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….

First Issue of 2012's Journal du Droit International

The first issue of French *Journal du droit international* (*Clunet*) for 2012 was just released. It contains five articles and several casenotes.
Four articles explore private international law issues.

In the first one, María Mercedes Albornoz and Jacques Foyer (both from Paris II University) compare the Interamerican Convention on the law applicable to international contracts with the Rome I Regulation (*Une relecture de la Convention interaméricaine sur la loi applicable aux contrats internationaux à la lumière du règlement « Rome I »*). The English abstract reads:

> *The substantive and formal changes undergone by the Rome Convention as a result of its transformation into a European Community Regulation have altered*

the terms of comparison between the Rome and Mexico systems on the law applicable to international contracts. An analytical re-reading of the Inter-American Convention in the light of the Rome I Regulation shows that even if the Rome system may continue contributing to the interpretation of the Mexico system, Rome I's introduction of new interpretive elements is limited.

In the second article, Gian Paolo Romano (University of Geneva) wonders whether private international law fits within Emmanuel Kant's theory of justice (*Le droit international privé à l'épreuve de la théorie kantienne de la justice*).

Kant's legal writings are becoming increasingly popular and so is the idea that Law purports to ensure consistency of the domains of external freedom of the rational agents – in Kant's view : both individuals and States – so as to prevent or resolve conflicts, which are simultaneous and mutually incompatible claims asserted by two agents over the same domain of freedom. If it is commonly held that private international law is also centered around coordination, the Kantian account on how Law comes into existence, both at the national and international levels, suggests that what cross-border relations between private persons require is actually a twofold consistency, i.e. that of domains of external freedom of States, which freedom consists here in securing, through their national laws and adjudications, mutually consistent domains of external freedom of private persons which are parties to those relations. Positivism and natural law, liberty and necessity, universalism and particularism, multilateralism and unilateralism : those dualisms with which conflict of laws thinking and methodology has been grappling for some time also feature within the Kantian tradition and the way the latter manages to come to terms with them may assist the former in readjusting its paradigm. Which readjustment arguably mandates reconciling the contention that conflict of laws ultimately involves a conflict between States with the idea that conflicts between private persons are the only ones truly at stake here.

In the third article, Xavier Boucobza and Yves-Marie Serinet (both Paris Sud University) explore the consequences of a recent ruling of the Paris court of appeal on the application of human rights in international commercial arbitration (*Les principes du procès équitable dans l'arbitrage international*).

The affirmation of fundamental right to a fair hearing before the international

arbitrator emerges clearly from the ruling handed down by the Paris Court of Appeals on November 17, 2011. The ruling states, in part, that arbitration decisions are not exempt from the principle according to which the right to a fair trial implies that a person may not be deprived of the concrete possibility of having a judge rule on his claims and, furthermore, that the principle of contradictory implies that all parties are in an equal position before the arbitrator. In light of of these principles, the decision taken in application of the rules of arbitration of the ICC to regard counter-claims as withdrawn because of the failure of the defendant to advance fees, constitutes an excessive measure because of the impecuniousness of the claimant.

The solution that emerges has positive implications from the point of view of the politics of arbitration. The guarantee of the right to arbitration, until now invoked in order to facilitate arbitration, has evolved into an actual duty, which is the corollary of the promotion of this form of settling claims. Ultimately, arbitration law can never be totally independent of and exempt from universally recognized fundamental principles.

Finally, Sandrine Maljean-Dubois (Centre National de la Recherche Scientifique) discusses the impact of international environmental norms on businesses (*La portée des normes du droit international de l'environnement à l'égard des entreprises*).

International environmental law must reach enterprises to be effective. It nevertheless grabs hold of them only imperfectly. While enterprises are among the final addressees of international rules, its apprehension by international law is generally indirect, requiring the mediation of domestic law. It is commonplace to say that in an international society made from States enterprises are secondary actors, « non-prescribers ». Though they are thirds to interstate relations, enterprises are actively involved. And though they do not have an international or internationalized status, enterprises can all the same enjoy rights or be subjected to obligations stemming from the interstate society by means of international law. In practice, international law makes them enjoy more rights than it lays down obligations. In spite of this, regulatory constraints on enterprises are increasing. Their forms and terms are varied. Traditional, interstate sources of international law are but one of the many layers of the « normative millefeuille » gripping enterprises. Newer – rather global or

transnational – sources also regulate their activities. Paradoxically, binding law (customary and conventional law) only binds weakly, since it binds mediately. On the contrary, incentive law actually manages to grab hold of and to compel enterprises, complementing more traditional rules and instruments and under pressure of citizens-consumers-unions-shareholders-investors.

