Simon on Fair Use under the UDRP

David A. Simon (Harvard Law School and Harvard College) has posted An Empirical Analysis of Fair Use Decisions Under the Uniform Domain-Name Dispute-Resolution Policy on SSRN. Here is the abstract:

For over ten years, the Uniform Domain-Name Dispute-Resolution Policy (UDRP) has resolved nearly 20,000 domain-name disputes brought before the World Intellectual Property Organization (WIPO), a United Nations organization that arbitrates UDRP disputes. The UDRP allows the holder of a legally protectable trademark to initiate proceedings to cancel the domain name or have it transferred to the trademark owner. Domain-name holders, though, have a number of defenses, including using their domain names in a noncommercial, fair manner. Although several empirical studies have analyzed various aspects of the UDRP, none has specifically examined this fair use defense.

This study does what others have not. It analyzes the fair use defense in decisions before WIPO. Using WIPO's online decision database, this study found that arbitrator and respondent nationality influence the success of a respondent's fair use claim to a statistically significant degree. Specifically, respondents from the United States are more likely than those from other countries to succeed on a fair use defense. Additionally, arbitrators from the United States are more likely than those from other countries to find that a respondent's use of a domain name was fair. This means that, under the UDRP, respondents from the United States enjoy greater speech protections than those from other countries, and that arbitrators from the United States are more sympathetic to speech interests than arbitrators from other countries. To improve the UDRP, I propose two revisions. First, ICANN should adopt a choice of law provision stating that the law of the respondent's home country governs fair use disputes. Second, ICANN should implement a panel assignment provision in fair use cases that requires arbitrators to share the nationalities of the litigants.

Fellowship in Collective Redress

The British Institute of International and Comparative Law is seeking a part-time Research Fellow to work on a new project in the area of European collective redress.

The Institute is creating a web-based information resource, containing comprehensive and up-to-date information on legislation and case law in this area, and needs a researcher to develop and administer this project. The website, linked to the main website of the Institute, will be supported by leading law firms and other interested parties.

Further information as to the nature and responsibilities of the role are available on the Institute's website.

Informal enquiries may be made to Dr Eva Lein by email on e.lein@biicl.org. The closing date for applications is Monday 24 July 2011, so don't delay.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2011)

Recently, the July/August issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

Here is the contents:

- ***Hans J. Sonnenberger:*** "Grenzen der Verweisung durch europäisches internationales Privatrecht" – the English abstract reads as follows:

The designation of the applicable law by European private international law rules is limited by four factors: limits of competence, limits of conflict of laws, limits of substantive law and limits of procedural law. The present article analyses these limits. The exercise of legislative competence by the European Union according to art. 81 (2) lit. c), (3) TFEU is governed by the principles of conferral, subsidiarity and proportionality. Furthermore, the constitutional law of the member state influences the genesis of European private international law rules. Limits of conflict of laws are imposed on the designation of the applicable law by European primary law, public international law and by the domestic law of the member states. The restrictions imposed by substantive law are mainly based on the public policy exemption. International civil procedure law demands for coordination with private international law. Both the procedural treatment of conflict-of-law rules as well as the rules on the proof of foreign law impact how and to what extent the applicable law is actually applied in court. As regards the creation of a European area of justice, the author underlines that the mere harmonization of conflict of law rules will not be enough to realise this goal. He goes on to discuss the establishment of a special court for civil and private international law matters based on art. 257 TFEU.

- ***Heinz-Peter Mansel/Dagmar Coester-Waltjen/Dieter Henrich/Christian Kohler:*** "Stellungnahme im Auftrag des Deutschen Rats für Internationales Privatrecht zum Grünbuch der Europäischen Kommission – Weniger Verwaltungsaufwand für EU-Bürger: Den freien Verkehr öffentlicher Urkunden und die Anerkennung der Rechtswirkungen von Personenstandsurkunden erleichtern – KOM (2010) 747 endg." – the English abstract reads as follows:

The German Council of Private International Law contributes to the ,,European Commission Green Paper: Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records – (COM [2010] 747 final)". The Council is an autonomous academic institution, which reports to the German Ministry of Justice. A ,,mutual recognition" of the content of administrative documents, notarial acts, civil status records within civil status matters involves complicated legal issues. The advantage of the unification of the rules on the law applicable to civil status situations, when compared with the so-called principle of ,,automatic

recognition", is that a unification would uniformly determine the applicable law in all EU Member States and thereby guarantee identical determination of the civil status of a person throughout the Union. The underlying cause of the divergent approaches taken by EU Member States would be eliminated. This would not be the case with a simple ,,automatic recognition". There is also the risk that an uncoordinated ,,automatic recognition" would encroach on the sovereignty of Member States over their citizens in the field of nationality. Therefore uniform rules on conflict of laws are considered to be an essential prerequisite for the movement of public documents and the application of a principle of mutual recognition in relation to civil status matters.

