Fourth Issue of 2011's Journal du Droit International

The fourth issue of French *Journal du droit international* (*Clunet*) for 2011 was just released. It contains five articles and several casenotes. A table of content is accessible here.

Four articles explore private international law issues.

In the first one, Jonathan Mattout, who practices at the Paris office of Herbert Smith, wonders whether the English Bribery Act is a danger for French businesses (*Le Bribery Act ou les choix de la loi britannique en matière de lutte contre la corruption.- Un danger pour les entreprises françaises ?*). The English abstract reads:

> *The entry into force of the UK Bribery Act is an important step forward in the fight against corruption. This demanding legislation allows the UK to meet its international commitments. It requires all relevant commercial organisations carrying on a business in the UK to have in place adequate procedures designed to prevent bribery or face a serious risk of criminal prosecution. The Act reaches out beyond the UK and gives a new role to compliance, which will inevitably lead foreign businesses trading in the UK to adapt to its requirements. It is likely that this new legislation will inspire similar changes in France.*

In the second 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 . – Première partie : Les origines de la comity au carrefour du droit international privé et du droit international public*). The English abstract reads:

> *In a series of two articles, to be published in the present and the next issue of the Clunet, the authors provide an account of the emergence and development of comity in the history of private international law, discussing where comity came from, how it developed and what purposes it was initially meant to fulfil.*

The purpose of such recalling of comity is to provide a historical background and conceptual starting point for the increasing current attempts to rely again on the comity doctrine in court decisions and private and public international law scholarship. In the current article, we review the forces that led to strict territoriality in the 17th century and how comity became needed to mitigate it. We will see how regulatory overlaps contributed to making the Thirty Years War inevitable and will discuss the subsequent efforts to do away with such regulatory overlaps through territorial sovereignty, whose radicalism made comity necessary to accommodate the transnationalism of commerce and societies. In the second article, we will present the early history of the concept of comity in the context of the history of private international law generally. We will focus on the evolution of the use of comity through the great stages of its history. We will thus embark on a voyage from Rome and the ius gentium, to Perugia with Bartolus de Saxoferrato, to Holland and the Voets, to Berlin and Prussia with Savigny, to the United States with Joseph Story, and to the UK with Mansfield, Westlake and Dicey.

Valerie Pironon, who is a professor of law at Nantes University, is the author of the third article which discusses the method of focalisation of torts and contracts in e-commerce after recent cases of the European Court of Justice and the French Supreme Court for private and criminal matters (*Dits et non-dits sur la méthode de la focalisation dans le contentieux – contractuel et délictuel – du commerce électronique . – (À propos de trois arrêts : CJUE, 7 déc. 2010, aff. C-585/08, Peter Pammer c/ Reederei Karl Schlüter GmbH & Co. KG et C-144/09, Hotel Alpenhof GesmbH c/ Oliver Heller. – Cass. com., 7 déc. 2010, n° 09-16.811, Sté eBay Inc. et a. c/ SA Louis Vuitton Malletier. – Cass. com., 29 mars 2011, n° 10-12.272, Sté eBay Europe et a. c/ SARL Maceo et a*).

In recent case law, our highest jurisdictions seem to use the method of the focus to identify the competent judge in the disputes of the e-commerce : the European Court of Justice in B2C conflicts, the commercial chamber of the Cour de cassation in two recent eBay affairs. A comparison of these decisions shows however certain ambiguities relating to the method employed, in particular its subjective dimension. Some gaps concerning the probationary status of the listed indications remain also to be fulfilled.

Finally, Eric Loquin discusses in the last article an important French case of 2010 ruling on the arbitrability of international administrative contracts (*Retour dépassionné sur l'arrêt INSERM c/ Fondation Letten F. Saugstad . – (Tribunal des conflits, 17 mai 2010)*). No English abstract is provided.

