Muir Watt on PIL as Global Governance

Horatia Muir Watt (Sciences Po Law School) has posted a new version of her paper on Private International Law as Global Governance: Beyond the Schism, from Closet to Planet on the PILAGG website. The abstract reads:

Despite the contemporary turn to law within the global governance debate, private international law remains remarkably silent before the increasingly unequal distrib tion of wealth and power in the world. By leaving such matters to its public international counterpart, it leaves largely untended the private causes of crisis and injustice affecting such areas as financial markets, levels of environmental pollution, the status of sovereign debt, the confiscation of natural resources, the use and misuse of development aid, the plight of migrating populations, and many more. This incapacity to rise to the private challenges of economic globalisation is all the more curious that 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. The explanation seems to lie in the development, under the aegis of the liberal separation of law and politics and of the public and the private spheres, of an « epistemology of the closet », a refusal to see that to unleash powerful private interests in the name of individual autonomy and to allow them to accede to market authority was to construct the legal foundations of informal empire and establish gaping holes in global governance. 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 on the balance of informal power in the global economy. Adopting a planetary perspective means reaching beyond the schism and connecting up with the politics of public international law, while contributing a specific savoir-faire acquired over many centuries in the recognition of alterity and the responsible management of pluralism.

Time-sharing in Spain

One year after the expiry of the deadline set by the Directive 2008/122/EC of the European Parliament and the Council of 14 January 2009, on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts, the Spanish legislator has transposed it through the Royal Decree-Law 8/2012 of 16 March (BOE of March, 17), already in force. The Time-sharing Act (Act 42/1998 of 15 December) is repealed.

In addition to some rules on the language of pre-contractual information and the contract itself, Art. 17, entitled "Rules of private international law", states that when according with the Rome I Regulation the applicable law is the of a non-member State of the EEA, the consumer may invoke the legal protection granted by the Royal Decree-Law in the following cases:

a) When the any of the inmovable properties concerned is located whithin the territory of a Member State of the European Economic Area.

b) In the case of a contract not directly related to immovable property, if the trader pursues commercial or professional activities in a Member State or by any means directs such activities to a Member State and the contract falls within the scope of such activities

Also on the applicable law, Annexes I to IV provide for standard forms for different types of contracts which include the following standard term: "In accordance with private international law, the contract may be governed by a law other than the law of the Member State in which the consumer is resident or is habitually domiciled, and disputes may be referred to courts other than those of the Member State in which the consumer has his habitual residence or domicile "

Art. 20 provides for the submission to arbitration and other ADR methods included in the list published by the European Commission on ADR for consumers contracts.

On Business and Human Rights (Article)

Prof. Zamora Cabot's course on Human Rights (Donostia-San Sebastian, May 2011), entitled **"La responsabilidad de las empresas multinacionales por violaciones de los derechos humanos: práctica reciente"** has just been published in *Papeles "El tiempo de los derechos"* (ISSN: 1989-8797), and can be downloaded here. In due course it will also appear in the standard form in which these courses are usually published.

The author addresses the most relevant and contemporary items on the topic of human rights, multinational corporations and responsibility: the Protect Respect and Remedy framework of the UN, the Dahl Model Law, the Kiobel case under revision by the USSC… He also analyses five cases concerning the mineral extraction sector and Canadian companies, and another five of other business areas, among which the case of illness inoculations in Guatemala, involving the U.S. Government.

Worth remarking are the very extensive documentation that supports the study and the selection of cases, from which a panorama of the most interesting data about the current situation of litigation against multinational corporations for human rights violations may be inferred. As means of conclusion, the author speaks in favor of private litigation as necessary in order to compensate -even if only in part -the victims of the atrocities, and also as and effective tool for deterrence.

With this publication Professor Zamora Cabot goes one step further in his already rich literary production (so far probably the richest in Spanish) centered on disputes under the ATS in the business-human rights realm.

Swiss Court Rules on Enforcement of English Freezing Orders

On October 31st, 2011, the Swiss Federal Tribunal ruled again that English freezing (formerly *Mareva*) orders may be declared enforceable in Switzerland.

The judgment was delivered in German, but it is usefully presented in English by Matthias Scherer and Simone Nadelhofer (Lalive) at the *Kluwer Arbitration Blog*.