- ***Heinz-Peter Mansel**: "* Kritisches zur „Urkundsinhaltsanerkennung""
- ***Christoph Althammer***: "Die prozessuale Wirkung materiellrechtlicher Leistungsortsvereinbarungen (§ 29 Abs. 1, 2 ZPO)" – – the English abstract reads as follows:

In the herein discussed decision, the OLG München dealt with the question of the appointment of jurisdiction in Section 36 Nr. 3 of the German civil procedure code (ZPO). The claimant sued the three defendants in the claimant's local court, with the justification the jurisdiction of that court was agreed in the loan contract.

One critical issue was that the parties had agreed the place of performance of the loan contract, however, which the court did not recognise due to Section 29 subsection 2 of the ZPO. The court stated it was only due to the procedural noneffectiveness of the agreement on place of performance, that non-merchants could avoid the application of a valid agreement on place of jurisdiction (Section 38 of the ZPO). The following annotation discusses whether the decision of the OLG München was based on the right grounds.

- ***Stefan Arnold***: "Beklagtenwechsel im Produkthaftungsprozess nach Verjährung" – the English abstract reads as follows:

The ECJ has effectively overruled its own decision from 2006 concerning the very same proceedings. The court now held that national procedural rules as regards substitution of defendants must not be applied in a way which permits a producer to be sued after the ten-year period of Art. 11 of the Product

Liability Directive. This holding is the corollary of interpreting the directive as aiming at full harmonization. Legal certainty is severely undermined, however, by the ECJ postulating an inconsistent and unprincipled exception as regards closely controlled suppliers of the producer.

- ***Jörg Pirrung:*** "Grundsatzurteil des EuGH zur Durchsetzung einstweiliger Maßnahmen in Sorgerechtssachen in anderen Mitgliedstaaten nach der EuEheVO" – the English abstract reads as follows:

The preliminary procedure in case Purrucker I, conducted by the ECJ in a very convincing way, has lead to clarifications as to fundamental questions concerning the enforcement of provisional measures in parental responsibility cases in other EU Member States. Where a court of a Member State, which has (expressly) founded its jurisdiction on one of Articles 8–14 of Council Regulation (EC) No 2201/2003, adopts a provisional measure concerning custody, recognition and enforcement of this measure in all other Member States is governed by Article 21 et seq. of the Regulation. In contrast, where a court of a Member State, which has not based its jurisdiction as to the subject matter on Article 8 et seq., adopts a provisional measure under the conditions of Article 20, Article 21 et seq. of the Regulation are not applicable.

To distinguish provisional measures of a court with jurisdiction as to the substance matter from measures eventually based on Article 20 of the Regulation the courts of the State of execution have to establish whether the court of origin has based its jurisdiction on Article 8 et seq. of the Regulation or not; Article 24 does not hinder such an examination. The Regulation is based on the assumption that the courts of the Member States respect their obligations according to the Regulation to give convincing reasons for accepting their jurisdiction, even in cases where there is an urgent need for measures of protection for the children concerned. If an order for a provisional measure does not contain an unmistakable reasoning concerning its jurisdiction as to the substance matter referring to one of the bases for jurisdiction in Article 8 et seq. of the Regulation and if the jurisdiction for the substance matter does not otherwise emerge manifestly from the decision adopted, it is to be assumed that the decision has not been adopted according to the jurisdiction rules of the Regulation.

In the interest of ensuring a permanent success of the Regulation the clear criticism by the ECJ of the Spanish court's reasoning with regard to its own jurisdiction mentioning irrelevant circumstances and in casu inapplicable legal bases should remind courts all over the EU of their duties in this context.

