JHA Council (7-8 June 2012): EU Regulation on Successions and Wills Adopted – General Approach on Brussels I Recast – CESL

The Justice and Home Affairs (JHA) Council of the EU, currently holding its meeting in Luxembourg (7-8 June), **adopted today the successions regulation** (Regulation on jurisdiction, applicable law, recognition and enforcement of decisions, acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European certificate of succession): see the Council's note and RAPID press release. The final text can be found in doc. no. PE-CONS 14/12.

Denmark, Ireland and the United Kingdom do not participate in the regulation, pursuant to the special position they hold in respect of the Area of Freedom, Security and Justice, **while Malta voted against the adoption**, expressing concerns on the uncertainty that the new rules will create in the legal regime of international successions, vis-à-vis current Maltese law (see the Maltese statement in the Addendum to Council's doc. no. 10569/1/12).

As pointed out in a previous post, an agreement had been reached by the Council and the Parliament in order to adopt the new instrument at first reading: a history of the legislative procedure, along with the key documents, is available on the OEIL and Prelex websites. Once the regulation is published in the OJ, the whole set of Council's documents relating to the procedure, currently not available, will be disclosed. An interesting reading on the legislative history can also be found on the IPEX website, which gathers the opinions of national parliaments of the Member States on draft EU legislation.

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Two other PIL items are set on the agenda of the JHA meeting on Friday 8 June. **The Council is expected to approve a general approach on the Brussels I recast** (see the state of play in Council's doc. no 10609/12 and the draft text set out in doc. no 10609/12 ADD 1), **and to hold a debate on the orientation and**

the method to handle the further negotiations on the proposal for regulation **on a Common European Sales Law** (CESL). As regards the latter, here's an excerpt from the background note of the meeting:

> *The first discussions on the [CESL] proposal have made it clear that this file entails divergences among member states. Several member states had therefore requested that a political debate at the level of the Council takes place before proceeding further with technical discussions.*
>
> *To this end, the Presidency submits a discussion paper to the Council (10611/12) proposing that ministers address questions related to the legal basis and the need for the proposal, its scope (focus on sales contracts concluded on-line) and whether to start work on model contract terms and conditions.*

U.S. Symposium on Personal Jurisdiction

The *South Carolina Law Review* publishes a symposium issue on (U.S.) Personal Jurisdiction – The Implications of *McIntyre* and *Goodyear Dunlop Tires.*

Keynote Address

Arthur R. Miller, McIntyre *in Context: A Very Personal Perspective*

Articles

Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in* J. McIntyre Machinery, Ltd. v. Nicastro

John Vail, *Six Questions in Light of* J. McIntyre Machinery, Ltd. v. Nicastro

Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop

Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*

Linda J. Silberman, Goodyear *and* Nicastro*: Observations from a Transnational and Comparative Perspective*

Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by* Goodyear Dunlop Tires v. Brown *and* J. McIntyre Machinery v. Nicastro

Paul D. Carrington, *Business Interests and the Long Arm in 2011*

Rodger D. Citron, *The Case of the Retired Justice: How Would Justice John Paul Stevens Have Voted in* J. McIntyre Machinery, Ltd. v. Nicastro*?*

Meir Feder, Goodyear, "Home," *and the Uncertain Future of Doing Business Jurisdiction*

Collyn A. Peddie, *Mi Casa Es Su Casa: Enterprise Theory and General Jurisdiction over Foreign Corporations After* Goodyear Dunlop Tires Operations, S.A. v. Brown

Wendy Collins Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*

Howard B. Stravitz, *Sayonara to Fair Play and Substantial Justice?*

First Issue of 2012's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains four articles and several casenotes.

The first article is a survey of the 2011 Polish law of private international law by

the late Tomasz Pajor, who was a professor at Lodz University (*La nouvelle loi polonaise de droit international privé*).

The second article is authored by Isabelle Veillard and explores the scope of res judicata of arbitral awards (*Le domaine de l'autorité de la chose arbitrée*). It is this only one to include an English abstract:

> *Expanding from specific arguments to the cause of action itself, the requirement that the dispute be concentrated may, in the field of arbitral res judicata, be beneficial from the standpoint of procedural speed and fairplay, but it threatens the adversarial principle all the more so that there is a presumption in favour of renunciation of the right to appeal ; this is why the non-concentration of the legal grounds of action should not be sanctioned unless it is the fruit of gross negligence or abuse in the exercise of the right to bring suit. The distrust of French law towards res judicata could be mitigated in respect of arbitral awards given the contractual nature of arbitration, by the adoption as between the parties of a mechanism of collateral estoppel, along with safeguards designed to guarantee both efficiency and fairplay with the requirements of a fair trial ; the distinction between res judicata and third party effects suffices no doubt to protect the latter.*

In the third article, Aline Tenenbaum, who lectures at Paris Est Creteil University, discusses the issue of the localization of financial loss for jurisdictional purposes in the light of the Madoff case (*Retombées de l'affaire Madoff sur la Convention de Lugano. La localisation du dommage financier*).

