grundlagen der internationalen Notzuständigkeit im Europäischen Zivilverfahrensrecht
Wolfgang Hau

Reviewing Foreign Judgments in American Practice – Conclusiveness, Public Policy, and Révision au fond –
Peter Hay

Materieller Anspruch und Rechtshängigkeitssperre nach Art. 27 EuGVVO
Bettina Heiderhoff

Der Vorschlag der EU-Kommission zur vorläufigen Kontenpfändung – ein weiterer Integrationsschritt im Europäischen Zivilverfahrensrecht
Burkhard Hess

Koordinierung europäischer Zivilprozessrechtsinstrumente
Stefan Huber

Beschaffenheitsvereinbarung und Haftungsausschluss beim Kunstkauf – unter besonderer Berücksichtigung der Falschlieferung
Erik Jayme

Der Gerichtsstand des Erfüllungsortes nach der Brüssel I-Verordnung im Licht der neueren EuGH-Rechtsprechung
Abbo Junker

Wer bestimmt das Honorar des Schiedsrichters?
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Zur Regelung von Sprachfragen im europäischen Internationalen Zivilverfahrensrecht
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Internationale Schiedsverfahren zwischen Effizienzanforderungen und zunehmender Komplexität
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Internationale Zuständigkeit und Anerkennung ausländischer Entscheidungen im chinesischen Insolvenzrecht
Mei Wu

More details can be found here.

Civil Litigation in a Globalising World

Xandra E. Kramer, Professor at Erasmus University Rotterdam, and *Remco van Rhee,* Professor at Maastricht University, have edited a book on “Civil Litigation in a Globalising World”. Published by T. M. C. Asser Press and distributed by Springer the book is available as ebook on SpringerLink.

More information, including a table of content, is available here. The official announcement reads as follows:

This book is an important contribution to the discussion about globalisation of civil procedure. Globalisation of legal matters and the inherent necessity of having to litigate in foreign courts or to enforce judgments in other countries considerably complicate civil proceedings due to great differences in civil procedure. This may jeopardise access to justice. As a result, the debate on the need for the harmonisation of civil procedure becomes ever more prominent. This book discusses the globalisation and harmonisation of civil procedure from various angles, including fundamental (international) principles of civil justice, legal history, private international law, law and economics and (European) policy. It offers important theoretical and practical perspectives and is valuable reading for, amongst others, academic researchers, policy makers, judges, legal practitioners and court bailiffs.

Spanish Decision on the Proof of Foreign Law

Many thanks to Nicolás Zambrana, Assistant professor. University of Navarra, Spain

A very recent decision issued by a Court of First Instance in Madrid presents a slightly new turn of the screw in the issue of the proof of foreign law before Spanish tribunals. The facts are as follows: in 1997, Mr X, of Moroccan nationality, died, leaving a widow (Ms Y) and several children. Mr X had married Ms Y in1973 in Madrid by the Jewish rite, which was at that time not recognised by Spanish law. In 1975 he had made a will in Madrid where he had declared that he was of Jewish faith and that Moroccan succession law referred to Jewish law for succession matters.

In his testament, he bequeaths a life interest on 80% of all his real estate property to his mother and siblings. He also names his son and daughter as his heirs concerning all of his property. Apparently, Mr X, the eldest son of a numerous family, had made a fortune in the real estate business inSpain, where he had

moved fromMorocco, with money borrowed from his family.

The claimants, who are the siblings of the deceased and the children of one of the aforementioned siblings, had filed a claim before a Madrid tribunal and had requested the tribunal to apply Spanish law and thus declare that the testament gave them a right to a life interest on 80% of the real estate property of the deceased or an equivalent amount in money.

The respondents –the children of Mr X- answered the claim and requested the tribunal to declare that the testament was null and void, in accordance with Jewish law and that, therefore, in accordance with Jewish law, too, the widow should receive half of the estate of the deceased and the rest should be divided among those children who were single, with the exception of the eldest son, who should receive a double portion than his siblings. Finally, it seems that Mr X had expressly forbidden all his heirs to resort to judicial means in case of a disagreement.

