ERA Conference on Cross-Border Successions

On 22 and 23 November 2012 the Academy of European Law (ERA) will host a bilingual (English/German) conference in Trier on the new regulation on cross-border successions. The conference is set up for practitioners (lawyers, notaries, ministry officials) and academics. Key topics are:

- Scope of the instrument
- Jurisdiction and applicable law
- Recognition and enforcement of decisions
- Authentic documents in matters of succession
- Creation of a European Certificate of Succession

The official inivitation reads as follows:

> *On 7 June 2012, the Regulation aimed at simplifying the settlement of international successions was adopted by the EU's Justice Council. This new Regulation will ease the legal burden when a family member with property in another EU country passes away.*
>
> *Under the Regulation, there will be a single criterion for determining both the jurisdiction and the law applicable to a cross-border succession: the deceased's habitual place of residence. People living abroad will, however, be able to opt for the law of their country of nationality to apply to the entirety of their succession. The Regulation will also permit citizens to plan their succession in advance in more legal certainty. This new instrument paves the way for the European Certificate of Succession which will allow people to prove that they are heirs or administrators without further formalities throughout the EU.*
>
> *The conference will provide an in-depth discussion of the most topical issues regarding successions and wills in a European context.*

More information is available at the ERA's website.

Fox on Securities Class Actions Against Foreign Issuers

Merritt B. Fox, who is Michael E. Patterson Professor of Law at Columbia Law School, has published Securities Class Actions Against Foreign Issuers in the last issue of the *Stanford Law Review*.

> *This Article addresses the fundamental question of whether, as a matter of good policy, it is ever appropriate that a foreign issuer be subject to the U.S. fraud-on-the-market private damages class action liability regime, and, if so, by what kinds of claimants and under what circumstances. The bulk of payouts under the U.S. securities laws arise out of fraud-on-the-market class actions—actions against issuers on behalf of secondary market purchasers of their shares for trading losses suffered as a result of issuer misstatements in violation of Rule 10b-5. In the first decade of this century, foreign issuers became frequent targets of such actions, with some of these suits yielding among the very largest payouts in securities law history.*
>
> *The law determining the reach of the U.S. fraud-on-the-market liability regime against foreign issuers has since been thrown into flux. The Supreme Court's recent decision in the Morrison case adopted an entirely new approach for determining the reach of Rule 10b-5 in situations with transnational features. This new approach focused on whether the purchase was of a security listed on a U.S. exchange or occurred in the United States, in contrast to the previous focus on whether either conduct or effects of sufficient importance occurred in the United States. In almost immediate response, Congress, in the Dodd-Frank Act, reversed the Court's decision with respect to actions by the government and mandated that the SEC prepare a report concerning the desirability of doing the same with respect to private damages actions.*
>
> *This Article goes back to first principles to look at the basic policy concerns that are implicated by the reach of fraud-on-the-market class actions for damages, and to determine who, under a variety of circumstances relating to the*

nationality of the purchasers, the place of the trade, and the place of the issuer's misconduct, is ultimately affected by imposition of this liability regime on foreign issuers. The resulting analysis suggests a simple, clear rule likely to both maximize U.S. economic welfare and, by also promoting global economic welfare, foster good foreign relations. The U.S. fraud-on-the-market class action liability regime should not as a general matter be imposed upon any genuinely foreign issuer, even where the claimant is a U.S. investor purchasing shares in a U.S. market or where the issuer engages in significant conduct in the United States relating to the misstatement. The only exception would be a foreign issuer that has agreed, as a form of bonding, to be subject to the U.S. regime.

This Article then charts a practical path to reform based on this simple rule. It assesses the attractions of, and problems with, the two competing alternatives—using the Morrison rule and returning to the conduct/effects test—and explores the possibilities for reform through the courts, SEC rulemaking, and legislation.

PhD position at Erasmus University Rotterdam

The Erasmus School of Law has a vacancy for a PhD candidate within the area of private international law/(European) civil procedure. The application deadline is 8 July 2012.

For more information and application click here. Please direct questions to kramer@law.eur.nl.

2012 Summer Seminar in Urbino

The Faculty of Law of the University of Urbino will host this summer its 54th Seminar of European Law.

Many of the courses taught over the two weeks of the seminar (20 August-1 September) will deal with conflict issues. Although courses can be taught in English, this is a franco-italian seminar where courses are typically taught in French or Italian, with a translation in the other language.

Speakers include leading academics and practitioners.

The full program can be found here.

Kiobel – Amicus Brief of Comparative Law Scholars

A group of U.S. French and German comparative law scholars have filed an amicus brief in *Kiobel* under the lead of Professor Vivian Grosswald Curran.

The brief summarizes the argument as follows:

> *Understanding other countries' domestic legal systems and practices is necessary to determining if United States law is in conflict with theirs, and more specifically if the United States would be unique in the world by allowing extraterritorial civil jurisdiction under the Alien Tort Statute ("ATS"). This brief will argue that universal criminal jurisdiction for jus cogens violations in civil-law States is analogous to extraterritorial civil jurisdiction under the ATS.*
>
> *Unwarranted similarities between "criminal" and "civil" law in both legal orders have been assumed erroneously because both civil- and common-law systems have the same two classifications. They have significantly different meanings and functions in the different legal orders, however. United States tort law is*

more similar to civilian criminal law than to civilian civil law in many ways. "Civilian" in this brief denotes legal systems, such as those of Continental Europe, emanating from Roman law and organized around a Civil Code. Civilian criminal law and United States civil law have comparable functions because of the roles of judges, prosecutors, and lawyers in the respective legal orders and societies, and because of the methods for victims to initiate legal actions in the criminal courts of civilian States, and in tort lawsuits in the United States.

Civilian judges specialize in either criminal or private law, with criminal-law judges in civilian States having a more didactic, public role than their private-law counterparts. Civilian prosecutors traditionally are non-partisan, neutral figures. Criminal trials, which include those that arise under universal jurisdiction, are public, and organized around a concentrated, oral event. Tort trials in civilian States, on the other hand, often take place exclusively in writing, with no oral testimony, and giving the public no opportunity to witness them. Where victims in civilian States join criminal trials as civil parties, they benefit from the State's resources and can be compensated financially. By contrast, in a tort suit, they would be barred from contingency fee arrangements and class action suits, so civil actions would not be an effective option for many.

Conversely, the aspects of criminal trials in civilian States which render extraterritorial or universal criminal jurisdiction appropriate in those legal systems do exist in United States tort law: both are aired in public; both allow victims effective access to the court system; and both allow victims financial compensation. Although civilian States traditionally have rejected prosecutorial discretion, they have tended to adopt it to varying degrees for universal jurisdiction cases in the interests of international harmony. Similarly, in ATS cases, the Act of State and Foreign Sovereign Immunities Act restrain undue ATS extraterritorial jurisdiction.

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.