U.S. Court Rules (e)Mail Interception Order Violates Public Policy

On July 22, 2011, the U.S. Bankruptcy Court for the Southern District of New York held in *In re Dr. Jürgen Toft, Debtor in a Foreign Proceeding* that a German Mail Interception Order issued in the context of German insolvency proceedings violates U.S. public policy and would thus be denied recognition.

Dr. Jürgen Toft is an orthopedic surgeon who assertedly has debts exceeding 5.6 million euros ($7.6 million) owed to approximately 110 creditors. Insolvency proceedings were initiated against him in Munich on June 10, 2010, but Toft refused to cooperate with the German trustee and allegedly secreted his assets outside of Europe. On July 8, 2010, the German Court entered a "Mail Interception Order" authorizing the German trustee to intercept Toft's postal and electronic mail.

London

Having received information that Toft might have relocated to London, the trustee initiated a proceeding on January 28, 2011 in England. The English High Court of Justice issued an ex parte order on February 16, 2011, which granted recognition and enforcement to the German Mail Interception Order. It seems that a public policy defense was rejected on the grounds that Toft could have appealed the July order in Germany, but had not, and that § 371 of the 1986 English Insolvency Act provided a similar remedy.

New York

The German trustee then sought to enforce ex parte both the German and the English orders in the United States. The trustee requested that no notice be given to the debtor both before and after the U.S. court would agree to enforce the foreign orders so that the trustee could continue to investigate the affairs of a debtor whose intransigence, obstructionism, and evasive tactics have allegedly thwarted the German insolvency proceeding.

The point of the enforcement proceedings was to access servers located in the United States. The trustee requested that the US court compel the ISPs, AOL, Inc. and 1 & 1 Mail & Media, Inc., to disclose to the trustee all of the debtor's e-mails currently stored on their servers and to deliver to the trustee copies of all e-mails received by the debtor in the future.

The United States has adopted the UNCITRAL Model Law on Cross–Border Insolvency in 2005 as the Chapter 15 of its Bankruptcy Code, including its article 6 providing for a public policy exception (§ 1506 of the Bankruptcy Code). The Court denied recognition to the foreign orders as manifestly contrary to U.S. public policy.

The U.S. Court first examined U.S. privacy law and concluded:

> *the relief sought by the Foreign Representative is banned under U.S. law, and it would seemingly result in criminal liability under the Wiretap Act and the Privacy Act for those who carried it out. The relief sought would directly compromise privacy rights subject to a comprehensive scheme of statutory protection, available to aliens, built on constitutional safeguards incorporated in the Fourth Amendment as well as the constitutions of many States. Such relief "would impinge severely a U.S. constitutional or statutory right."*

The Court then insisted that, contrary to the allegation of the German trustee, a U.S. trustee would not enjoy such power in U.S. insolvency proceedings.

The Court finally concluded:

> *This is one of the rare cases in which an order of recognition on the terms requested would be manifestly contrary to U.S. public policy, reflected in rights that are based on fundamental principles of protecting the secrecy of electronic*

communications, limiting the powers of an estate representative, and providing notice to parties whose rights are affected by a court order. The motion of the Foreign Representative for ex parte relief is therefore denied.

Katia Fach on Latin America and ICSID

Katia Fach, senior Researcher at the University of Zaragoza (Spain) has posted a new article on SSRN, under the title *Latin America and Icsid: David versus Goliath?.* Here is the abstract:

> Some Latin American countries have shown in recent times a very critical attitude with respect to the International Centre for Settlement of Investment Disputes (ICSID). In this regard, various States of this region have individually elaborated some mechanisms to resist against the international arbitration developed under the auspices of the World Bank. Argentina has for example used legal strategies to avoid compliance with a number of ICSID awards that require from the defendant State the payment of high amounts of money; Venezuela and Bolivia have created models of oil contracts in which no reference has been included to ICSID as the forum for settling disputes arising from these investments, and in the same way this ICSID option has been omitted from recent BITs signed by Latin American states; Venezuela and Ecuador seek to disengage from existing BITs and Bolivia and Ecuador have even come to denounce the Washington Convention. Additionally, entities such as UNASUR are trying to develop regional initiatives in Latin America, that aim to be a viable alternative to the ICSID arbitration. In short, Latin America is a region that deserves special attention in the area of international investment, as new initiatives such as the referred may have an influence on the future redefinition of international arbitration.

