2nd Annual ICQL Lecture: Assignment of Contractual Claims under the Rome I-Regulation

On Thursday, 10 May 2012, 5 pm to 7 pm the British Institute for International and Comparative Law will host the 2nd Annual ICQL Lecture. The lecture will be given by Professor Trevor Hartley (Professor of Law Emeritus, London School of Economics) and it will focus on "Assignment of Contractual Claims under the Rome I Regulation: Choice of Law for Third-Party Rights".

More information is available on the Institute's homepage.

Conference Announcement: European Class Action – Status and Perspectives

On 7 and 8 May 2012 the Humboldt-Viadrina School of Governance will host a conference on EU Class Action in Berlin. The programme reads as follows:

Monday, 7 May

- 10:00 **Welcome**, *Prof. Dr. Christoph Brömmelmeyer*, European University Viadrina Frankfurt (Oder)
- 10:15 **Opening Statement**, *Herr Lothar Jünemann*, German Judges Association, Berlin

I. Kollektiver Rechtsschutz – Rechtspolitische Fragen

- 10:45 **Aktuelle Pläne und Perspektiven einer EU-Rahmenregelung für kollektive Rechtsschutzinstrumente,** *Frau Salla Saastamoinen*,

Directorate-General for Justice, Brussels

- 11:15 **Bemerkungen zu den Brüsseler Gesetzgebungsplänen aus Sicht des Bundesverbandes der Deutschen Industrie (BDI),** *Herr Dr. Heiko Willems*, Federation of German Industry
- 11:30 **Coffee break**
- 12:00 **Bemerkungen zu den Brüsseler Gesetzgebungsplänen aus Sicht der Verbraucherzentralen,** *Herr Gerd Billen*, Federation of German Consumer Organisations, Berlin
- 12:15 **Bemerkungen zu den Brüsseler Gesetzgebungsplänen aus Sicht der Anwaltschaft,** *Dr. Christian Duve*, Attorney-at-law, Frankfurt am Main
- 12:30 **Der Meinungsstand im Europäischen Parlament zu den Gesetzgebungsplänen in der Kommission,** *Dr. Andreas Schwab*, European Parliament, Brussels
- 12:45 **Discussion**, Chair: *Prof. Dr. Thomas Lübbig*, Attorney-at-law, Berlin
- 13:15 **Lunch**

II. Kollektiver Rechtsschutz: Effektivität und Erforderlichkeit in ausgewählten Rechtsgebieten

- 14:45 **Effektivität kollektiver Rechtsschutzinstrumente,** *Prof. Dr. Caroline Meller-Hannich*, Martin-Luther-University Halle-Wittenberg
- 15:15 **Kollektiver Rechtsschutz im Kartellrecht,** *Prof. Dr. Christoph Brömmelmeyer,* European University Viadrina Frankfurt (Oder)
- 15:45 **Coffee break**
- 16:15 **Kollektiver Rechtsschutz im Verbraucherrecht,** *Prof. Dr. Eva Kocher*, European University Viadrina Frankfurt (Oder)
- 16:45 **Discussion,** Chair: *Prof. Dr. Hans-Peter Schwintowski*, Humboldt-University Berlin
- 17:15 **End of the first day**

Tuesday, 8 May

III. Kollektiver Rechtsschutz in den U.S.A. und den Mitgliedstaaten der EU

- 10:00 **Class Actions in den U.S.A. als Vorbild für Europa?,** *Prof. Dr.*

Astrid Stadler, University of Konstanz
- 10:30 **The Status and Practice of Collective Redress in France,** *Jacqueline Riffault-Silk*, Cour de Cassation, Paris
- 11:00 **Coffee break**
- 11:15 **Grenzüberschreitender kollektiver Rechtsschutz,** *Prof. Dr. Michael Stürner*, European University Viadrina Frankfurt (Oder)
- 11:45 **Discussion,** Chair: *Prof. (em.) Dr. Dieter Martiny*, European University Viadrina Frankfurt (Oder) / Hamburg
- 12:15 **Lunch**

