Fleischer on Optional Instruments in European Private Law

Holger Fleischer, Director at the Max Planck Institute for Comparative and International Private Law in Hamburg, has posted a (German) article on optional instruments in European Private Law on SSRN. It is forthcoming in Rabels Zeitschrift für ausländisches und internationales Privatrecht and can be downloaded here. The abstract reads as follows:

> *"This paper explores the 'optional instrument' as a regulatory tool in European private law. The term 'optional instrument' or '28th Regime' refers to supranational corporate forms, legal titles or legal instruments which provide an alternative model for doing business throughout the European Union while leaving national laws untouched. After distinguishing different modes of optional law, the paper provides an overview of optional instruments that already exist or are proposed in European company law, intellectual property law, insurance contract law and sales law. It then identifies common features and problems of the 28th Regime, from its appropriate legal basis and the need for an optional instrument to its scope of application, its interface with national law and its relationship to private international law. Finally, the paper addresses the under-researched question of vertical regulatory competition triggered by optional instruments in European private law."*

Article 14 Code Civil Comports

with the French Constitution

In a judgment of February 29th, 2012, the French supreme court for civil and commercial matters (*Cour de cassation*) held that Article 14 of the French Civil Code raises no serious constitutional issue, and thus that the question would not be referred to the French Constitutional Council.

France only introduced recently a proper judicial review mechanism. The new mechanism, however, does not enable parties to petition directly the French constitutional court. Instead, parties arguing that a given statute is unconstitutional must obtain leave of the *Cour de cassation* to do so.

Article 14 of the Civil Code grants jurisdiction to French court on the sole ground that the plaintiff is a French national. This is widely regarded as an exorbitant head of jurisdiction, except in family matters.

In this case, it was argued that Article 14 violated the principle of equality before the law, and the right to a fair trial. The *Cour de cassation* rules that no such argument could seriously be made for a series of reasons which all amount to one single argument: the scope of Article 14 is not so wide, and some disputes do not fall within it.

Reasons of the Court

Article 14 neither bars recognition of foreign judgments, nor excludes lis pendens

Although this reason is the last given by the court, it is useful to begin with it. It is true that it used to be the case that Article 14 would not only grant jurisdiction to French courts on the sole ground that a party was a French national, but also bar recognition of foreign judgments. The rule was abandonned by the court in the *Prieur* case, and it is widely believed that an important incentive for the *Prieur* courtwas the fear that the European Court of Human Rights would find that the rule was contrary to Article 6.

Now, the only question is whether retaining jurisdiction on the sole ground of the nationality of the parties is acceptable.

Article 14 does not grant exclusive, but rather subsidiary jurisdiction to French courts, and is optional for the parties.

That Article 14 granted exclusive jurisdiction meant that it was a bar to the recognition of foreign judgments. It is not anymore. Today, it is a subsidiary ground of jurisdiction, which means that it only applies when French courts do not have otherwise jurisdiction over a given dispute. Of course, in such cases, the jurisdiction of French courts does not raise any issue, since there is another connecting factor designating France. The problem with Article 14 is precisely when Article 14 is the only ground for jurisdiction.

Article 14 is optional "for the parties". This statement seems to stem out of a misunderstanding. The French beneficiary from Article 14 may waive his right (see below). But no foreign party was ever asked to agree with jurisdiction arising out of Article 14. As the Court ruled as recently as in 2009, Article 14 is optional *for French plaintiffs*, not "for the parties"! And this is the right to a fair trial of non French parties which is at stake!

French nationals can waive their right to benefit from it

They certainly can, but we are (and foreign defendants are) really concerned with cases where they have not.

Article 14 does not apply when an international treaty governs the international jurisdiction of French courts

Again, who will ever complain in cases where Article 14 does not apply?

Question

It would be interesting to know whether famous American and German cases on the constitutionality of jurisdictional rules were brought to the attention of the *Cour de cassation.*

Many thanks to Patrick Kinsch for the tip-off.

