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.

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.

When Rome meets Greece: could Rome I help the Greek debt restructuring?

Among all the buzz about a possible (but much feared) 'Grexit', there are two elements in the story of the Greek debt restructuring (diplomatically called 'Private Sector Involvement') which should be of interest for conflict lawyers.

First the fact that the governing law of the Greek bonds was one of the central issues in the discussion which led to the restructuring. The law governing sovereign bonds is usually only a side issue which does not attract much attention – probably because so many of the bonds issued are governed either by English law or the law of New York. The Greek bonds (issued or guaranteed by Greece) which were subject of the restructuring were overwhelmingly governed by Greek law. This peculiar feature gave Greece much more leeway vis-à-vis the bondholders, as Greece could modify its law and by doing so directly impact the terms of the debt. To give one element of comparison, when Argentina restructured its debt in 2005, the vast majority of the bonds concerned were governed by either English law or the law of New York, as is common in the market.

Greece will, however, no be able to repeat this trick twice. This distinctive feature of the Greek bonds which were eligible for the swap (for a total amount of EUR 206 billion), will indeed disappear. The new bonds which were offered to the existing bondholders as compensation for the substantial haircut they had to swallow, are issued under English law while the older bonds (tendered in the exchange) were mostly Greek law bonds. This choice of law does make a difference as it means that investors holding the new bonds will not be subject to a change in Greek legislation which Greece could unilaterally decide to impose.

The second element worth noticing is the nature of the law adopted by Greece as part of its restructuring operation. The Act which was rushed through the Greek Parliament (but had been anticipated by some highly knowledgeable commentators), inserted so-called collective action clauses (CAC's) in the documentation. This meant altering the terms of the debt, in a retroactive fashion. This move has been much discussed : rating agencies had warned that activating the CAC's would trigger lowering the issue ratings on the debt issues concerned, ISDA's determination committee also decided that the use of collective action clauses meant that a so-called Restructuring Credit Event had occurred and some have even warned that this move could be challenged under the BIT's signed by Greece. Although the use of CAC's has been widely promoted over the past decade, with the EU recently adopting its own versions of the CAC's, the use of these clauses in the sovereign debt market remains a relatively novel phenomenon.

The Greek Act (Law 4050/2012 adopted by the Greek Parliament on 23 February 2012) introducing CACs in the terms of the outstanding Greek bonds allows for one single vote across all issues, an interesting feature. Even more interesting is that the law provides that its provisions

> *"aim to protect the supreme public interest, are mandatory rules effective immediately, prevail any contrary legislation of general or special provisions…" (translation courtesy of Andrea Koutras' blog).*

This is a clear reference to Article 9 of the Rome I Regulation and an attempt to strengthen the Greek legislation by elevating it to the status of 'overriding mandatory provisions'. It remains to be seen whether this will be sufficient to ensure that the law will be applied whenever investors (private or institutional)

institute legal proceedings against what some of them have deemed to be a 'forced expropriation'. It is indeed almost inevitable that the whole operation will lead to much litigation, which will raise interesting features of investment law and even human rights. Another issue which will be discussed is whether the Greek Mopping Up Law will be applied at all by courts and possibly arbitral tribunals called to decide on claims filed by investors. Given the limitations imposed by Article 9.3 of the Rome I Regulation on the application of foreign mandatory rules, the Regulation may offer a very limited protection to Greece if investors who have not accepted the bond swap but were nonetheless forced to take part on the basis of the CAC's, succeed in bringing proceedings outside Greece.

Editors' note: Patrick Wautelet is a professor of law at Liege University.

German Federal Supreme Court Refers Preliminary Question on Article 15 I lit. c) Brussels I to the ECJ

On 1 February 12 the German Supreme court has referred two questions concerning the interpretation of Article 15 I lit. c) Brussels I to the ECJ. Following the ECJ's decisions in Pammer and Alpenhof which dealt with the targeted activity-criterion of Article 15 I lit. c) Brussels I, the questions are meant to shed light on the provisions' nexus-requirement:

> *1. Is there a matter relating to a consumer contract within the meaning of Article 15(1)(c) of Regulation No 44/2001 (1) if a trader has, by the design of his website, directed his activities to another Member State and a consumer domiciled in the territory of that Member State, on the basis of the information on the trader's website, travels to where his business is located and the parties sign the contract there, or does Article 15(1)(c) of Regulation No 44/2001 presuppose in that case that a distance contract is concluded?*

2. If Article 15(1)(c) of Regulation No 44/2001 is to be inter preted as meaning that in that case the contract must in principle be a distance contract: Does the consumer jurisdiction under Article 15(1)(c) in conjunction with Article 16(2) of Regulation No 44/2001 apply if the parties to the contract enter into a distance pre-contractual commitment which subsequently flows directly into the conclusion of the contract?

The question referred to the ECJ can be downloaded here (in English). The full decision is available here (in German).

Long Arm Tactics

The next event in the Herbert Smith Private International Law Seminar Series at the British Institute of International and Comparative Law will take place on Tuesday 29 May, from 5:30pm, at the Institute's concrete bunker, Charles Clore House, Russell Square, London W1.

Entitled "Jurisdiction of the North-American Courts: When Will the Long Arm Reach You?", the seminar will consider important recent case law of the US and Canadian Supreme Courts considering the grounds for asserting jurisdiction in cross-border cases, in particular *J. McIntyre Machinery Ltd. v. Nicastro* and *Goodyear Dunlop Tires Operations S.A. v. Brown* (US) and *Club Resorts Ltd. v. Van Breda* (Canada).

Professor Linda Silberman (Martin Lipton Professor of Law, New York University), Adam Johnson (partner, Herbert Smith LLP, London) and Alexander Layton QC (barrister, 20 Essex Street, London) will tackle the subject matter under the chairmanship of Lord Collins of Mapesbury.