IV. Kollektiver Rechtsschutz im Bereich der Finanzdienstleistungen

- 13:45 **Kollektiver Rechtsschutz im Kapitalmarktrecht**, *Prof. Dr. Jan von Hein*, University of Trier
- 14:15 **Kollektiver Rechtsschutz im Versicherungsrecht,** *Dr. Theo Langheid*, Attorney-at-law, Cologne
- 14:45 **Discussion: Ist das KapMug ein Erfolgsmodell und sollte es auf andere Bereiche des Ersatzes von Streu- und Massenschäden ausgedehnt werden?**, *Prof. Dr. Jan von Hein*, University of Trier; *Dr. Theo Langheid, Ministerialrat Dr. Christian Meyer-Seitz*, Federal Ministry of Justice, Berlin, *Dr. Wolfgang Schirp*, Attorney-at-law, Berlin; Chair: *Prof. Dr. Axel Halfmeier*, Frankfurt School of Finance, Frankfurt am Main
- 15:30 **End of Conference**

Wal-Mart and the Foreign Corrupt Practices Act

Here in the United States, news outlets (and investors) are abuzz in reponse to a blockbuster article this weekend in the New York Times regarding allegations of bribery in Mexico by a foreign subsidiary of Wal-Mart Stores, Inc. If the allegations are true, Wal-Mart officials may have violated the Foreign Corrupt Practices Act, a U.S. statute that makes it unlawful for U.S. persons and foreign issuers, as well as foreign firms whose actions have an impact in the

United States, to, among other things, bribe foreign government officials to assist in obtaining or retaining business. FCPA investigations are exploding and corporations are thus being required to spend significant resources on in-house counsel and outside law firms to ensure compliance.

For the purposes of this blog's subject, one issue that should not be missed is the fact that in this case U.S. law will ostensibly be applied to conduct occurring in whole or in part in a foreign country. Regardless of whether or not the alleged conduct violates Mexican law, we see a real potential here for regulatory conflict–a species of the conflict of laws–between U.S. interests and foreign interests and arguably no doctrinal way to negotiate such a conflict, except the discretion of U.S. government officials to exercise their authority in ways that are senstive to international relations and foreign regulatory authority. As such, this case brings to the forefront yet again the question of the extraterritorial application of U.S. law that has recently become a steady diet of recent Supreme Court caselaw, as illustrated by the recent Morrison and Kiobel cases.

As the Wal-Mart investigation develops, it will be interesting to see how forcefully the U.S. pushes to regulate such conduct and whether foreign governments will resist that regulation or basically defer to the United States. It will also be interesting to see what reactions Wal-Mart and other U.S. corporations, and their lawyer-advisors, take in response to these allegations. And, of course, how will Mexico react?

New edition standard textbook on modern Roman-Dutch private international law

The fifth edition of Christopher Forsyth's Private International Law. The Modern Roman-Dutch Law, including the Jurisdiction of the High Courts (2012) appeared

recently. The author is professor of public law and private international law at the University of Cambridge. This work is the standard textbook on the private international law applicable in South Africa and most of its neighbouring countries (Botswana, Lesotho, Namibia, Swaziland and Zimbabwe), as well as in Sri Lanka. Of interest to the foreign reader may be especially the sections on classification (76-90; the decision Society of Lloyd's v Price; Society of Lloyd's v Lee 2006 5 SA 393 (SCA) is regarded by the author as "the leading decision on characterization in the common-law world" (v)) and on the influence of constitutional values on private international law (19-20), including in the context of arrest to found or confirm jurisdiction (196), polygamous marriages (289-291), same-sex marriages (300-301), the proprietary consequences of marriages (302-303) and the enforcement of foreign judgements (468). More information can be found on the website of the publisher: www.juta.co.za.

Sciences Po Seeks to Recruit Professor of Private International Law

The law school of the Paris Institute of Political Science (*Sciences Po*) is seeking to recruit a professor of private international law.

> *Sciences Po Law School is advertising an open position for a professor of private international law (with public employee status). The expected starting date is September 1st, 2012.*
>
> ***Profile of Researcher and Teacher***
>
> *Sciences Po Law School is looking for a professor of economic international law. The chosen candidate will be granted a teaching position at the Law School and within the University College of Sciences Po. He or she will conduct research with the faculty at the Law School, specifically in the field of international economic law, international arbitration, and international private*

law.

The chosen candidate must provide proof of research at an internationally recognized level at the forefront of these academic fields. The chosen candidate will be open to multidisciplinary research and will have to demonstrate an aptitude for collaborating with researchers outside of the field of law. The chosen candidate will also contribute to the creation of agreements with partners outside of Sciences Po.

The chosen candidate will have solid teaching experience and will have had demonstrated a capacity for innovation that matches the teaching model implemented by Sciences Po Law School.

