Smits on Party Choice and the Common European Sales Law

Jan M. Smits, Professor of European Private Law at Maastricht University Faculty of Law – Maastricht European Private Law Institute (M-EPLI) and Research Professor of Comparative Legal Studies at University of Helsinki – Center of Excellence in Foundations of European Law and Polity has posted **"Party Choice and the Common European Sales Law, or: How to Prevent the CESL from Becoming a Lemon on the Law Market"** on SSRN. The paper can be downloaded here. The abstract reads as follows:

> *Optional legal regimes, such as the Proposal for a Regulation on a Common European Sales Law (CESL), must derive their success from being chosen by parties. This contribution asks on what conditions it is dependent whether parties will choose for an optional regime such as the CESL. This requires a clear view of the added value of so-called vertical jurisdictional competition, of the preferences of business and consumers, and of the choices available to contracting parties when designing their contractual relationship. It is argued that in order to be an attractive competitor on the law market, the proposed CESL must meet three requirements. First, it must be significantly different from existing options by offering more innovative solutions, reflecting an alternative view of contractual justice or offering a wider scope of application. Secondly, parties should be able to easily recognize the benefits of a choice for the CESL, calling for innovative ways of marketing such as user-based rankings. Thirdly, the costs of making the CESL applicable must be low compared to other available options. Only if these requirements are met – which is not the case with the present Proposal – it is avoided that CESL turns into a lemon on the European law market.*

Folkman on International Judicial Assistance

Theodore J. Folkman, who practices at Murphy & King, P.C. in Boston, has just published International Judicial Assistance for Massachusetts Lawyers. Many readers will know Ted's work from Letters Blogatory, the Blog of International Judicial Assistance and one of the great and most active blogs in North America on international civil procedure.

> *In a global economy, litigators are increasingly dealing with foreign parties, witnesses, evidence, and judgments in the course of representing their clients. International Judicial Assistance offers clear, practical guidance on the law, procedure, and best practices for accomplishing a number of essential actions requiring international judicial assistance: serving process, obtaining depositions and documentary evidence, and enforcing foreign judgments and arbitration awards. With frequent practice notes, sample forms, and concrete explanations, International Judicial Assistance is an indispensable resource for any litigator.*

I think that one of the great advantages of Folkman's book is that it does not only deal with issues which are common to all U.S. states (either because they are governed by federal law, or by an international convention), but it also presents in details the particular rules of one state (Massachusetts) for other issues. Many readers outside of the United States will appreciate to get clear answers on all issues, even when they are governed by state law.

More details on the book can be found here.

Italian Society of International

Law’s XVII Annual Meeting (Genova, 31 May – 1 June 2012)

On 31 May – 1 June 2012, the **Italian Society of International Law** (Società Italiana di Diritto Internazionale – SIDI) will hold its **XVII Annual Meeting at the University of Genova**. The conference is dedicated to “L’Unione europea a vent’anni da Maastricht: verso nuove regole” (European Union 20 Years After the Maastricht Treaty: Towards New Rules) (see the complete programme here).

The opening session, in the afternoon of Thursday 31 May, will be devoted to international economic law, focusing on the euro crisis (“Diritto internazionale dell’economia e crisi dell’euro”). In the morning of Friday, 1 June, the meeting will be structured in two parallel sessions, respectively dealing with international trade law (“Unione europea e diritto del commercio internazionale”) and private international law (“Le nuove sfide del diritto internazionale privato e processuale europeo”). The final session (Friday 1 June, afternoon) will analyse the effects of EU Law on national procedural law of the Member States (“Gli effetti del diritto dell’Unione europea sul diritto processuale nazionale”).

Here’s the programme of sessions 2-4:

Friday, 1 June 2012 (parallel sessions: 9h00 – 13h00)

Unione europea e diritto del commercio internazionale (venue: Facoltà di Giurisprudenza, Aula Magna)

Chair: *A. Mazzoni* (Univ. of Milan)

- *F. Marrella* (Univ. of Venice and EIUC): Unione europea e investimenti esteri;
- *P. Kindler* (Univ. of Munich): Crisi dell’impresa e insolvenza transnazionale;
- *L. Radicati di Brozolo* (Catholic University of Milan): *Corporate governance* tra autonomia privata, norme e *best practices*;
- *D. Gallo* (Univ. LUISS – Guido Carli of Rome): *Golden shares* e diritto dell’Unione europea: sviluppi e prospettive tra mercato interno ed

investimenti extracomunitari;

- *G. Peroni* (Univ. of Milan): Gli aiuti di stato alle imprese in tempo di crisi e loro compatibilità rispetto alle regole del commercio europeo ed internazionale.