International Conference on Recovery of Maintenance in the EU and Worldwide – Call for Papers

The organisers of the International Conference on "**Recovery of Maintenance in the EU and Worldwide**" taking place in **Heidelberg from 5 – 8 March 2013** are looking forward to receiving papers to the conference.

The deadline for submissions is 30 April 2012.

More information, in particular on the conference topics and the submission procedure can be found here: Heidelberg conference on maintenance Call-for-Papers-1202-en_v2.

German Compendium on English

Commercial and Business Law

As part of a series of compendia on foreign commercial and business law in German language, a fully revised edition on English commercial and business law has just been released. The book is edited and authored (with two additional co-authors) by Volker Triebel, a German Rechtsanwalt and English barrister, Martin Illmer from the Max Planck Institute for Comparative and International Private Law in Hamburg and Wolf-Georg Ringe, Stefan Vogenauer as well as Katja Ziegler, all from the University of Oxford.

The book attempts to provide a comprehensive overview of English commercial and business law while at the same time explaining and analyzing the differences between German and English business law as well as the increasing interfaces between English and European law. For readers of this blog the chapters on international civil procedure, private international law, international insolvency law and international arbitration, all written by Martin Illmer, may be of particular interest. They present the autonomous common law rules in these fields as well as the interfaces of the European regimes (such as Brussels I, Rome I, Rome II and the Insolvency Regulation) with English law which are often are only rarely covered. Other areas explored by the treatise are the legal sources of English commercial law, contract law (with sale of goods in particular), company law, labour law, insolvency law and competition law.

More information is available on the publisher's website.

Leuven Seminar on ADR and Mediation in China

On Thursday **15 March 2012** the Hanenburg-Yntema Foundation convenes a **seminar on Alternative Dispute Resolution (ADR) and Mediation in China**,

with a focus on “People’s Mediation in China”.

The “Hanenburg-Yntema Fonds” is Belgian foundation, based at the University of Leuven, whose key goal is to promote academic research on the law of the People’s Republic of China or the Republic of China on Taiwan (further info on the Foundation is available at www.hanenburg-yntemafonds.be).

To this end, the foundation offers a yearly prize of EUR 2.500 for a dissertation at master’s level on one of these topics. The prize is open to graduates of outstanding academic merit who are graduating from their initial master degree. At the occasion of the price award ceremony the foundation uses to organize an expert seminar where the prize winner presents his/her thesis and where some renowned experts shed light on the topic of the thesis from connected angles. The prize for 2011 was awarded to Selina Schmidt, a Swiss student, for her excellent thesis on arbitration and mediation in the PRC (*Die Rolle des Rechts in der Schlichtungspraxis in der VR China. Analyse einer Sammlung von ‘Volksschlichtungsfällen’*). Accordingly the upcoming edition of the seminar will revolve around alternative dispute resolution.

The event will take place in Leuven; full **programme** is available at www.law.kuleuven.be/hyfonds/nl/mediation_2012.htm. The seminar starts at 16:00 and lasts until 19:15. The language will be English. Participation is free of charge, but previous registration is required at jacoba.hanenburg@law.kuleuven.be.

Many thanks to Dimitri Droshout for the tip.

Vacancy at the University of Trier

Professor Jan von Hein from the Faculty of Law at the University of Trier is seeking to fill the position of a Research Assistant at his Chair for Civil Law, Conflict of Laws and Comparative Law as of 1 May 2012. Candidates should be

interested in the Chair's main research areas and should have a thorough knowledge of German civil as well as either conflict of laws and international procedural law or companies and securities law. The successful candidate will be expected to work on his or her doctorate (Ph.D.), to teach a few hours per week and to contribute to the Chair's research projects. The contract is for 2 years.

Trier is not only Germany's oldest city, a world cultural heritage and a favourite tourist destination, but also a hot spot for research in private international law: it is the seat of the Academy of European Law and very close to Luxembourg, the seat of both the Court of Justice of the European Union and the recently founded Max Planck Institute for International Procedural Law which will start its work in 2012.

More information is available on Professor von Hein's website. Deadline for application is 23 March 2012.

Quebec Court Refuses Jurisdiction on Forum of Necessity Basis

There has not been much to report from Canada for the past few months. The Supreme Court of Canada's jurisdiction decision in the Van Breda quartet of cases is still eagerly awaited. There was some thought these decisions would be released by the end of February but it now appears that will not happen. These cases were argued in March 2011.