SSRN: New Papers on the Proposed Common European Sales Law

Several papers dealing with various aspects of the Common European Sales Law (CESL) have recently been published on SSRN:

A Numbers Game – The Legal Basis for an Optional Instrument in European Contract Law, Maastricht Faculty of Law Working Paper No. 2012/02, by *Gary Low,* University of Maastricht

The paper can be downloaded here. The abstract reads as follows:

> *"Despite the fact that it is an optional instrument, the proposed Common European Sales Law (CESL) is based on Art 114 TFEU. This article considers whether the measure approximates the contract laws of Member States, such that the continued use of Art 114 TFEU is justifiable. One possibility, using the lens of regulatory competition, is to suggest that CESL is an intermediate step towards harmonisation. However, it is questionable whether regulatory competition will lead to the required degree of harmonisation, and whether CESL's features demonstrate that is contributes within a wider context to that process of harmonisation. Another possibility is to distinguish CESL from other optional instruments on the basis that it is a second national regime. This is to say that since the regulation makes all second national contractual regimes the same, the contract laws of Member States are harmonised. The problem with this argument is that CESL leaves purely national contract laws unmolested.*
>
> *Clearly, either justification for the use of Art 114 TFEU is plausible, just as they are open to debate. This is precisely the dilemma that must face the Commission if it is to defend its current choice of legal basis. If the issue is brought before the CJEU, CESL might end up as the Commission's Tobacco Advertising III, forcing it to re-experience tremors of competence anxiety. On the other hand, if it risks litigation and obtains a favourable judgment, one can surmise the future of positive integration to be one of unitas via diversitas."*

The Common European Sales Law and the CISG – Complicating or Simplifying the Legal Environment?, Maastricht Faculty of Law Working Paper No. 2012/4, by *Nicole Kornet*, University of Maastricht

The paper can be downloaded here. The abstract reads as follows:

> *"Businesses would undoubtedly prefer a legal environment with less complexity. In the European Commission's view, the legal diversity resulting from the 27 different national contract laws of the Member States creates unnecessary legal complexity and constitutes an impediment to the proper functioning of the internal market. While existing European contract law instruments mainly focus on harmonizing aspects of consumer law, with the proposed Common European Sales Law (CESL), the Commission has now firmly extended the scope of European contract law to also cover commercial sales contracts. However, the CESL is not the first instrument to create a set of uniform rules for cross-border commercial sales contracts. At the international level, there is already the United Nations Convention on Contracts for the International Sale of Goods (CISG). The current proposal consequently raises a number of pertinent questions concerning the relationship between the two instruments, as well as the necessity, desirability, choice for legal base and likely success of the European instrument. The introduction of a European instrument for cross-border commercial sales contracts essentially inserts a new, regional instrument between the divergent national laws of the Member States and the international sales convention. Rather than simplifying the legal environment, such a step adds to its complexity. This would only make sense if diversity of national contract laws is a serious problem for business that needs to be tackled by creating uniform (European) rules; the existing uniform rules (CISG) have significant shortcomings, and the new instrument has added value. This article examines the proposed CESL on this basis."*

The Proposal for a Regulation on a Common European Sales Law: Shortcomings of the Most Recent Textual Layer of European Contract Law, by *Horst Eidenmueller,* University of Munich/University of Oxford, *Nils Jansen,* University of Muenster, *Eva-Maria Kieninger,* University of Wuerzburg, *Gerhard Wagner,*University of Bonn; Erasmus School of Law; University of Chicago Law School, and *Reinhard Zimmermann,* Max Planck Institute for Comparative and International Private Law

The paper can be downloaded here. The abstract reads as follows:

> *"On 11 October 2011, the European Commission published a Proposal for a Regulation on an optional Common European Sales Law (CESL). This text represents a milestone for the further development of European contract law. Our essay critically examines and evaluates the Commission's proposal. It outlines the Commission's draft as well as its background and deals with some of the most pressing doctrinal and policy issues raised by it. We show that the suggested range of application and the technical mode for opting into the CESL are flawed. Further, the CESL incorporates many elements and doctrines of the current acquis communautaire, such as unduly extensive information duties and withdrawal rights as well as a policing of standard contract terms, without reconsidering their proper purposes and uses. With respect to the rules on sales law, it is particularly the mandatory character of most of them that poses grave problems. We also demonstrate that the CESL's optional character does not eliminate the quality concerns raised in this essay: The CESL might become a 'success' despite its shortcomings. Hence, notwithstanding its optional character, the proposed text should not be enacted. What is needed is a broad and thorough debate on the scope, forms and contents of contract law harmonization in Europe rather than the speedy legislative enactment of a flawed product."*