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Le nuove sfide del diritto internazionale privato e processuale "europeo" (venue: Facoltà di Giurisprudenza, Aula Meridiana)

Chair: *F. Pocar* (Univ. of Milan)

- *H. Kronke* (Univ. of Heidelberg): La legge applicabile alla responsabilità e alla disciplina delle *intermediated securities*;
- *S. Bariatti* (Univ. of Milan): Abuso del diritto, conflitti di leggi e diritto del commercio internazionale;
- *B. Nascimbene* (Univ. of Milan): Operatività e limiti del mutuo riconoscimento nella circolazione delle sentenze e degli atti;
- *A. Leandro* (Univ. of Bari): Verso il futuro sequestro europeo su conti bancari nel bilanciamento tra tutela del creditore e tutela dei diritti fondamentali del debitore;
- *M. Maltese* (Univ. of Rome "Tor Vergata"): Le forme di cooperazione internazionale nelle procedure di insolvenza transfrontaliere.

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Friday, 1 June 2012 (final session: 14h30 – 19h00)

Gli effetti del diritto dell'Unione europea sul diritto processuale nazionale (venue: Facoltà di Giurisprudenza, Aula Magna)

Chair: *C. Consolo* (Univ. of Padova)

- *E. Cannizzaro* (Univ. of Rome "La Sapienza"): Diritto dell'Unione europea e processo civile;
- *R. Mastroianni* (Univ. of Naples "Federico II"): Diritto dell'Unione europea e processo penale;
- *L. Daniele* (Univ. of Rome "Tor Vergata"): Diritto dell'Unione europea e processo amministrativo;
- *P. De Pasquale* (University LUM "Jean Monnet"): Diritto dell'Unione

europea e procedimenti davanti alle autorità indipendenti;
- *P. Ivaldi* (Univ. of Genova): Diritto dell'Unione europea e processo costituzionale.

Final Report: *S.M. Carbone* (Univ. of Genova).

Two New Titles from Prof. de Miguel (Publicly Accessible)

Two new titles from Prof. Pedro de Miguel (Universidad Complutense, Madrid), written in English, are to be found now in the institutional repository of the Universidad Complutense de Madrid. The first, "Transnational Contracts Concerning the Commercial Exploitation of Intengible Cultural Heritage" (click here), is included in the book *Il patrimonio culturale intangibile nelle sue diverse dimensioni*, edited by T. Scovazzi, B. Ubertazzi y L. Zagato, based on the proceedings of the a conference held in Novedrate in April 2011. The second, entitled "International Conventions and European Instruments of Private International Law: Interrelation and Convention" (here), is one of the chapters of the book *Quelle architecture pour un code européen de droit international privé,* edited by M. Fallon, P. Lagarde, S. Poillot Peruzzetto, based on a colloquium held in March 2011 at the University of Toulouse (see G. Buono's post).

French Conference on Optional Harmonization

The University of Strasbourg will host a conference on Optional Harmonisation: Theory and Practical Applications on June 8th, 2012.

Topics will include the law of sales, intellectual property, company law and inheritance.

The full programme can be found here.

Briggs on Comity in Private International Law

The latest volume of Recueil des cours, published by The Hague Academy of International Law, has recently been released. It contains an article by Adrian Briggs from the University of Oxford on "The Principle of Comity in Private International Law". The abstract reads as follows:

> *The lectures examine the concept of comity, drawing particular attention to the twin principles of respect for sovereign acts done within the territory of a sovereign, and non-interference with the exercise of that power. They seek to show how rules on jurisdiction, foreign judgments, judicial assistance (and, to a limited extent, choice of law) are derived from and honour the principle of comity; and assess certain new developments in private international law in terms of their compatibility with the principle of comity.*

The complete table of contents is available here.

Stigall on U.S. Extraterritorial

Jurisdiction

Dan Stigall, who works at the U.S. Department of Justice, has posted International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law on SSRN.

> *With the dramatic rise in the frequency and scope of transnational criminal activity and the modern phenomenon of globalization, the interrelationship between international law and U.S. domestic law has come into sharper focus. From issues relating to international terrorism to more banal matters with distinct international dimensions, national courts in the modern era find themselves deciding cases with significant international elements and which have the potential to impact relations between sovereigns on the international plane. One area which is implicated across a broad range of legal topics and which has a natural propensity to affect international relations is the assertion of extraterritorial jurisdiction. This is due to the inherently conflict-generative nature of extraterritoriality.*
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> *In grappling with the need to address transnational issues in the context of a national legal system, domestic courts have increasingly looked to international legal principles, resulting in a level of penetration of international law in the national legal order. This Article explores the degree to which international law has permeated U.S. jurisprudence governing the exercise of extraterritorial jurisdiction over transnational criminal activity and the degree to which international law has been used by U.S. courts to limit or empower extraterritorial jurisdiction. Specific focus is given to the interrelationship between the limits imposed by international law, such as the "rule of reasonableness," and due process limitations imposed by U.S. courts.*
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> *In reviewing a broad spectrum of U.S. judicial decisions, this Article demonstrates that the justifications for and against the exercise of extraterritorial jurisdiction in U.S jurisprudence are multifarious, revealing distinct analytical strata that are dependent upon the nature of the law being applied extraterritorially and the conduct regulated. For instance, regulatory laws impacting commercial markets have been made the subject of an analysis that is distinct from analysis applied to other forms of transnational criminal activity. Moreover, due to a split in U.S. jurisprudence, the analysis applied to*