- ***Marc Bungenberg***: "Vollstreckungsimmunität für ausländische Staatsunternehmen?"
- ***David-Christoph Bittmann:*** "Die Bestätigung deutscher Kostenfestsetzungsbeschlüsse als Europäische Vollstreckungstitel" – the English abstract reads as follows:

Since the coming into force of Regulation (EC) 805/2004 creating a European Enforcement Order for uncontested claims it has been highly discussed in German literature and jurisprudence, under which circumstances a decision on the costs of litigation can be issued as European Enforcement Order. The problem arises from the fact that according to German law the decision on the costs is rendered in a two-step-procedure. In the first step the court which decides on the merits of the case only determines which of the parties has to bear the costs of litigation, so called Kostengrundentscheidung. In a second step, in a separate procedure according to § 104 ZPO, the court determines the amount of the costs the debtor has to pay, so called Kostenfestsetzungsbeschluss. Whether the Kostenfestsetzungsbeschluss can be issued as European Enforcement Order was the subject of a case, the OLG Nürnberg had to adjudicate on.

Another question the court had to deal with was, which possibilities of appealing a decision according to Art. 10 of Regulation (EC) 805/2004 the German law provides.

This article critically looks at the answers to these questions given by the OLG Nürnberg.

- ***Götz Schulze***: "Übertragung deutscher GmbH-Anteile in Zürich und Basel" – the English abstract reads as follows:

The District Court of Frankfurt Main negates the possibility of a foreign notarisation both under the aspect of substitution of German law and by

application of Swiss law which was the proper legal form at the place where the instrument is made (Ortsform). Thus the in 2008 newly implemented notary's duty to write a list of shareholders and to transmit it to the company register according to § 40 II GmbHG (Limited Liability Companies Act) can not be substituted by a Swiss notary. Furthermore, the in 2008 likewise implemented requirement of a simple written form for the assignation of equity shares according to Art. 785 I OR (Swiss Code of Obligations) can not substitute the notarization under the terms of § 15 III, IV GmbHG, which is required by the German company law. To that effect the district court negates the applicability of the "locus regit actum forum-rule" in Art. 11 I Alt. 2 EGBGB (Introductory Act to the German Civil Code) for assignations of shares under the GmbHG. The one-sided national perspective of the district court is to be refused.

- ***Matthias Kilian:*** "Beschränkung von Untersuchungsbefugnissen der Kommission in Kartellverfahren bei Beteiligung von Unternehmensjuristen mit Anwaltszulassung"
- ***Ulrike Janzen/Veronika Gärtner:*** "Rückführungsverweigerung bei vorläufiger Zustimmung und internationale Zuständigkeit im Falle von Kindesentführungen" – the English abstract reads as follows:

The case note analyses two decisions given by the Austrian Supreme Court of Justice (Oberster Gerichtshof, OGH) in a case concerning the abduction of four children by their mother. The case raised in particular questions on the interpretation of Art. 10 Brussels II bis Regulation as well as Art. 13 Convention on the Civil Aspects of International Child Abduction: The OGH clarified that "consent" in terms of Art. 13 a Child Abduction Convention can only be assumed if the approval to the removal/retention is declared unconditionally. Thus, the approval to a temporary stay of the children with the abducting parent – as it ad been declared in the present case – cannot be regarded as "consent" in terms of Art. 13 a Child Abduction Convention. The same interpretation has to be applied with regard to Art. 10 lit. a Brussels II bis Regulation. Thus, the courts of the Member State where the child was habitually resident immediately before the wrongful removal/retention retain their jurisdiction until the child has acquired a habitual residence in another Member State and each person having rights of custody has acquiesced unconditionally in the permanent stay of the child with the abducting parent.

- ***Jason Dinse/Hannes Rösler:"*** Libel Tourism in U.S. Conflict of Laws – Recognition and Enforcement of Foreign Defamation Judgments" – the abstract reads as follows:

The libel tourism phenomenon has ignited an international debate over recognition of foreign defamation judgments. Legislatures in the United States have now reacted to this problem with a response at both the state and federal level. The most important piece of legislation in this respect is the federal SPEECH Act. It most likely preempts the state acts, with the result that the state libel tourism laws will be rendered largely insignificant in practice. Under the SPEECH Act, a foreign defamation judgment will be presumed unenforceable in U.S. federal and state courts, unless the party seeking enforcement proves that the law underlying the foreign adjudication protected the defamation defendant's free speech expectations in accordance with U.S. federal and state constitutional standards. This article analyzes the new libel tourism legislation on the state and federal level and describes their implications.