The Proposed Common European Sales Law: Legal Framework and the Agreement of the Parties, Oxford Legal Studies Research Paper No. 10/2012, by *Simon Whittaker,* University of Oxford

The paper can be downloaded here. The abstract reads as follows:

> *"Economic integration remains at the heart of the European Union, and it is not surprising, therefore, that contract law has increasingly formed the object of European legislative initiatives. During the 1980s and 1990s, the resulting legislation was particular in its scope, targeted in its aims, and its main technique was the harmonization by directive of aspects of the national contract laws of Member States. Over the last decade, increasing dissatisfaction with this technique prompted a move towards 'full harmonization' in EU consumer law, seen first as regards the Unfair Commercial Practices Directive 2005, and later as regards the reshaped versions of the Timeshare Directive and*

Consumer Credit Directive. However, when in 2008 the Commission sought in its Consumer Rights Directive Proposal to extend 'full harmonization' to four of the most important directives in the consumer acquis, the proposal met with very considerable opposition. The Consumer Rights Directive as promulgated in late 2011 is therefore much reduced in scope, its provisions leaving aside almost entirely change to earlier (minimum harmonization) directives on unfair terms and consumer guarantees in sale. However, a second legislative development of importance for the present discussion was the new competence established by the Amsterdam Treaty, which allowed the EU to bring existing European private international law instruments on jurisdiction and on applicable law in contract within the framework of EU law and to add to them new instruments on applicable law. As a result, EU law now possesses uniform laws governing the law applicable to cross-border contracts and cross-border torts, whose justification was again the needs of the internal market. It is in this somewhat crowded legislative arena which we must place the recent Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Broadly, the proposal would set up an optional contract law instrument (the 'Common European Sales Law' or 'CESL') governing sales of goods, the supply of digital content and certain related services for contracts between traders (where one is a small or medium size business (SME)) and contracts between traders and consumers. This note will outline the purposes and the scope of this initiative and then examine two of its central features: its technical legal framework, particularly as regards its relationship with private international law, and its approach to the agreement required of the parties to use the CESL to govern their contract."

The Commission Proposal for a 'Regulation on a Common European Sales Law (CESL)' – Too Broad or Not Broad Enough?, EUI Working Papers LAW No. 2012/04, by *Hans-W. Micklitz,* European University Institute, *Norbert Reich*, University of Bremen

The paper can be downloaded here. The abstract reads as follows:

"The paper which was commissioned by the Austrian Ministry of Consumer Affairs but written under the exclusive responsibility of the authors consists of three parts: The first part written jointly by the authors gives an analysis of the so-called "chapeau" of the Commission proposal on a Regulation (EU) for a

"Common European Sales Law" (CESL), published as COM (2011) 635 final of 11.10.2011. The chapeau, that is the legal instrument putting into effect the eventual CESL, concerns such fundamental questions as legal basis, namely Art. 114 TFEU on the internal market, importance of the subsidiarity and proportionality principles, personal, territorial and substantive scope of the proposal, the mechanism of "opting-in" in cross-border B2C (business to consumer) transactions, its relation to the "acquis", in particular the recently adopted "Consumer Rights Directive" (CRD) 2011/83/EU of 25.10.2011, to existing Member State law under conflict-of-law provisions of Art. 6 on consumer protection of Regulation (EU) 593/2008, and to options left to them. The second part, written by Hans Micklitz, analyses the substantive provisions of the so-called Annex I, namely the text of the CESL itself which with some modifications took over over the results of the EU expert group on a "feasibility study on an optional instrument" of 3.5.2011. It is concerned with B2C provisions on so-called "off-premises" and distance contracts with respect to information obligations of traders and withdrawal rights of consumers which are particularly relevant in e-commerce. Also the new proposals on unfair terms are discussed which go beyond the existing acquis of Dir. 93/13/EEC. The third part, written by Norbert Reich, is concerned with provisions on consumer sales and related service transactions, also based on the feasibility study with an extension to "digital content". Some of them go beyond the existing acquis of Dir. 99/44/EC, while the concept of "related service contracts" remains rather obscure and controversial."

Call for Papers International Family Law and Party Autonomy

Subject

At the substantive law level, party autonomy has always been limited in the field of family law. The mandatory nature of many family law rules has meant that

choice has always been restricted. Take, for instance, the mandatory nature of divorce proceedings in virtually every European jurisdiction. Increasingly, however, party autonomy in family law matters is becoming the standard instead of the exception. Moves towards parenting plans, child support agreements and enforceable pre-nuptial contracts are all signs of this trend. In juxtaposition to this trend, in other areas of family law state involvement and inference in family law matters are instead on the rise, for example in the field of adoption or child protection.