The most interesting contribution of the case is to address the issue of whether obtaining a declaration of enforceability is conditional upon the plaintiff showing that he has a legitimate interest in seeking such declaration. The argument against the existence of such interest was that Swiss banks typically comply with English world wide freezing orders voluntarily. The Federal Court held that this did not prevent plaintiffs from seeking a declaration. According to Scherer and Nadelhofer:

> *According to the Supreme Court, the Lugano Convention 1988 does not require that a party shows a legitimate interest in obtaining a declaration of enforceability of a freezing order. Furthermore, the (Swiss) bank's voluntary compliance with a foreign freezing order is no obstacle to the claimant's right to have the order declared enforceable. Indeed, once the claimant obtains such a declaration, the foreign freezing order is treated as if it were a Swiss decision. The recognition of a foreign judgment thus results in its equal treatment with domestic judgments. The declaration of enforceability by domestic courts further allows for a facilitated enforcement procedure.*

Rühl on European Sales Law and

PIL

Giesela Rühl (Jena University) has posted The Common European Sales Law: 28th Regime, 2nd Regime or 1st Regime? on SSRN. The abstract reads:

> *The article analyses three basic models that can be applied to determine the relationship between the proposed Common European Sales Law (CESL) and the rules of private international law: the '28th regime-model', the '2nd regimemodel', and the '1st regime-model'. It argues that both the '28th regime-model' and the model favoured by the European Commission, the '2nd regime-model', endanger the overall objective of the CESL because Article 6 Rome IRegulation will continue to apply. The '1st regime-model', in contrast, avoids application of Article 6 Rome I-Regulation because it classifies the CESL as a uniform law that takes precedence over the rules of private international law. The article, therefore, concludes that the European Commission should rethink its position and apply the '1st regime-model' instead of the '2nd regime-model'.*

New UAM "Julio d. González Campos" Seminar (13 April)

The Private International Law Department of the UAM (Universidad Autónoma, Madrid) is happy to announce a new edition of the so called "Julio D. González Campos" series of seminars on April 13, with Matthias Lehmann (Professor of Private International Law at the Martin Luther University, Halle-Wittenberg, and Director of the Institute of Economic Law, and Eva Lein, Herbert Smith Senior Research Fellow of the British Institute of International and Comparative Law) as speakers.

The first session will begin at 11:00 with Ms. Eva Lein's intervention, entitled "Which Law Should Apply to an Assignment of Claims? – The Reform of Article 14 Rome I Regulation". The second lecture, by Prof. Lehmann, is programmed for

12:15, under the title “Do We Need A Reform of the Rome I Regulation Regarding the Law Applicable to Financial Torts?”. Both sessions will be in English.

All those interested are welcome. Venue: Seminar V (Julio D. González Campos, 4th Floor), Faculty of Law, Universidad Autónoma de Madrid.

Saumier on Forum Non Conveniens in Quebec

Geneviève Saumier (McGill University) has posted Forum Non Conveniens in Quebec: Assessment of a Transplant on SSRN. The English abstract reads:

> *The doctrine of forum non conveniens was adopted in Quebec private international law with the new Civil Code of 1991 that came into force on 1 January 1994. After almost 20 years, how has this common law transplant adapted to its new environment? This article examines how the jurisdictional discretion was embraced and absorbed into Quebec legal and judicial practice and compares its particularities to those found in other jurisdictions.*

The paper, which is written in French, was published in the *Mélanges Prujiner* (2011).

Bayreuth Conference on a “Rome 0-Regulation”

On 29 and 30 June 2012 Stefan Leible and Hannes Unberath from the University of Bayreuth will host a conference on the question whether we need a “Rome 0-

Regulation" dealing with general issues of European Private International Law. Registration is online.

The programme reads as follows:

FREITAG, 29. Juni 2012 (FRIDAY, 29 June 2012)