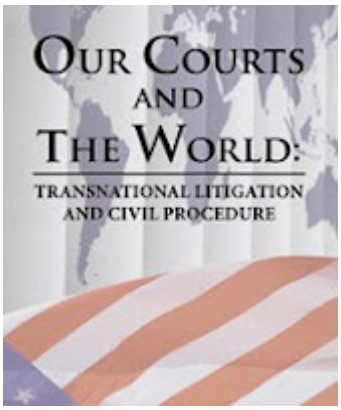
The text is available here, and also in the *Law and Business Review of the Americas*, volume 17, spring 2011, number 2, pp. 195-230.

Conference Announcement: Our Courts and the World

The Southwestern Journal of International Law will host a symposium on "Our Courts and the World: Transnational Litigation and Civil Procedure," on February 3, 2012. The program is here.

Here's the overview:

> *Transnational litigation and procedure*
> *is an important and timely topic – it is now taught as a first-year course in several law schools, prominent law firms have established transnational litigation practices and national courts have emerged to play a significant role in responding to cross-border challenges. Several recent high-profile cases have involved international elements, and just last term, the U.S. Supreme Court decided its first personal jurisdiction case involving international elements in over 25 years. From personal jurisdiction, forum non coveniens and conflicts of laws to interjurisdictional preclusion and enforcement of foreign judgments, a number of important procedural issues now commonly arise in transnational civil*
> *litigation cases.*



Publication book Party Autonomy in International Property Law

Roel Westrik, Jeroen van der Weide (eds.), Party Autonomy in International Property Law. Sellier, 2011

This book is the result of a Conference that was held on May 27 and 28, 2010, at the Erasmus School of Law in Rotterdam, the Netherlands. The subject of the conference, 'Party Autonomy in Property Law', is known as highly controversial. The conference perfectly met its objective: analyzing and commenting on the question whether party autonomy or, more specifically, a choice of law possibility in matters of Property Law should be recommended or required. The inspired and vivid discussions that took place at the conference are also embodied in this book.

The book includes twelve contributions around four themes: 1) General aspects of party autonomy, as seen from the perspective of Continental Law as well as of Common Law; 2) Private International (Property) Law; 3) Developments and prospects in Europe and in European Law Projects (e.g. European conflict rules for property law?); 4) Assignment in Private International Law, Financial Instruments/the Collateral Directive; Insolvency Law.

Spanish Mortgages Are Null And Void. Who Says?: The Ecuadorian

Parliament

Nicolás Zambrana has kindly sent me this text. Nicolás Zambrana Tévar (nzambranat@unav.es) is assistant lecturer of Private International Law at the University of Navarra, Pamplona, Spain. He is also member of the Grupo de Estudios sobre el Derecho Internacional Privado y los Derechos Humanos.

Several Ecuadorian political parties have introduced a new draft bill in the Ecuadorian Parliament which explicitly manifests that "no legal validity will be given in Ecuador to financial arrangements made to acquire the property of houses (viviendas) in Spain and the judicial acts which may have been derived from such arrangements because the latter have been made under conditions of illegality and fraud". Another paragraph of this draft bill introduces criminal sanctions for those responsible of entities which try to seize property for this reason in Ecuador (http://www.librered.net/?p=13006).

The present Spanish economic doom commenced with a real estate crisis. As in the US case, many mortgages were arranged on the basis of the belief that the economic situation would remain stable and the real estate prices would continue to rise. Nevertheless, when the bubble exploded, thousands of families saw how the price of the house which guaranteed their loan began to decrease while their interests continued to increase. Furthermore, apparently, many immigrants contend that they had no idea about the Spanish foreclosure system, where the mortgagor (typically, the bank) can auction the house (often obtaining much less than the market price) and still having to pay the remaining part of the secured debt.