To book your place, and for other details, please go to the Institute's website: http://www.biicl.org/events/view/-/id/706/

Second Issue of 2012's Journal du Droit International

The second issue of French *Journal du droit international* (*Clunet*) for 2012 was just released. It contains four articles and several casenotes. A table of content is accessible here.

In the first article, Thomas Clay, who is a professor at Versailles Saint Quentin University, offers a survey of the French law on arbitration *(« Liberté, Égalité, Efficacité » : La devise du nouveau droit français de l'arbitrage – Commentaire article par article*). The English abstract reads:

> *It was the long-awaited reform. The arbitration regulation has just been amended and modernized, more than thirty years after the previous regime came into force. This has been achieved by different means : by rewriting certain unclear or outdated sections, by implementing case law-developed solutions already being applied in arbitral proceedings and, finally, by promoting new (sometimes avantgardist) solutions. All the above has resulted in the enactement of a real new Arbitration act.*
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> *Therefore, an article-by-article review seems to be a suitable form for an accurate and comprehensive study. This study consists of a comparison between the replaced articles and the new ones, a an analysis of the first commentaries on the reform and an interpretation of the case law following the enactment of the new regulation.*
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> *The proposed analysis also evidences the main principles governing the new French law of arbitration. Surprisingly they are in fact rooted in the foundations, not only of private law, but also on the principles of our Republic since they apply (almost perfectly), our Republican maxim, except that brotherhood is substituted by efficiency (the later being more representative).*
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> *In conclusion, it is without any doubt a successful text and the long wait was worth it. However it is useful to explain the circumstances of its endless*

development, which has experienced many disruptions. The article below starts by describing such circumstances.

In the second article, Olivier Cachard, who is a professor of law at the university of Nancy, present the recently adopted Rotterdam Rules (*La Convention des Nations Unies sur le contrat de transport international de marchandises effectué entièrement ou partiellement par mer (Règles de Rotterdam)*).

The Rotterdam Rules, that were signed on 23th september 2009, were recently ratified by the Kingdom of Spain, while the maritime community is now expecting the ratification by the United States of America. The purpose of this Convention is to address the new realities of transportation by sea, going further than the antique Hague Rules. The scope of the Convention is larger, encompassing door-to-door transportation. Although the Convention dedicates substantial provisions to transportation documents, it is not limited to contracts where a bill of lading is issued. The new uniform regime is built on the traditional case law, but takes into consideration containers and tends to establish a new balance between carriers and shippers. The provisions dedicated to jurisdiction and arbitration deserve more criticism and fortunately are under a opt in regime.

In the third article, Thomas Schultz, who lectures at the University of Geneva, and David Holloway, who is barrister at Number 5 Chambers in London, provide an account of the emergence and development of comity in the history of private international law (*Retour sur la comity . – Deuxième partie : La comity dans l'histoire du droit international privé*). The English abstract reads:

In a series of two articles, published in the previous and the current issue of the Clunet, the authors provide an account of the emergence and development of comity in the history of private international law. In the previous article, the authors have reviewed the forces that led to strict territoriality in the 17th century and how comity became needed to mitigate it. In the current article, the authors discuss the historical development of the concept of comity in the context of the history of private international law generally. An examination of five issues that marked the history of comity seems to allow a global yet fragmented understanding of the concept: the idea of a natural or universal law of conflicts ; the theoretical building blocks of the modern interstate system;

the normative character of a concept created specifically to avoid constraining sovereigns ; reciprocity as a principle of international collaboration; and the international dimension of private international law. The most critical finding of the study is this: the history of the comity principle negates the ideas that the very nature of comity requires bilateral reciprocity and that it is a strictly discretionary and internal principle.

Valérie Parisot, who lectures at the university of Rouen, discusses the implications of recent cases of the ECJ on choice of law in employment contracts (*Vers une cohérence verticale des textes communautaires en droit du travail ? Réflexion autour des arrêts* Heiko Koelzsch *et* Jan Voogsgeerd *de la Cour de justice*).

The multiplicity of Community legal provisions leads quite naturally to think about their coherence, especially as far as a uniform interpretation of common terminologies is at stake. Two recent judgments of the European Court of justice deal precisely with this matter. They decide that the ECJ's case-law regarding the interpretation of the connecting factors of Article 5 (1) of the Brussels Convention of 27 September 1968 that are used to determine jurisdiction in matters relating to individual contracts of employment remains relevant to analyze the connecting factors of Article 6 (2) of the Rome Convention of 19 June 1980 and of Article 8 (2) of the Rome Regulation of 17 June 2008, concerning the law applicable to these contracts.

Article 6 (2) (a) of the Rome Convention must therefore be understood as meaning that, in a situation in which an employee carries out his activities in more than one Contracting State, the country in which the employee habitually carries out his work in performance of the contract, within the meaning of that provision, is that in which or from which, in the light of all the factors which characterize that activity, the employee performs the essential part of his obligations towards his employer (Heiko Koelzsch and Jan Voogsgeerd cases). Furthermore, article 6 (2) (b) of the Rome Convention, which makes subsidiary reference to the concept of "the place of business through which the employee was engaged" must be understood as referring exclusively to the place of business which engaged the employee and not to that with which the employee is connected by his actual employment. The possession of legal personality does not constitute a requirement which must be fulfilled by the place of business of

the employer within the meaning of that provision. Finally, the place of business of an undertaking other than that which is formally referred to as the employer, with which that undertaking has connections, may be classified as a « place of business » according to the same provision, if there are objective factors enabling an actual situation to be established which differs from that which appears from the terms of the contract, and even though the authority of the employer has not been formally transferred to that other undertaking (Jan Voogsgeerd case).