At private international law level, the same trends are also evident. Choice of law clauses are, for example, increasingly being inserted into international family law instruments. Take for instance the Hague Maintenance Protocol 2007, which fundamentally departs from the principles of the Hague Maintenance Convention 1973 with respect to party autonomy.

Procedure

The Netherlands Journal of Private International Law (*Nederlands Internationaal Privaatrecht)* is to devote a special edition to these issues in 2012. This special issue is open to submissions from the entire globe and is, therefore, not restricted to European contributors. On the basis of a submitted abstract a selection of articles will be selected for inclusion.

Abstracts of no more than 500 words should be sent to Wilma van Sas-Wildeman at w.van.sas-wildeman@asser.nl. Please ensure that you include your name, contact details and e-mail address in your submission. The ultimate contribution to this special edition should not be more than 8,000 words. For more information concerning this call for papers please e-mail managing editor Wilma van Sas-Wildeman (w.van.sas-wildeman@asser.nl) with the subject "Special Edition 2012".

Timeline

Deadline for submission of abstract: 15th April 2012 —— Choice of authors: 1st May 2012

Deadline for submission of contributions: 15th August 2012 —— Publication: Dember 2012

Bennett on the Presumption against Extra-Territoriality

Thomas B. Bennett has posted an article on the presumption against extraterritoriality: The Canon at the Water's Edge.

> *What motivates substantive presumptions about how to interpret statutes? Are they like statistical heuristics that aim to predict Congress's most likely behavior, or are they meant to protect certain underenforced values against inadvertent legislative encroachment? These two rationales, fact-based and value-based, are the extremes of a continuum. This Note uses the presumption against extraterritoriality to demonstrate this continuum and how a presumption can shift along it. The presumption operates to diminish the likelihood that a federal statute will be read to extend beyond the borders of the United States. The presumption has been remarkably stable for decades despite watershed changes in the principles — customary international law and conflict of laws — that once supported it. As the presumption's normative justifications have diminished, a new justification has grown in importance. Today, the presumption is often justified as a stand-in for how Congress typically legislates. This Note argues that this change makes the presumption less defensible but even harder to overcome in individual cases.*

This is a student note, forthcoming in the *New York University law Review*, but legal theorist Larry Solumn has characterized the piece as impressive and illuminating from the perspective of legal interpretation.

Pauwelyn on Public International Law and the Conflicts Approach

Joost Pauwelyn (Graduate Institute of International and Development Studies, Geneva) has posted Public International Law and the Conflicts-Law Approach on SSRN. The abstract reads:

> *What are the challenges when thinking about public international law through the three dimensional prism of the conflicts-law approach? This contribution describes how international law is based on a "thin consent" paradigm. It then explores challenges that come with this paradigm under each of the conflicts-law three dimensions: law as system (how to open up a specific treaty regime to other legal orders?); law as regulation (how to open up law to non-legal expertise?); and law as governance (how to open up law to informal or para-legal regimes?). In conclusion, a shift is pointed at from "thin consent" to "thick consensus". This shift affects in particular the parallel universe of transnational standard-setting. Yet, it also finds early reflections in formal international law adjudication.*

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (2/2012)

Recently, the March/April issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Gerhard Hohloch:***" Die „Bereichsausnahmen" der Rom II-VO – Zum Internationalen Privatrecht in und um Art. 1 Abs. 2 Rom II-VO" – the English abstract reads as follows:

The scope of applicability of the regulation "Rome II" is governed by its art. 1. Art. 1 subpara. 1 defines this scope as the matter of "non-contractual obligations", art. 1 subpara. 2 traces the limits of this scope by a catalogue of "excepted areas" (lit. a–g). The subsequent article hereinafter has been dedicated to the research of the limits of these "excepted areas" as well as the conflict of laws rules governing these areas. The author underlines that art. 1 subpara. 2 has to be understood on the basis of "European law making"; therefore methods of classification have to follow European, not "national" ideas. The program of harmonization and unification of conflicts of laws ("Rome I"–"Rome V" and more) obliges to describe the scope of each regulation. The "excepted areas" are defined by methods of interpretation of European style, meanwhile their contents are governed by European conflict rules ("Rome I–III") or by conflict rules based on multilateral conventions or by "national rules". The author discusses their "border lines" and goes on to the residuary competences of national conflict rules and to look for the future development.