Conditions for Recruitment

Because the position is a public employment position, all candidates must apply using the "Galaxie" portal through the French Ministry of Higher Education. All applications must be received within a month starting from the date of the position's publication, which is expected to April 5, 2012

In addition to the required materials mentioned on the "Galaxie" portal, all applications must include:

– cover letter addressed to Professor Horatia Muir Watt, Head of the admissions committee
– comprehensive curriculum vitae that includes the list of all past research
– a short-form resume
– Three research samples that demonstrate the candidate's aptitude for multidisciplinary legal research (maximum of 5 articles and/or books).

Candidates must send these documents to the address below:

Sciences Po – DRH Pôle académique
27 rue Saint Guillaume
75007 Paris

All applications will be carefully examined by an admissions committee as per the requirements laid out by the law 2007-1199 of August 10, 2007 concerning the public employment of teachers. An initial selection round will take place mid June. Those candidates whose applications are retained will be invited to

an interview before the members of the admissions committee and the academic community of Sciences Po first weeks of July; the candidate will freely choose the subject of his presentation among his most recent research. He will then be interviewed by the admissions committee on his project both in research and teaching at Sciences Po.

Following the interviews, Sciences Po will make a final offer to the selected candidate.

New Canadian Framework for Assumption of Jurisdiction

After 13 months the Supreme Court of Canada has finally released its decisions in four appeals on the issue of the taking and exercising of jurisdiction. The main decision is in *Club Resorts Ltd v Van Breda* (available here) which deals with two of the appeals. The other two decisions are *Breeden v Black* (here) and *Editions Ecosociete Inc v Banro Corp* (here).

The result is perhaps reasonably straightforward: in all four cases the court upholds the decisions of both the motions judges and the Court of Appeal for Ontario. All courts throughout held that Ontario had jurisdiction in these cases and that Ontario was not a *forum non conveniens*.

The reasoning is more challenging, and it will take some time for academics, lawyers and lower courts to work out the full impact of these decisions. The court's reasoning differs in several respects from that of the courts below.

The court notes that a clear distinction needs to be drawn between the constitutional and private international law dimensions of the real and substantial connection test. This is an interesting observation, particularly in light of the fact that the court's own decision is not as clear on this distinction as it could be. I expect that going forward there will be different interpretations of what the court

is truly saying on this issue.

The court is reasonably clear that the real and substantial connection test should not be used as a conflicts rule in itself. It is not a rule of direct application. Rather, it is a principle that informs more specific private international law rules governing the taking of jurisdiction. This is a change from the approach used by provincial appellate courts, especially the Court of Appeal for Ontario, which arguably had been using the real and substantial connection test as its rule, at least in part, for establishing jurisdiction in service *ex juris* cases.

The court states that it is establishing the framework for the analysis of jurisdiction. Going forward, a real and substantial connection must be found through a "presumptive connecting factor" which is a factor that triggers a presumption of such a connection. The presumption can be rebutted. If the plaintiff cannot establish such a presumption, the court cannot take jurisdiction. This last point is perhaps the largest change made to the law. On the law as it stood, the plaintiff could establish jurisdiction through a variety of non-presumptive factual connections that collectively amounted to a real and substantial connection to the forum. That approach is rejected by the Supreme Court of Canada.

The court does not purport to set out a complete list of presumptive connections. It confines itself to identifying some such connections that could apply in tort cases, namely that (a) the defendant is domiciled or resident in the forum, (b) the defendant carries on business in the forum, (c) the tort was committed in the forum, and (d) a contract connected with the dispute was made in the forum. It is quite open, on the language in the decisions, as to what other presumptive connections lower courts will need to be finding in other cases. One possible solution is that lower courts will largely continue to follow the recent approach of the Court of Appeal for Ontario that the enumerated bases for service *ex juris*, subject to some exceptions, amount to such presumptive connections.

The decisions also address the test for the doctrine of *forum non conveniens*. Three points can be made about that analysis. First, the language suggests the burden is always on the defendant/moving party. Second, emphasis is placed on "clearly" in "clearly more appropriate", suggesting that it will be harder to displace the plaintiff's choice of forum. Third, the court cautions against giving too much weight to juridical advantage factors. Judges should avoid invidious

comparisons across forums and refrain from “leaning too instinctively” in favour of the judge’s own forum.

The decisions are not a radical break with the earlier cases but they do change the law on taking jurisdiction in several respects. In addition, the court makes several points along the way, as asides, that will impact other aspects of the conflict of laws. For example, the court confirms the propriety of taking jurisdiction based on the defendant’s presence in the forum.