Fortunately, Professor Genevieve Saumier of McGill University has written the following analysis of a recent Quebec Court of Appeal decision which might be of interest in other parts of the world. The case is *ACCI v. Anvil Mining Ltd.*, 2012 QCCA 117 and it is available here (though only in French, so I appreciate my colleague's summary). I am grateful to Professor Saumier for allowing me to post her analysis.

> *In April 2011, a Quebec court concluded that it had jurisdiction to hear a civil*

liability claim against Anvil Mining Ltd. for faults committed and damages inflicted in the Democratic Republic of Congo where the defendant exploits a copper mine.

The facts behind the claim related to actions alleged to have been taken by the defendant mining company in the course of a violent uprising in Kilwa in the Democratic Republic of Congo in October 2004 that caused the deaths of several Congolese (the number is disputed). In essence, the plaintiff alleges that the defendant collaborated with the army by providing them with trucks and logistical assistance.

The defendant, Anvil Mining Ltd, is a Canadian company with its head office in Perth, Australia. Its principal if not its only activity is the extraction of copper and silver from a mine in Congo. Since 2005, the company has rented office space in Montreal for its VP (Corporate Affairs) and his secretary. It is on the basis of this connection to the province of Quebec that the plaintiff launched the suit there. The plaintiff is an NGO that was constituted for the very purpose of instituting a class action against the defendant, for the benefit of the victims of the 2004 insurgency in Congo.

The defendant contested both the Quebec court's jurisdiction and, in the alternative, invoked forum non conveniens to avoid the exercise of jurisdiction. At first instance, the court held that it had jurisdiction over the defendant on the basis of its establishment in Quebec (the office in Montreal) and that the claim was related to the activities of the defendant in Montreal (the two conditions for jurisdiction under 3148(2) Civil Code of Quebec given the foreign domicile of the defendant). Interpreting this second conditions broadly, the court held that the VP's frequent visits to Congo and his activities to attract investors in Quebec were linked to the defendant's activities in Congo and therefore to the claims based on those activities.

In rejecting the alternative forum non conveniens defense to the exercise of jurisdiction, the court considered the other fora allegedly available to the plaintiffs, namely Congo and Australia. A claim had already been made before a Congolese military court but it had been rejected. The plaintiff claimed that the process before the Congolese court, competent to hear the claim, was in breach of fundamental justice for a number of reasons. As to the Australian court, the plaintiff claimed that an attempt to secure legal representation in that country

had failed because of threats made by the Congolese regime against both the victims and the lawyers they were seeking to hire in Australia. The Quebec court accepted this evidence and held that the defendants had failed to show that another forum was more appropriate to hear the case, a requirement under art. 3135 C.C.Q. It appears that the plaintiffs had also presented an argument based on art. 3136 C.C.Q. ("forum of necessity"), but since jurisdiction was established under art. 3148 and forum non conveniens was denied, the court decided not to respond to the argument based on forum of necessity. Still, the court did state that "at this stage of the proceedings, it does appear that if the tribunal declined jurisdiction on the basis of art. 3135 C.C.Q., there would be no other forum available to the victims," suggesting that Quebec may well be a "forum of necessity" in this case.

Leave to appeal was granted and the Quebec Court of Appeal reversed, in a judgment published on 24 January 2012. The Court of Appeal held that the conditions to establish jurisdiction under art. 3148(2) C.C.Q. had not been met. As a result of that conclusion, it did not need to deal with the forum non conveniens aspect of the first instance decision. This made it necessary to deal with the "forum of necessity" option, available under art. 3136 C.C.Q. The Court found that the plaintiff had failed to show that it was impossible to pursue the claim elsewhere and that there existed a sufficient connection to Quebec to meet the requirements of article 3136 C.C.Q. In other words, the plaintiff had the burden to prove that Quebec was a forum of necessity and was unable to meet that burden.

The reasons for denying the Quebec court's jurisdiction under art. 3148(2) C.C.Q. are interesting from the perspective of judicial interpretation of that provision but are not particular to human rights litigation. Essentially the Court of Appeal found that the provision did not apply because the defendant's Montreal office was open after the events forming the basis of the claim. This holding on the timing component was sufficient to deny jurisdiction under 3148(2) C.C.Q. The Court also held that even if the timing had been different, it did not accept that there was a sufficient connection between the activities of the vice president in Montreal and the actions underlying the claim to satisfy the requirements of the provision.

The reasoning on art. 3136 C.C.Q. and the forum of necessity, however, are directly relevant to human rights litigation in an international context. Indeed,

one of the challenges of this type of litigation is precisely the difficulty of finding a forum willing to hear the claim and able to adjudicate it according to basic principles of fundamental justice. In the Anvil case, the victims had initially sought to bring a claim in the country where the injuries were inflicted and suffered. While the first instance court had accepted evidence from a public source according to which that process was tainted, the Court of Appeal appeared to give preference to the defendant's expert evidence (see para. 100).