- 9:00 **Begrüßung und Einführung,** *Prof. Dr. Stefan Leible*, Vicepresident of the University of Bayreuth and *Prof. Dr. Hannes Unberath*, M. Jur., University of Bayreuth
- 9:15 **Kodifikation und Allgemeiner Teil im IPR,** *Prof. Dr. Dr. h.c. mult. Erik Jayme,* University of Heidelberg
- 9:45 **Das rechtspolitische Umfeld für eine Rom 0-Verordnung ,** *MR Dr. Rolf Wagner*, Federal Ministery of Justice, Berlin
- 10:15 **Allgemeiner Teil und Effizienz ,** *Prof. Dr. Giesela Rühl*, LL.M. (Berkeley), University of Jena
- 10:45 **Diskussion**
- 11:15 **Kaffeepause**
- 11:45 **Qualifikation,** *Prof. Dr. Helmut Heiss*, LL.M. (Chicago), University of Zurich
- 12:15 **Vorfrage,** *Prof. Dr. Gerald Mäsch*, University of Münster
- 12:45 **Diskussion**
- 13:15 **Mittagspause**
- 14:30 **Engste Verbindung,** *Prof. Dr. Oliver Remien,* University of Würzburg
- 15:00 **Parteiautonomie ,** Prof. Dr. Heinz-Peter Mansel, University of Cologne
- 15:30 **Diskussion**
- 16:00 **Kaffeepause**
- 16:30 **Gewöhnlicher Aufenthalt,** *Prof. Dr. Peter Mankowski*, University of Hamburg
- 17:00 **Stellvertretung,** *Prof. Dr. Martin Gebauer*, University of Tübingen
- 17:30 **Diskussion**
- 18:00 **Ende des ersten Veranstaltungstages**
- 20:00 **Abendessen**

SAMSTAG, 30. Juni 2012 (SATURDAY, 30th June 2012)

- 9:00 **Renvoi,** *Prof. Dr. Jan von Hein*, University of Trier
- 9:30 **Interlokale und interpersonale Anknüpfungen,** *Prof. Dr. Wolfgang Hau,* University of Passau
- 10:00 **Diskussion**
- 10:30 **Kaffeepause**
- 11:00 **Eingriffsnormen,** *Prof. Dr. Dres. h.c. Hans Jürgen Sonnenberger*, University of Munich
- 11:30 **Ordre Public,** *Prof. Dr. Wolfgang Wurmnest*, University of Hannover
- 12:00 **Diskussion**
- 12:30 **Mittagspause**
- 13:30 **Ermittlung und Anwendung ausländischen Rechts,** *Prof. Dr. Eva-Maria Kieninger*, University of Würzburg
- 14:00 **Alles obsolet? – Anerkennungsprinzip vs. klassisches IPR,** *Priv.-Doz. Dr. Michael Grünberger*, LL.M. (NYU), University of Cologne/University of Bayreuth
- 14:30 **Diskussion**
- 15:00 **Ende der Veranstaltung**

More information (in German) is available here and here.

ERA Conference on Rome I and II

On 31 May and 1 June 2012, the European Academy of European Law (ERA) will host a conference on Rome I and Rome II in Trier (Germany). The conference will concentrate on day-to-day situations in cross-border context, notably consumer contracts and traffic accidents, and is supposed to provide a forum for debate between legal practitioners on the practical implementation of the two Regulations. Participants are invited to share and evaluate their own experiences in their member states.

The conference programme reads as follows:

THURSDAY, 31 May 2012

- 9:00 **Arrival and Registration**
- 9:30 **Welcome**

I. SYNOPSIS OF ROME I & II

- 9.35 **Scope of Application in the light of English and ECJ law,** *Alexander Layton*
- 10.00 **Mandatory rules and ordre public,** *Michael Hellner*
- 10.25 **Discussion**
- 10.45 **Coffee break**

II. ROME I: WHICH LAW APPLIES TO INTERNATIONAL CONTRACTS?

1. General and Specific Rules

- 11.15 **Choice of Law and applicable law in the absence of choice,** *Jan von Hein*
- 11.45 **Discussion**
- 12.10 **Case law on employment contracts,** *Etienne Pataut*
- 12.40 **Discussion**
- 13.00 **Lunch**

2. Focus on Consumer Contracts

- 14.00 **Consumer contracts: recent developments,** *Giesela Rühl*
- 14.30 **Discussion**

Workshop (with coffee & tea)

- 14.45 **Cross-border consumer contracts in judicial practice,** *John Ahern*
- 15.45 **Results of the workshop and discussion**

3. What's Next

- 16.30 **Towards a revision? – Consumer contracts, insurance contracts and assignment,** *Stefania Bariatti*
- 17.00 **Discussion**
- 17.15 **End of the first conference day**
- 19.00 **Evening programme and dinner**