The claimants did not submit any evidence of foreign law. The respondents did request the tribunal, in a previous hearing, to call several witness-experts on Jewish law, including the Rabbinic Tribunal of Tangiers, all of which was refused by the judge because she claimed that, according to Spanish procedural law, they simply should have submitted to the tribunal an official translation of the foreign applicable law, which they had not done.

As it has been said, the claimants based their claim on Spanish law, which is why the Tribunal turned down all their petitions, given the fact that the applicability of the connecting factors is compulsory (art. 12.6 of the Spanish Civil Code). The Tribunal understood that, according to Spanish conflict of laws, the law applicable to succession is the "personal law of the deceased" (arts. 9.1 and 9.8 of the Spanish Civil Code). In this case, such law was Moroccan law. At no point did the Tribunal ask itself whether Moroccan law does in fact refer to Jewish law as the ultimately applicable law, but such issue is not a real problem because the claimants had simply denied that Moroccan law was applicable. Instead, they had had resort to Spanish law for the merits.

Spanish statutory law, as understood by Spanish case law (including cases decided by the Supreme Court), states that foreign law is to be considered as a fact and needs to be proved by the party that bases his or her claims on it.

Spanish case law and doctrine seem not to agree as to the extent of the proof by the party that claims the applicability of the foreign law. For some scholars, only an initial proof is needed, after which the tribunal would have to check on its own the contents of the foreign law. For part of the case law examined, tribunals may or may not provide assistance to the parties in the task of proving the foreign law. Something on which there is consensus is the fact that the law to be alternatively applied, where the foreign law has not been sufficiently proved, is Spanish law. Nevertheless, the case described in this note is different, to the extent that the claimants simply fail to apply correctly the connecting factor that would have led to the application of the foreign law. Therefore, the tribunal understands that the claims lack sufficient legal base and must be dismissed.

This is just one more example of the mine field that the application of foreign law may turn into. An appeal has been filed before the Provincial Court. We will keep you informed as regards the progress of the case

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Canberra Calling

Australia has often been described as the “lucky country”. Blessed with spectacular coastlines and landscapes as well as bountiful natural resources, Australia’s international prominence has grown throughout the past century as her products and people have become increasingly mobile.

During this period, the development of private international law rules has been left, principally, to the Courts and to the legislatures of the States and Territories that make up the Commonwealth of Australia and the focus, until very recently, has been on the regulation of internal situations involving two or more States/Territories. As a result, private international law in Australia is an interesting, but erratic, patchwork of common law rules (e.g. law applicable to contract and tort), local legislation (e.g. jurisdiction over non-local defendants) and unified Commonwealth-level regimes (e.g. enforcement of some foreign judgments).

In 2011, the Standing Committee of Law and Justice (comprising the Attorneys-

General of the Commonwealth Government and of each of the States and Territories, as well as the Minister of Justice of New Zealand) recognised the need to assess the suitability of Australia's private international law rules in modern conditions. In April 2012, the SCLJ agreed to the establishment of a working group to commence consultations with key stakeholders to determine whether further reform in this area would deliver worthwhile micro-economic benefits for the community.

Having established its working group, the Commonwealth Attorney-General has now launched a public consultation on its newly created Private International Law website, and in parallel on Twitter (@agd_pil), Linked In (AGD – Private International Law) and on Facebook (Private International Law). Online discussions have been launched on jurisdiction, applicable law and other private international law issues and all contributions are welcomed. In particular, and without wishing to exclude the contributions of experts in the field, the organisers of the consultation would like to solicit the views of businesses and individuals with practical experience of the operation of the Australian rules which currently apply to cross-border transactions and events.

There is no need to hop on a plane – follow the link now.

Brussels I (Recast)

For the latest amendments of the European Parliament to the Commission's Proposal, dated 25 September 2012, click here.

International Child Abduction and the Importance of Speaking Catalan

Today's *Boletín Oficial del Estado* publishes Spain's acceptance of the accession of Andorra to the Hague Convention on the Civil Aspects of International Child Abduction; it will enter into force on 1 November 2012. That's how I've learnt about Andorra's first reservation to the Convention:

> Reservation relating to article 24. In accordance with the provisions of article 42 and pursuant to article 24, second paragraph of the Convention, the Principality of Andorra declares that it will not accept the applications, communications and other documents sent to its Authority unless they are accompanied by a translation into Catalan or, where that is not feasible, a translation into French.