The Court of Appeal does not quote from that expert's evidence whereas the trial judge's reasons contain a long extract of the affidavit. And while the extract does not include the statement referred to by the Court of Appeal, it does include a statement according to which an acquittal in a penal court is res judicata on the issue of fault in a civil proceeding based on the same facts.

The obvious alternative forum was in Perth, Australia, where the defendant company had its headquarters (and therefore its domicile under Quebec law). There too the victims had sought to bring a claim but were apparently unable to secure legal representation or pursue that avenue due to allegedly unlawful interference by the defendant and government parties in the Republic of Congo. While the first instance judge had accepted the plaintiff's evidence that Australia was not an available forum, the Court of Appeal quickly dismissed this finding, without much discussion.

Finally, the Court of Appeal returned to its initial findings regarding the interpretation of art. 3148 C.C.Q. to conclude that there was, in any event, an insufficient connection between Anvil and Quebec to meet that condition for the exercise of the forum on necessity jurisdiction. The court did not consider that under art. 3136 C.C.Q. it is unlikely that the timing of the connection should be the same as under 3148(2) C.C.Q. given the exceptional nature of the former basis for jurisdiction and the likelihood that the connections to the forum of necessity could arise after the facts giving rise to the claim.

The decision of the Court of Appeal in Quebec is disappointing in so far as its interpretation of the forum of necessity provision in the Civil Code of Quebec is quite narrow, particularly as regards the condition of a connection with Quebec; moreover, its application of the provision to the facts of the case deals rather summarily and dismissively with findings of fact made by the first instance judge without sufficient justification for its rejection of the evidence

provided by the plaintiff and relied upon by the trial judge. Given the nature of the claims and of the jurisdictional basis invoked, it was incumbent on the Court of Appeal to provide better guidance for future plaintiffs as to what type of evidence will be required to support an article 3136 C.C.Q. jurisdictional claim and to what extent trial court findings in relation to such evidence will be deferred to in the absence of an error of law.

ICLQ at 60

International & Comparative Law Quarterly celebrates 60 years of international and comparative law scholarship.

The first issue for 2012 not only offers two articles exploring international private law issues, but also a susbtantial editorial reviewing 60 Years of Legal Scholarship in the International & Comparative Law Quarterly, with a special section on the Contribution to Private International Law by James Fawcett.

The first of the two PIL articles is one by Mihail Danov (Brunel University) on EU Competition Law Enforcement: Is Brussels I Suited To Dealing with All the Challenges?

There are arguments indicating that Brussels I could be applicable to cross-border competition law proceedings before a National Competition Authority located in one Member State and private EU competition law proceedings before another Member State court. However, an analysis of the current private international law framework appears to indicate that Brussels I is not well suited to deal with the difficulties that could arise in this context. Given the fact that, in the new proposal for a regulation on jurisdiction and the recognition and enforcement of judgments there is no indication that special jurisdictional bases for competition law actions in the successor to Brussels I are on anyone's agenda, an option for a reform may be setting up a new and special regulation to be applicable with regard to EU competition law claims only.

The second article is authored by Uglješa Grušic (PhD Candidate, LSE) on Jurisdiction in Employment Matters under Brussels I: A Reassessment.

> *This article examines the rules of jurisdiction in employment matters of Brussels I. It focuses on a paradox in that these rules aim to protect employees jurisdictionally, but in fact fail to accord employees a more favourable treatment when they need it most, namely when they appear as claimants. The article argues that the current rules fail to achieve the objective of employee protection, examines the reasons for this, proposes certain amendments that would improve the existing rules, and thereby engages in the debate surrounding the forthcoming review of Brussels I.*

Happy birthday !

Latest Issue of ZEuP: No. 1, 2012

The latest issue of the "Zeitschrift für Europäisches Privatrecht (ZEuP)", No. 1, 2012, has been released. The table of contents reads as follows (in brackets: pages in the issue):

Leitartikel (Editorial)

Towards a European Legal Culture (1-6)
Vassilios Skouris

Artikel (Articles)

Freiheitliche Dispositionsmaxime und sowjetischer Paternalismus im russischen Zivilprozessrecht: Wechselwirkung verschiedener Bestandteile einer Transformationsrechtsordnung (7-22)
Eugenia Kurzynsky-Singer & Natalya Pankevich

Internationales Prospekthaftungsrecht – Kollisionsrechtlicher Anlegerschutz nach der Rom II-Verordnung (23-46)

Jens Kleinschmidt