- ***Dieter Martiny:*** "Lex rei sitae as a connecting factor in EU Private International Law" – the English abstract reads as follows:

The situs rule is one of the classic connecting principles in private international law, particularly for property law. In European conflict law, which is mainly regulated by different Regulations, the lex rei sitae only plays a restricted role as a connecting factor. Property issues are generally outside the scope of the Regulations. In international civil procedure the situs functions as a basis for exclusive jurisdiction. It is, however, difficult to separate the effects of relationships in contract law, succession and matrimonial property law from questions of property law as such. In international contract law the situs has only a reduced importance in the context of the form of the contract and overriding mandatory rules. Since there is a lack of harmonised property law, problems arise mainly in the context of non-possessory security rights when encumbered assets cross the border. The plethora of problems arising from a change of the applicable law and the recognition of foreign security rights suggest that the creation of an additional uniform security right might be more successful than a solution restricted to private international law.
The scission or dualist approach in matrimonial property law and succession law with its distinction between the law applicable to the person (and movable property) and the law applicable to immovables (the lex rei sitae applying as to

the latter) is not followed by the proposed EU Regulations for succession and matrimonial property. However, it is necessary to a certain extent that the law of the place where property is located be applied or at least be taken into account. Property rights in rem, transfer of land and land registers have to be excluded from the scope of application of the EU instruments so long as there is no uniform law. For some separate issues a special connection to the place of location of property is appropriate. Precise definitions are of particular importance given the need to ensure legal certainty and satisfy the expectations of parties.

- ***Christoph Reithmann*** on foreign notarial deeds***:*** **"**Urkunden ausländischer Notare in inländischen Verfahren"
- ***Timo Nehne***: "Die Internationale Geschäftsführung ohne Auftrag nach der Rom II-Verordnung – Anknüpfungsgegenstand und Anknüpfungspunkte" – the English abstract reads as follows:

The choice of law rules of the Rome II Regulation have so far been dealt with by a remarkable number of scholarly publications in different countries and languages. Most of them, however, pay only little attention to Article 11. Its legal category and connecting factors give rise to specific questions of construction and application which the following contribution aims to address.

- ***Susanne Fucks***: "Die Zustellungsbevollmächtigung von inländischen Schadensregulierungsbeauftragten ausländischer Kraftfahrzeughaftpflichtversicherer" – the English abstract reads as follows:

According to Art. 4 of the 4th Motor Insurance Directive all motor vehicle insurers are required to appoint a claims representative in each Member State other than that in which they have received their official authorisation. The claims representative should be authorised to collect all necessary information in relation to claims and to take appropriate action regarding the settlement of claims on behalf and for the account of the insurance undertaking in cases where the victim of a motor vehicle accident abroad makes use of his or her direct right of action against the foreign insurance company. If the claim is not settled the insurance company may be sued before the courts for the place in a

Member State where the injured party is domiciled.
This article discusses the decision made by the Higher Regional Court of Saarbrücken, which concluded that the service of the writ cannot be effected to the claims representative if the representative is not explicitly authorised to receive such a statement of claim. The article attempts to give reasons why Art. 4 of the 4th Motor Insurance Directive suggests such an authorisation and a service of process abroad including the translation of the statement of claim according to the European Regulation on the service of documents is not necessary in that case.

- ***Peter Mankowski:*** "Autoritatives zum „Ausrichten" unternehmerischer Tätigkeit unter Art. 15 Abs. 1 lit. c EuGVVO" – the English abstract reads as follows:

„Directing activities" in Art. 15 (1) (c) Brussels I Regulation is the key term for the width and scope of consumer protection in Europe. Now, the ECJ has adressed and refined it with regard to the most important area, e-commerce. The Joint Declaration of Council and Commission has lost any sway. A test of criteria has been established, creating some guidelines but leaving some remaining uncertainty. Some of the criteria mentioned deserve closer inspection. Going beyond the borders of the State in which a business has its seat is the foundation for a rebutable presumption that the business directs its activities to the consumer's State. The yardsticks developed in consumer protection law can be transferred to the PIL of unfair commercial practices.