Which is quite easy to understand, Catalan being the official language there.

I must confess that before realising that I was stricken by the text. We are living a turbulent political moment in Spain.

PIL and Human Rights In Europe

Professor Zamora Cabot (University of Castellón) has just published "Derecho Internacional Privado y Derechos Humanos en el Ámbito Europeo" in Papeles el tiempo de los derechos, 2012 (number 4).

This paper is a previous version of a broader article that will appear under the same title in a *Liber Amicorum* for Professor Alegria Borras. With this publication the author continues an already fruitful research on the relationship between private international law and human rights.

The article is introduced by a reflection on the need for a rapprochement between private international law and international law, with the aim of mutually reinforcing their potential against global governance- the *Kiobel* case being a good opportunity for experimenting in the field.

Section II is devoted to multiculturalism, which according to the author provides an appropriate "testing ground" to try out the interrelation between private international law and human rights through principles such as legal pluralism and tolerance.

In Section III Prof. Zamora focuses on the question of multinational corporations accountability – again another opportunity for private international law to show its potential, this time via the improvement of the legal remedies available to victims of human rights violations perpetrated by transnational and multinational corporations. In this regard the author draws attention to the different trends currently in place in Europe and the US, the protection of the victims being progressively enhanced here through case law and gradual legislative changes at the State level, as well as through the expression of a strong interest in the reform and improvement of the *acquis communnautaire* which deals with these questions.

Prof. Zamora concludes the article expressing his firm belief in private international law as a tool in the fight against racism and xenophobia -two phenomena which are unfortunately quite visible in nowadays Europe-, and against the frequent lack of respect towards human rights displayed by European transnational corporations present in third, underdeveloped countries.

French Supreme Court Strikes Down One Way Jurisdiction Clause

In a judgment of September 26th, 2012, the French Supreme Court for private and criminal matters (*Cour de cassation*) struck down a one way choice of court agreement governed by Article 23 of the Brussels I Regulation.

A woman had received € 1,7 million from her father. She had put it on a bank account in Luxembourg. The contract with the bank included a clause providing for the exclusive jurisdiction of Luxembourg courts, but allowing the bank to sue wherever it wanted to. The woman sued the bank and its French sister company in Paris.

The *Cour de cassation* holds that the bank was not genuinely bound by the clause, as it had the right to disregard it. It was thus void, for being "*potestative*". This is an implicit referrence to the French law of obligations, which provides that obligations conditional upon an event that one party entirely controls is void (Civil Code, articles 1170 and 1174).

The court also rules that such *potestative* clauses contradict the rationale and purpose of Article 23 of the Brussels I Regulation.

> *ayant relevé que la clause, aux termes de laquelle la banque se réservait le droit d'agir au domicile de Mme X… ou devant "tout autre tribunal compétent", ne liait, en réalité, que Mme X… qui était seule tenue de saisir les tribunaux luxembourgeois, la cour d'appel en a exactement déduit qu'elle revêtait un caractère potestatif à l'égard de la banque, de sorte qu'elle était contraire à l'objet et à la finalité de la prorogation de compétence ouverte par l'article 23 du Règlement Bruxelles I*

The case is of the highest importance given how standard the clause is in banking contracts, and possibly in others. One might want to argue that the fact that the plaintiff was a natural person, maybe a consumer, suggests that the *Cour de cassation* would be more friendly to a pure business clause. This would not be convincing. The case does not insist on who the plaintiff was, and it only refers to Article 23. Furthermore, it gives full publicity to the jugdment by publishing it immediately on its website, for the purpose of indicating that all should take notice of the case.

An interesting aspect of the case is that it applies a doctrine of French law and thus implicitly rules that French law governed the validity of the clause. One should note, however, that while Luxembourg law seemed more appropriate, as it was both the law of the designated court (likely future choice of law rule under the amended Brussels I Regulation) and the law chosen by the parties to govern the contract, the Luxembourg civil code contains the exact same provisions on

potestativité.