Finally, in the last article, Fabien Marchadier, who is a professor at Poitiers University, explores the consequences of the ECHR case *Genovese v. Malta* as far as awarding citizenship is concerned (*L'attribution de la nationalité à l'épreuve de la Covnentino européenne des droits de l'homme. Réflexion à partir de l'arrêt* Genovese c. Malte).

Advocate General opines on Article 15 (1) lit. c) Brussels I in Mühlleitner (C-190/11)

On 24 May 2012 Advocate General Villalón delivered his opinion in *Mühlleitner* (C-190/11) concerning the interpretation of Article 15 (1) lit. c) of the Brussels I-Regulation. The Austrian Supreme Court had referred the following question to the European Court of Justice: "Does the application of Article 15 (1) (c) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters presuppose that the contract between the consumer and the undertaking has been concluded at a distance?" In his opinion Advocate General Villalón answers this question in the negative. Neither the history of the provision, nor its purpose nor the decision of the ECJ in *Pammer* and *Alpenhof* required that the contract be concluded at a distance.

The full opinion can be downloaded here, albeit not yet in English.

The Max Planck Institute Luxemburg for International, European and Regulatory Procedural Law

On June 1st, the Max Planck Society and the Government of the Grand Duchy of Luxemburg announced the foundation of a new Max Planck Institute for International, European and Regulatory Procedural Law (more information). Located at the Kirchberg Plateau, the Institute shall operate in three areas: the European law of civil procedure, international litigation and arbitration, financial

markets and listed corporations. Professor Burkhard Hess (University of Heidelberg) and Professor Marco Ventoruzzo (University Bocconi Milano) accepted calls to the directorship of the Institute. They intend to start work in Luxemburg before the end of this year. A third Scientific Member of the Board of Directors will be appointed in coordination with the two Founding Directors. Slovenian legal expert Verica Trstenjak, who has been Advocate General at the European Court of Justice since 2006, is an External Scientific Member of the Institute.

- The Luxembourg Institute shall comprehensively investigate modern civil procedural law, dispute resolution and different approaches to regulation. It focusses at European and international, at inter-disciplinary and comparative elements of dispute resolution and of regulation. Being the first Max Planck Institute on legal research located outside of Germany, it shall closely cooperate with the Faculty of Law, Economics and Finance of the Luxembourg University.

The Institute is seeking to hire senior and junior legal researchers either on a full time or temporary basis.

Several positions are available in the department for European and comparative procedural law. Interested candidates are kindly invited to send their applications to Professor Burkhard Hess. Please click here for further information.

Information regarding positions in the department of regulatory procedural law can be found here.

ATS and Extraterritoriality: A Point of View

Profs. Juan José Álvarez Rubio, Henry S. Dahl, José Luis Iriarte Ángel, Olga Martín-Ortega, Alberto Muñoz Fernández , Lorena Sales Pallarés, Nicolás

Zambrana Tévar and Francisco Javier Zamora Cabot (Reporter), are members of the *Grupo de Estudio Sobre el Derecho internacional privado y los Derechos Humanos (**Group Of Study On Private International Law And Human Rights**)*. The Group has recently produced some notes on *Kiobel* and the issue of extraterritoriality in response to several *Amicus Curiae*, especially those of Germany, the Netherlands and the UK. Main premise of the paper is that discussion of the ATS should steer clear of the debate on extraterritoriality – id. est., be kept apart from what the group consider a sterile, artificial inclusion in the debate, and go on being applied extraterritorial, as it has occured for many decades. Download here.

Liber Amicorum for Klaus Schurig

Ralf Michaels and *Dennis Solomon* have published a Festschrift to honor the work and life of Klaus Schurig, a leading German conflict of laws scholar. The Festschrift contains contributions by friends and colleagues dealing with current topics in German and European private international law.