- ***Heinz-Peter Mansel*** on the decision of the Disctrict Court Neustrelitz of 18 January 2011: "Rechtsprechungsübersicht zu AG Neustrelitz, Beschluss v. 18.1.2011 – 6 F 106/09"
- ***Renata Fialho de Oliveira***: "Die Zulässigkeit ausschließlicher internationaler Gerichtsstandsvereinbarungen in Brasilien" – the English abstract reads as follows:

In the absence of an express legal rule providing for international choice of court agreements and its effects under Brazilian law, the subject has to be analysed considering the national general legal framework regarding international jurisdiction, legal writing and case law. As far as the latest is

concerned, courts in Brazil have adopted in the last decades different approaches when it comes to the derogatory effects of exclusive choice of court agreements. The lack of a clear line of decision in such an important subject for international affairs is source of legal uncertainty. A recent decision of the Superior Tribunal de Justiça gives rise to a brief analysis of the subject in the following note.

- ***Michael Stürner:*** "Internationale Zuständigkeit für provisorische Rechtsöffnung nach LugÜ" – the English abstract reads as follows:

Pursuant to Article 22 No. 5 Brussels I Regulation/Lugano Convention 2007, in proceedings concerned with the enforcement of judgments, the courts of the State in which the judgment has been or is to be enforced shall have exclusive jurisdiction. The jurisdictional concept of Brussels I/Lugano Convention is based on the assumption that proceedings can either qualify as being part of the enforcement stage or of the adjudication itself, the basis for such qualification being an autonomous interpretation. Given the multitude of different enforcement proceedings and recourses under national law it is not always clear if a particular type of proceeding falls within the scope of Article 22 No. 5 Brussels I/Lugano Convention. The decision of the Swiss Bundesgericht (Federal Supreme Court) of 7 October 2010 discussed here deals with the so-called provisorische Rechtsöffnung, which is a preliminary proceedings taking place before the actual enforcement proceedings. The Bundesgericht holds Article 22 No. 5 Brussels I/Lugano to be applicable, a decision, it is submitted here, which is to be criticised.

- ***Boris Kasolowsky/Magdalene Steup***: "Dallah v Pakistan – Umfang und Grenzen der Kompetenz-Kompetenz von Schiedsgerichten" – the English abstract reads as follows:

The UK Supreme Court and the Paris Cour d'appel have recently confirmed, in connection with the ICC arbitration involving Dallah and Pakistan, that the national state courts are not bound by any determinations made by an arbitration tribunal with regard to the existence of a valid arbitration agreement between the parties. The arbitration tribunal's Kompetenz-Kompetenz therefore remains subject to full review by the state courts at the recognition and enforcement stage. English and French courts have thus

clarified that the principle of Kompetenz-Kompetenz is effectively just a rule of priority: the arbitration tribunal has the authority to rule on its own jurisdiction first and before any review by the national courts.

- ***David Diehl:*** "Keine Anwendbarkeit des US-amerikanischen Foreign Sovereign Immunities Act auf amtlich handelnde Individuen – Das Urteil des US Supreme Court in Samantar v. Yousuf" – the English abstract reads as follows:

The Foreign Sovereign Immunities Act (FSIA) and the Alien Tort Statute (ATS) are the two main pillars of the Human Rights Litigation in the United States. While the former constitutes the sole basis for suits against foreign states, the latter is frequently invoked by courts to establish jurisdiction over foreign government officials. However, in Amerada Hess Shipping v. Argentina, the US Supreme Court decided that plaintiffs may only rely on the ATS if the FSIA does not apply to the given case. As the FSIA does not explicitly mention individuals, courts were faced with the question of whether they may be subsumed under the notion of the "state" directly (28 U.S.C. § 1603 (a)) or can be regarded as an "agency or instrumentality of a foreign state" (28 U.S.C. § 1603 (b)) when acting in official capacity. Since the decision of the Court of Appeals in Chuidian v. Philippine National Bank, courts have regularly followed the latter interpretation. This interpretation however, has been challenged by other courts in recent years, leading to the decision of the Supreme Court in Samantar v. Yousuf. In this ATS case against the former prime minister of Somalia for torture and arbitrary killings, the highest US Court finally decided that the FSIA may not be read to include individuals at all. Instead, according to the Court, all immunity of foreign individuals is solely governed by the (federal) common law, possibly forcing the courts to determine the scope of individual immunity according to international law in future cases. This may have severe impacts on the Human Rights Litigation in the United States which this article sets out to explore.