What will the Supreme Court do with the Alien Tort Statute?

What a strange day at the Supreme Court. If you didn't know you were before a court of law, you might have thought you were a fly on the wall at a legislative bill drafting commission. Indeed, as the oral argument in the *Kiobel* case developed, it was pretty clear that the Court was focused on two choices. First, it could hold that the ATS does not apply extraterritorially and thus encourage Congressional action—as the Court did in the *Morrison v. National Australia Bank* case. Second, it could undertake some saving construction of the ATS and thus encourage another several years of ATS litigation and academic commentary. Whatever the Court decides, it is likely to encourage what I am calling in a current work in process (which I hope to have done in the next month or so) a "brave new world of transnational litigation" where federal, state, and foreign courts compete through their courts and law to adjudicate transnational cases.

To me, one of the most intriguing aspects of the oral argument was the focus on the interest of the United States in adjudicating the case. In the first couple of minutes, Justice Kennedy asked: "What effects that commenced in the United States or that are closely related to the United States exist between what happened here and what happened in Nigeria?" Why did he ask this? Because he, and others, are concerned that allowing a U.S. court to hear a case where there is little or no nexus to this country potentially allows the courts of other countries to hear cases against U.S. corporations where they too have little nexus to the case at bar. So, one series of concerns is directed at reciprocity—if the Court permits U.S. courts to hear these cases against foreign corporations, then foreign courts may hear these cases against U.S. corporations. The question is how might the Court leave open the ATS without subjecting U.S. corporations to expansive jurisdiction in other countries?

Another concern is foreign affairs, and there were a series of questions directed at whether the State Department could sort out some of these issues by requesting dismissal. I have looked at this issue in some detail in the context of international comity. It is not clear to me, however, based on the oral argument that this approach can get a majority.

So, if the Court is not inclined to apply the presumption against extraterritoriality in a robust way but is concerned about a broad construction of the ATS, what might it do? Justice Sotomayor took up the suggestion of an amicus brief filed by the European Commission to lay the ground work for a compromise position. As it had in *Sosa*, the Commission argued that ATS cases should be permitted only where the plaintiff has exhausted local and international legal remedies, or demonstrates that such remedies are unavailable or futile. The Commission defines "local" as "those states with a traditional jurisdictional nexus to the conduct," which would mean, I think, those jurisdictions where the conduct or injury occurred and the home jurisdiction of the defendant. It might also include the home jurisdiction of the plaintiff, if the plaintiff were not a domiciliary of any of these other places.

The key for this exhaustion requirement, as explored by Justice Kagan, is that it not only requires exhaustion of local remedies at the place of conduct or injury, as does the Torture Victims Protection Act, but also other potential fora that may have a closer connection to the case. So, in this case, exhaustion of remedies in at least Nigeria, the Netherlands, and the U.K. would be required before a U.S. court could hear the case. Armed with such an exhaustion requirement, a defendant could argue for dismissal in favor of various foreign fora.

Note, however, that exhaustion of remedies is generally an affirmative defense. Thus, if a defendant forgets to plead it or makes the decision to waive it, then the U.S. court would hear the case, as many TVPA cases illustrate. A defendant might make this tactical decision to waive where it determines that the U.S. court has the best law and procedure to litigate the case. So, the Court may need a secondary fix for these cases—perhaps forum non conveniens? Furthermore, requiring exhaustion means that many ATS-like cases will be filed in foreign courts, proceed to judgment, and then return as enforcement actions in the United States. So, there is some potential that these cases will return to U.S. courts, albeit under a constrained standard of review, down the road. As I examine in a forthcoming piece in the *Virginia Journal of International Law*, if

there is a strong likelihood that the foreign judgment will be enforced in the United States, why should the U.S. court dismiss the case outright and tie its hands when the later enforcement proceeding is brought?

At bottom, a rewrite of the ATS by the Court has the potential to open up a Pandora's box of new issues for courts and commentators to deal with. Here is just a taste of what the future may bring.

Kiobel Before the Supreme Court

Click here for the transcript of the oral argument.