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….

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.