Ecuadorians amount to more than 11% (approximately 360.000) of the total amount of immigrants in Spain (Wikipedia). In 2010, Correa, the populist president of Ecuador had already made a public statement in the sense that debts whose creditors were Spanish banks would not be enforceable in Ecuador (El País.com 18/10/2010).

Spain has no bilateral treaty with Ecuador for the recognition and enforcement of foreign judicial decisions. Therefore, decisions made by Spanish tribunals seeking recovery of debts from assets located in Ecuador would be at the mercy of the Ecuadorian legal system and, hypothetically, the new bill would be applicable. It deserves to be noted that the new draft bill not only amends the Ecuadorian recognition and enforcement system in such a way that all those with assets in Ecuador would be able to benefit from it, but it also declares Spanish mortgages null and void by reason of fraud, with a clear extraterritorial reach which would have no effect whatsoever in Spain but may have effects in, for instance, other Latin American countries. Criminal sanctions promised would be of less interest for private international lawyers, but they may scare plenty of bank officials, given the great presence that Spanish banks have in those countries.

We will inform you of any forthcoming events related to this bizarre new law.

Morrison on the Impacts of McIntyre on Minimum Contacts

Alan B. Morrison, who is the Lerner Family Associate Dean for Public Interest & Public Service at the George Washington University Law School, has published The Impacts of *McIntyre* on Minimum Contacts in Arguendo, the online version of the *George Washington Law Review*.

> *The Supreme Court's June 2011 decision in J. McIntyre Machinery, Ltd. v. Nicastro seriously unsettles the law of personal jurisdiction in suits against manufacturers of dangerous products that are delivered, through a distributor, to the jurisdiction where the product harmed a person using it. The plurality opinion not only failed to satisfy its stated goal of clarifying the law twenty*

years after Asahi Metal Industry Co. v. Superior Court, but has set the stage for a significant increase in litigation at the preliminary stage when personal jurisdiction defenses are supposed to be resolved. Both the plurality and the concurrence placed great emphasis on the lack of a factual showing of the defendant's minimum contacts with the forum state, which will almost certainly lead plaintiffs to undertake substantial nonmerits discovery of the defendant and, in cases like this, the distributor and the employer of the injured plaintiff. Although McIntyre involved a non-U.S. defendant, its rationale also applies when the product maker is from another state, thereby substantially increasing the ability of U.S. companies to avoid suits in jurisdictions where the injured plaintiff resides. The focus on physical contacts with the forum state also suggests that obtaining personal jurisdiction over those whose contacts with the forum state exist only via the Internet will be even less likely than under the current state of the law. And the plurality's suggestion that the solution may lie in Congress conferring broad territorial jurisdiction upon the federal courts where there is diversity of citizenship raises the possibility of a significant increase in personal injury suits in federal district court to avoid personal jurisdiction issues, even where the state court is literally across the street and all the issues involce state law.

The article can be freely downloaded here.

Peterson on the Timing of Minimum Contacts after Goodyear and McIntyre

Todd David Peterson, who is a professor of law at the George Washington University Law School, has published The Timing of Minimum Contacts After *Goodyear* and *McIntyre* in the last issue of the *George Washington Law Review*.

The Supreme Court has never articulated a reason why the "minimum contacts"

test, which determines whether a defendant's contacts with a forum are sufficient to subject it to in personam jurisdiction there, is required by the Due Process Clause, or why the Due Process Clause should impose any limitation on the exercise of personal jurisdiction at all. Because the Court has not provided a reason, several issues remain unclear, including what the relevant time period is during which a defendant's contacts with the forum state may subject it to personal jurisdiction within that state. As I discussed in a previous article, the Supreme Court has never directly addressed the issue of the timing of minimum contacts in any of its personal jurisdiction decisions, which has resulted in confusion among the lower courts about how to apply the minimum contacts test.