- ***Fritz Sturm***: "Schweizer Familiengut in Liechtensteiner Stiftungshut" – the English abstract reads as follows:

The assets of a family foundation regularly incorporated in Vaduz (Liechtenstein) have been spoiled by one of the managers of a credit institution

in Geneva, where it had opened an account. The bank, however, refused to indemnify the foundation for its loss asserting that infringing the prohibition to create new family foundations (art. 335 sec. 2 Swiss Civil Code) the foundation as plaintiff could not be a subject of legal rights and duties. Following the Genevan instances, the Federal Court of Lausanne in a ruling dated 17/11/2009 rejected this argumentation. It stated that art. 18 Swiss Code of Private International Law can not be applied, the prohibition invoked not being intended to protect guiding principles of the Swiss social, political and economic policy.

- ***Hilmar Krüger***: "Zum auf Schiffspfandrechte anzuwendenden Recht in der Türkei"
- ***Carl-Johan Malmqvist***: "Die Qualifikation der Brautgabe im schwedischen IPR" – the English abstract reads as follows:

Sweden and Germany have become two multicultural countries with large Muslim minorities. This situation reflects on the court system and raises questions about some Muslim traditions and legal elements and their legal status within Swedish and German law. One example is the Mahr, the amount to be paid by the man to the woman at the time of marriage. This article is about the classification of Mahr according to German and Swedish law, but with main focus on the latter legal system. As part of this description, two basic Swedish cases regarding Mahr will be presented and analyzed and hopefully contribute to a clearer view on the Swedish standpoint on Mahr within the private international law.

- ***Karl Peter Puszkajler*** on the conference of the University of Belgrade: Current questions on international arbitration: "Aktuelle Fragen der Internationalen Schiedsgerichtsbarkeit – Tagung der Rechtsfakultät der Universität Belgrad"

Seminar: The Lugano Convention and the Recast of the Brussels I Regulation – An international Perspective

The “Europa Institut” at the University of Zurich is organising the seminar “The Lugano Convention and the Recast of the Brussels I Regulation – An international Perspective” which will take place at the **Lake Side Casino Zurichhorn on 4th May 2012.**

The registration deadline is 16th April.

The list of speakers, the program as well as information on the registration procedure can be found here: Program_Lugano Convention_04.05.2012

Publication book Civil Litigation in a Globalising World

The book *Civil Litigation in a Globalising World*, providing a unique compilation of 19 papers by international experts on comparative and international civil litigation, has just been released. It is edited by X.E. (Xandra) Kramer, Professor of Private International Law and European Civil Procedure at Erasmus School of Law (Rotterdam) and C.H. (Remco) van Rhee, Professor of European Legal History and Comparative Civil Procedure at Maastricht University, and published by T.M.C. Asser Press/Springer (2012).

This book discusses the globalisation and harmonisation of civil procedure from various angles, including fundamental (international) principles of civil justice, legal history, Law and Economics and (European) policy. Attention is also paid to

the interaction with private international law and private law (Part I: Different perspectives on globalisation and harmonisation). European and global projects that aim at the harmonisation of civil procedure or provide guidelines for the fair and efficient adjudication of justice are discussed in a subsequent part of the book (Part II: Harmonisation in a European and global context). The volume further includes contributions that focus on globalisation and harmonisation of civil procedure from the viewpoint of eight national jurisdictions (Part III: National approaches to globalisation and harmonisation).

The book is the result of a conference held at Erasmus University Rotterdam, the Netherlands, in 2010 (see also our previous post).

For more information and the table of contents click here.

Interesting News from the Supreme Court Regarding the ATS

The blogs were abuzz last week about the *Kiobel* case (argued on February 28), which asks whether corporations may be sued for violations of the law of nations under the Alien Tort Statute. Full information is available here. Today, the Supreme Court took the atypical step of ordering reargument. The Court's order sets out a briefing schedule for the parties that runs to June 29. Reading between the lines, it appears that some members of the Court have determined that *Kiobel*, as it was briefed, was not the best vehicle to resolve the issues at stake. As such, the Court has 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." This is, of course, a question of extraterritoriality–a question at the heart of Justice Kennedy and Alito's questions at oral argument. The ATS continues its interesting twists and turns….