> *that latter group of transnational crimes (those that do not impact international commercial markets), will further depend upon the judicial district.*
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> *This Article posits that the different approaches to these different sorts of legislation are entirely justifiable (and even logically necessary) due to the very obvious differences between civil actions involving U.S. antitrust law and criminal statutes that take on a transnational focus. Moreover, by understanding the role international law plays in each of these analyses, the similarities of the undergirding rationales, as well as the differences and potential dangers, policymakers and legal actors can work to clarify this otherwise discordant and fractured legal landscape and articulate a unified view of international law and limitations on the exercise of extraterritorial jurisdiction in U.S. domestic law.*

The paper is forthcoming in the *Hastings International and Comparative Law Review*.

Little on Internet Choice of Law Governance

Laura E. Little, who is a professor of law at Temple University, has posted Internet Choice of Law Governance on SSRN.

> *As society and legal institutions have become more accustomed to internet communications and transactions, some legal thinkers urge that existing approaches to governance developed outside the internet context are well suited for resolving internet choice of law issues. In this essay, Professor Little argues against this position, observing that internet disputes continue to pose unique choice of law problems and to call for special focus on developing appropriate governance rules. Professor Little finds evidence of this need for special focus in several phenomena, including: (1) the continuing tendency of courts to pursue unilateral decision-making despite multi-jurisdictional*

interests or global effects of internet disputes; and (2) the legal and cultural clashes that arise in disputes implicating freedom of expression. The internet plays a crucial role in developing new cultural and creative forms, such as fan fiction, mashups, scanlations, and various forms of humor. This raises the stakes of identifying appropriate regulatory forms for internet communication. Special study of internet choice of law problems has the potential to provide the United States with insight into other countries' methods of crediting human dignity in regulating hate speech and defamation as well as to create greater understanding among nations.

Volume on the Unification of European Conflict of Laws

A new book about the unification of conflict of laws in Europe, edited by *Professor Dr. Eva-Maria Kieninger* and *Professor Dr. Oliver Remien*W, both University of Würzburg, has recently been released. More information including a German abstract can be found on the publisher's website. The table of contents reads as follows:

- **Einführung**, *Prof. Dr. Eva-Maria Kieninger*, University of Würzburg
- **Europäische Kollisionsrechtsvereinheitlichung: Überblick – Kompetenzen – Grundfragen**, *Prof. Dr. Wulf-Henning Roth, LL.M. (Harvard)*, University of Bonn
- **Praktische Erfahrungen mit der Rechtsvereinheitlichung in der justiziellen Zusammenarbeit in Zivilsachen,** *Dr. Rolf Wagner*, Federal Ministry of Justice, Berlin
- **Die Rolle des EuGH im internationalen Privat- und Verfahrensrecht,** *Prof. Dr. Dagmar Coester-Waltjen, LL.M. (Michigan),* University of Göttingen
- **The Common Law and EU Private International Law,** *Trevor C Hartley*, London

- **Die Rechtswahl und ihre Grenzen unter der Rom I-VO**, *Prof. Dr. Andreas Spickhoff*, University of Göttingen
- **Die Haftung für Umweltschäden im Gefüge der Rom II-VO**, *Professor Dr. Karsten Thorn, LL.M. (Georgetown)*, Bucerius Law School, Hamburg
- **Das Europäische Zivilprozessrecht im Spannungsfeld zwischen Beschleunigung und Beklagtenschutz,** *Prof. Dr. Astrid Stadler*, Universitiy of Konstanz/University of Rotterdam
- **Traum, Albtraum und Perspektiven der Europäischen Kollisionsrechtsvereinheitlichung – Schlusswor**t, *Prof. Dr. Oliver Remien*, University of Würzburg

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Investors sue Vivendi in France

67 shareholders of Vivendi have initiated civil proceedings in France against the French company.

Readers will recall that investors had initially sued Vivendi in the U.S. However, the U.S. Supreme Court decided in *Morrison* that U.S. securities law had no extra-territorial reach and thus did not apply to shares traded outside of the U.S. As a consequence, the federal court of Manhattan dismissed the claims of investors who had bought their shares in France in February 2011 (see In re Vivendi Universal, S.A. Securities Litigation).

The lawyer for the investors specifically referred to Morrison to explain why this new suit had been brought. Although his clients are not exclusively French and include for instance American funds, it seems that they had all purchased their shares on French markets.

An interesting issue will be whether weight will be given to the New York judgment which had found Vivendi liable for misleading investors in January 2001, before the *Morrison* decision. I suspect that a consequence of the dismissal of the claims of investors who had purchased shares in France is that the judgment does not stand anymore between them and Vivendi. The New York judgment probably cannot be res judicata. But foreign judgments can produce non-normative effects under the French law of judgments. For instance, they can be used as evidence of the occurence of certain facts. The New York judgment could possibly be used for that limited purpose.