The Supreme Court recently had the opportunity to clarify its personal jurisdiction jurisprudence, especially with regard to the stream of commerce theory of jurisdiction and the timing issue, in Goodyear Dunlop Tires Operations, S.A. v. Brown and J. McIntyre Machinery, Ltd. v. Nicastro. These new cases raise many important questions with respect to the issues addressed in my previous article. This article analyzes Goodyear and McIntyre in an attempt to resolve some of those issues. First, it analyzes whether Goodyear and McIntyre modify existing Supreme Court personal jurisdiction precedent in a significant way, and whether the Court's holdings make sense in the context of existing precedent. It also addresses the more fundamental issue of whether the Supreme Court clarified the rationale for imposing a contacts requirement under the Due Process Clause. Finally, this Article examines the more specific issue of whether the Court's opinions shed any further light on the issues relating to the timing of minimum contacts in either general or specific jurisdiction cases.

The article can be freely downloaded here.

Whytock and Robertson on Forum Non Conveniens and the Enforcement of Foreign Judgments

Christopher A. Whytock (Irvine School of Law) & Cassandra Burke Robertson (Case Western Reserve University School of Law) have published Forum Non Conveniens and the Enforcement of Foreign Judgments in the last issue of the *Columbia Law Review*.

When a plaintiff files a transnational suit in the United States, the defendant will often file a forum non conveniens motion to dismiss the suit in favor of a court in a foreign country, arguing, as the forum non conveniens doctrine requires, that the foreign country provides an adequate alternative forum that is more appropriate than a U.S. court for hearing the suit. Some defendants, however, experience "forum shopper's remorse": Having obtained what they wished for—a dismissal in favor of a foreign legal system with a supposedly more pro-defendant environment than the United States—they encounter unexpectedly pro-plaintiff outcomes, including substantial judgments against them. When this happens, a defendant may argue that the foreign judiciary suffers from deficiencies that should preclude enforcement of the judgment—an argument seemingly at odds with the defendant's earlier forum non conveniens argument that the same foreign judiciary was adequate and more appropriate. This Article shows that under current doctrine, these seemingly inconsistent arguments are not necessarily inconsistent at all. The forum non conveniens doctrine's foreign judicial adequacy standard is lenient, plaintifffocused and ex ante, but the judgment enforcement doctrine's standard is relatively strict, defendant-focused, and ex post. Therefore, the same foreign judiciary may be adequate for a forum non conveniens dismissal, but inadequate for purposes of enforcing an ensuing foreign judgment. However, these different standards can create a transnational access-tojustice gap: A plaintiff may be denied both court access in the United States and a remedy based on the foreign court's judgment. This Article argues that this gap should be closed, and it proposes doctrinal changes to accomplish this.

The article can be freely downloaded here.

Robertson on Third Party Financing of Transnational Litigation

Cassandra Burke Robertson, who teaches at Case Western Reserve University School of Law, has posted the Impact of Third-Party Financing on Transnational Litigation on SSRN. The abstract reads:

> *Third-party litigation finance is a growing industry. The practice, also termed "litigation lending," allows funders with no other connection to the lawsuit to invest in a plaintiff's claim in exchange for a share of the ultimate recovery. Most funding agreements have focused on domestic litigation in Australia, the United Kingdom, and the United States. However, the industry is poised for growth worldwide, and the recent environmental lawsuit brought by Ecuadorian plaintiffs against Chevron demonstrates that litigation funding is also beginning to play a role in transnational litigation.*
>
> *This article, prepared for a symposium on "International Law in Crisis," speculates about how the growing litigation-finance industry may reshape transnational litigation in the coming decades. It argues that the individual economic incentives created by third-party financing will likely increase the number of transnational lawsuits filed, raise the settlement values of those lawsuits, and spread out the lawsuits among a larger number of countries than was typical in the past. It further hypothesizes that these individual choices about transnational litigation will lead countries to reassess their internal balance of litigation and regulation and will create pressure for greater international coordination of litigation procedure, including transnational forum choice and cross-border judgment enforcement.*