FRIDAY, 1 June 2012

III. ROME II: WHICH LAW APPLIES TO CROSS-BORDER TORTS?

1. General and Specific Rules

- 9.00 **Tort/delict under Rome II,** *Andrew Dickinson*
- 9.25 **Product Liability,** *Marta Requejo Isidro*
- 9.50 **Discussion**
- 10.15 **Coffee break**

2. Focus on Traffic Accidents

- 10.45 **Traffic accidents in the light of Brussels I, Rome II and the Hague Convention (including a case-study)**, *Thomas Kadner Graziano*
- 12.00 **Current issues on the traffic law and compensation**, *Marie Louise Kinsier*
- 12.30 **Discussion**

3. What's Next

- 12.45 **Amendment of the Rome II Regulation: a new rule on defamation?,** *Cecilia Wikström*
- 13.15 **Lunch and end of the conference**

More information is available here.

French Supreme Court Rules on European Enforcement Order

On January 6th, 2012, the French Supreme Court for Private and Commercial Matters (*Cour de cassation*) ruled for the first time on the European Enforcement Order established by Regulation 804/2005.

The issue before the court was whether a European Enforcement Order (EEO) certificate could stand and justify enforcement measures after the certified decision had been set aside in its legal order of origin. The *Cour de cassation* held that it could not despite the fact the the certificate had not been withdrawn in its legal order of origin.

Facts

The parties were a German couple who had married in 1970 in Germany. They had separated 20 years later. The husband was paying maintenance to his wife. In 2005, she sued before a German court arguing that he was not paying her what he ought to and claiming almost 1 million euros. The husband had moved to France, and thus probably did not hear about the case.

In October 2005, a Stuttgart Court issued a judgment ordering payment of 1 million euros. In January 2006, the same court certified the 2005 judgment as a European Enforcement Order. In December 2006, the wife attached a bank account and a house in France.

It seems that the husband realized at that point what had been going on in Germany. He challenged the German 2005 judgment in Stuggart, which transfered the case to a Court in Mainz. He also sought a stay of the enforcement proceedings in France, that he obtained. In 2007, the Mainz Court found that he owed nothing at all to his wife. She appealed. In 2008, the Court of appeal of Karlsruhe confirmed that she had no claim against her husband.

The husband then petitioned the French enforcement court to lift all enforcement measures carried out in France. The wife argued that this could not be done as long as she would have a valid EEO certificate. The French court disagreed and lifted all enforcement measures. The wife appealed to the Caen court of appeal, and then to the *Cour de cassation*.

Is the EEO Certificate Autonomous?

The reason why an EEO certificate must be issued is that it will then be the title used by enforcement authorities abroad to enforce the certified judgment. One could argue, therefore, that enforcement authorities in Europe should only be concerned with the EEO certificate.

In many of its provisions, the EEO Regulation provides that certificates wrongly issued must be withdrawn by the court of origin (see, eg, Article 10). Article 6 of the EEO Regulation even provides so for cases when the certified decision has ceased to be enforceable.

> *6.2 Where a judgment certified as a European Enforcement Order has ceased to be enforceable or its enforceability has been suspended or limited, a certificate indicating the lack or limitation of enforceability shall, upon application at any time to the court of origin, be issued, using the standard form in Annex IV.*

One possible interpretation of these provisions could be that certificates only stop producing their effects when they are withdrawn, and that they stand autonomously until this happens.

Another interpretation, however, is that EEO certificates only facilitate the circulation of judgments, and they are therefore not autonomous. If such judgments disappear, they cannot stand anymore.

This interpretation is seemingly endorsed by the *Cour de cassation*, which relies on the following provision:

> *Article 11 Effect of the European Enforcement Order certificate*
>
> *The European Enforcement Order certificate shall take effect only within the limits of the enforceability of the judgment.*

The Court rules that the EEO certificate could thus not found enforcement measures in France after the German court of appeal had ruled that the German certified judgment was not enforceable anymore. Existing enforcement measure had to be lifted.

Liability

The French lower courts had also held the wife liable for abuse of process. The *Cour de cassation* confirms the liability of the holder of the certificate, who is found to have committed a wrong for continuing to enforce the certificate after the German court of appeal had finally ruled that the wife had no claim against her husband.

In France, creditors seeking to enforce EEO certificates after the underlying judgment has been finally set aside are thus committing a wrong.