Yes We Can, Except in Belgium

Can France control the internet?

Today, the French are voting to elect their next president. They may vote until 8 pm. But polls have been available since mid afternoon, and it has long been considered in France that nobody should vote knowing those polls, and pretty much the results. French law thus prohibits to publish any poll before 8 pm…

Everyone knows, however, that French law will have a hard time reaching other countries, and websites of newspapers in other countries. Whatever! French officials have declared that a team of 20 people has been surfing on the internet to locate any tortfeasor and denounce him to French prosecution services. Everybody knows where the bad guys might be: Switzerland, Belgium … Can France control Swiss and Belgian newspapers?

An additional measure has been to get nine French polling agencies to undertake to starve potential tortfeasors, by waiting until 8 to reveal the precious information…

So, have the French scared their neighbours?

Le Temps (Geneva)

> ***Pourquoi Le Temps ne publiera pas d’estimations anticipée***

> *Une discussion est née, en cette fin de semaine, doublée d'une radicalisation des positions, en ce qui concerne la publication anticipée des estimations de votes de l'élection présidentielle française*
>
> *Il faut savoir que les principaux instituts de sondage français mettent à disposition de leurs mandataires des estimations basées sur le dépouillement des premiers bureaux tests. Lors des précédentes élections, ces estimations étaient largement portées, au-delà des mandataires directs, à la connaissance des médias étrangers à l'Hexagone. Elles étaient sourcées et livrées de bonne grâce.*
>
> *Aujourd'hui, cette situation a considérablement changé: les neuf principaux instituts de sondage français qui recueillent et élaborent pareilles estimations ont promis de ne pas communiquer ces résultats aux médias étrangers qui ne respecteraient pas l'embargo de 20h00. Dès lors ces sondages ne sont plus accessibles que de seconde main et ne peuvent être publiés qu'au mépris des engagements pris par les instituts.*
>
> *Au vu de cette situation nouvelle, née de l'exacerbation de la polémique liée à une publication anticipée, Le Temps, après réflexion et pesée précise des intérêts, a décidé de ne publier ces estimations que dès 20h01, dans le respect des embargos décidés.*

Summary: now that we cannot get the polls directly from the polling agencies, let's obey the French embargo.

Le Soir (Brussels)

> *Toute publication est interdite en France avant 20h00, sous peine d'amendes. Mais le soir.be vous dévoile en exclu les premiers resultats.*

Summary: In France, revealing any information would be a criminal offence, but we could not care less, and here they are!

Forthcoming on *conflictoflaws.net*: France v. Le Soir !

UPDATE: French prosecution services have announced that they are investigating several Belgian media and journalists.

Two New U.S. Decisions on Argentina Sovereign Debt Cases

See this post of Ted Folkman over at *Letters Blogatory*.

One of the decisions ruled on a new attempt of NML Capital to enforce its New York judgment. We had reported earlier about attempts in France and Belgium to enforce the same.

Love with Full Faith and Credit

Students sometimes miss concepts in their civil procedure class. This is why they should always take a conflict of laws course. Click on the picture above for additional evidence.

French Court Rules on Jurisdiction to Sue FIFA for Anti Competitive Conduct

On February 1st, 2012, the French supreme court for private and criminal matters (*Cour de cassation*) ruled that French courts had jurisdiction

over a claim brought against FIFA (*Fédération Internationale de Football Association*) for anti competitive conduct.

The plaintiff was willing to begin a career as a player agent in France. He thus sought a professional licence from FIFA, which denied his application in 1994 on the ground that he had not provided a banking guarantee of Swiss Francs 200,000. The agent argued that this was a restriction to his freedom to provide services. In 1998, he petitioned the European Commission on this ground, arguing that FIFA rules were contrary European law. FIFA amended its rules in 2000, and the European Commission rejected the application. In 2007, the agent eventually sued FIFA before a French court seeking damages for anti competitive conduct (relying both on French tort law and European competition law).

FIFA argued that the French court did not have jurisdiction under the Lugano Convention. The agent argued that It under Article 5-3, the French court had jurisdiction because his loss was directly suffered in France. FIFA, by contrast, argued that the alleged tort was committed in Zürich, where the litigious rules were adopted, and that the direct loss of the agent was suffered there as well. Only indirect financial consequences might have been suffered in France.

The *Cour de cassation* ruled that the direct and immediate loss of the agent had been suffered in France.