More information (in German) is available here. The table of contents reads as follows:

- Der gutgläubige Zwischenerwerb am Beispiel des § 16 Abs. 3 GmbHG, *Holger Altmeppen*
- Die Liberalisierung der Strafaussetzung zur Bewährung im Jugendstrafrecht*, Werner Beulke*
- Rechtswahlmöglichkeiten im Europäischen Kollisionsrecht*, Dagmar Coester-Waltjen und Michael Coester*
- Fremdsprachengebrauch durch deutsche Zivilgerichte ? Vom Schutz legitimer Parteiinteressen zum Wettbewerb der Justizstandorte, *Wolfgang Hau*
- Vorfragen im Familien- und Erbrecht: eine unendliche Geschichte*, Dieter Henrich*
- Einverständliche Ehescheidung und Internationales Privatrecht*, Erik*

Jayme

- Kollisionsnorm und Sachrecht im IPR der unerlaubten Handlung, *Abbo Junker*
- Vertragsinhalt oder Geschäftsgrundlage? – BGH „3 cm geschätzt“ (30.6.2011, VII ZR 13 / 10), NZBau 2011, 553*, Klaus D. Kapellmann*
- Europa und Zivilrecht heute – Eine Skizze*, Ulrich Klinke*
- Einige Anmerkungen zum traditionellen islamischen Kollisionsrecht*, Hilmar Krüger*
- Methodeneinheit und Methodenvielfalt im Internationalen Privatrecht –Eine Generation nach „Kollisionsnorm und Sachrecht“*, Gunther Kühne*
- Ein Vollmachtsstatut für Europa*, Gerald Mäsch*
- Das Bündelungsmodell im Internationalen Privatrecht*, Peter Mankowski*
- Movables or immovables – Zur Qualifikation eines vererbten Miterbenanteils im deutsch-englischen Erbrechtsverkehr*, Heinz-Peter Mansel*
- Die Struktur der kollisionsrechtlichen Durchsetzung einfach zwingender Normen*, Ralf Michaels*
- Zur Nacherfüllung beim Kauf*, Hans-Joachim Musielak*
- Datumtheorie und „local data“ in der Rom II-VO – am Beispiel von Straßenverkehrsunfällen*, Thomas Pfeiffer*
- Die Renaissance des Renvoi im Europäischen Internationalen Privatrecht*, Dennis Solomon*
- Handeln unter fremdem Namen in England und Deutschland*, Ulrich Spellenberg*
- Zur Qualifikation der nichtehelichen Lebensgemeinschaft im Europäischen Zivilprozess- und Kollisionsrecht*, Andreas Spickhoff*
- Rückerstattung nach dem Draft Common Frame of Reference und den nachfolgenden Gesetzgebungsschritten zu einem einheitlichen Europäischen Privatrecht*, Jan Wilhelm*

Mills on Cosmopolitan Sovereignty

Alex Mills (University College London) has posted Normative Individualism and Jurisdiction in Public and Private International Law: Toward a 'Cosmopolitan Sovereignty'? on SSRN. The abstract reads:

This paper examines one aspect of the role of the individual in international law, through analysis of the increasing recognition of individual rights in the context of jurisdiction in both public and private international law. Jurisdiction has traditionally been considered in international law as a right or power of states. The challenge to this traditional approach has arisen both at the international level and also within states, through the rise in theory and practice of doctrines of 'denial of justice', 'access to justice' and 'party autonomy', which reflect the increasing treatment of jurisdiction as a matter of individual right rather than state power. These developments arguably signify a transformation in the status of individuals at both international and national levels, from the passive objects of jurisdictional regulation to active rights-holders.

The analysis in this paper therefore highlights a challenge which cuts across the dual aspects of sovereignty – as international law increasingly recognises the power of legal persons beyond the state, this also provides a challenge to the claims for exclusive legal authority within states. This can also be described as the recognition of the individual, alongside the state, as a 'sovereign' actor, or as the recognition of 'normative individualism' in international and domestic law. The increased recognition of the individual in international law is a key feature of the arguments of cosmopolitan legal theorists – the challenge of normative individualism may therefore further be described as the question of whether, or to what extent, there is an emerging idea of 'cosmopolitan sovereignty' which attempts to accommodate the normative value of both state and individual actors.

Chevron, Ecuador, Canada

Ecuadorian Plaintiffs are seeking to enforce the $18.2 Ecuadorian judgment against Chevron in Canada. This piece of news was published yesterday by Roger Alford (Opinio Iuris), with a link to a copy of the Statement of Claim and his own opinion on the chances of the claim for recognition. Worth reading for those interested in the fate of this unique case.

U.S. Symposium on Forum Non Conveniens and Enforcement of Foreign Judgments

Letters Blogatory is currently holding a very interesting online symposium on Forum Non Conveniens and Enforcement of Foreign Judgments.

Contributors include Ronald Brand, Cassandra Burke, Christopher Whythock, Douglas Cassel, Aaron Marr Page.