- ***Prof. Dr. Christian Kohler:"*** Musterhaus oder Luftschloss? Zur Architektur einer Kodifikation des Europäischen Kollisionsrechts – Tagung in Toulouse am 17./18.3.2011″
- ***Maximilian Seibl***: "Grundfragen des internationalen Privatrechts": Symposium zum 80. Geburtstag von Dieter Henrich vom 26.–27.11.2010 in Regensburg"

D.C. Circuit Splits with Second… and is supported by Seventh

Boimah Flomo, et al v. Firestone Natural Rubber Co., LLC, an ATS suit concerning hazardous child labor on a plantation in violation of customary international law, was decided last Monday (July 11, 2011). Although the suit failed – the court was not satisfied that she had been given an adequate basis for

inferring a violation of customary international law- some of the statements are worth reproducing. I quote:

> "The principal issues presented by the appeal are whether a corporation or any other entity that is not a natural person (the defendant is a limited liability company rather than a conventional business corporation) can be liable under the Alien Tort Statute, and, if so, whether the evidence presented by the plaintiffs created a triable issue of whether the defendant has violated *customary international law*.
>
> The issue of corporate liability under the Alien Tort Statute seems to have been left open in an enigmatic footnote in Sosa, 542 U.S. at 732 n. 20 (but since it's a Supreme Court footnote, the parties haggle over its meaning, albeit to no avail). All but one of the cases at our level hold or assume (mainly the latter) that corporations can be liable (…). The outlier is the split decision in Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), which indeed held that because corporations have never been prosecuted, whether criminally or civilly, for violating customary international law, there can't be said to be a principle of customary international law that binds a corporation.
>
> The factual premise of the majority opinion in the Kiobel case is incorrect. (…)
>
> And suppose no corporation had ever been punished for violating customary international law. There is always a first time for litigation to enforce a norm; there has to be. (…)
>
> We have to consider why corporations have rarely been prosecuted criminally or civilly for violating customary international law; maybe there's a compelling reason. But it seems not (…)
>
> The court is satisfied that corporate liability is possible under the Alien Tort Statute".

Hague Prize Awarded to Paul Lagarde

The Hague Conference has announced that the Hague Prize for International Law 2011 will be awarded to Professor Paul Lagarde "in view of [his] outstanding contribution to the study and promotion of private international law".

> *The **Hague Prize for International Law 2011** will be awarded to Professor Paul Lagarde, expert, delegate, chairman and reporter for the Hague Conference, "in view of [his] outstanding contribution to the study and promotion of private international law".*
>
> *This prestigious prize was established in 2002 by the municipality of The Hague and is awarded by an independent foundation, the Hague Prize Foundation, "to physical persons and/or legal persons who – through publications or achievements in the practice of law – have made a special contribution to the development of public international law and/or private international law or to the advancement of the rule of law in the world". The prize consists of a medal of honour, a certificate and a monetary amount of € 50,000.*
>
> *The first recipient of the prize was Professor Shabtai Rosenne (2004), Professor M. Cherif Bassiouni received the prize in 2007 and in 2009 the prize was awarded to Dame Rosalyn Higgins.*
>
> *The ceremony will take place on 21 September 2011 at the Peace Palace in The Hague.*

Paul Lagarde taught at the university of Paris I (Panthéon-Sorbonne) from 1971 to 2001. He is the co-author of a leading treaty of French private international law (with Henri Batiffol).

Australian article round-up 2011: Arbitration

Continuing the Australian article round-up, readers may be interested in the following two articles raising points about arbitration:

- **Andrew Bell, 'Dispute Resolution and Applicable Law Clauses in International Sports Arbitration' (2010) 84 *Australian Law Journal* 116:**

Choice of law clauses and jurisdiction or arbitration agreements play a critical role in international commerce. They also play an increasingly important role in sporting disputes by reason of the ever-growing internationalisation and commercialisation of sport. The presence of such clauses does not, however, guarantee the elimination of interlocutory or adjectival contests concerning the law which will govern, and the forum or mode of dispute resolution that will apply, to the determination of an international sporting dispute. This article examines standard sports-related choice of law clauses and arbitration agreements, and considers the emerging jurisprudence in this field.

- **Geoffrey Fisher, 'Anti-Suit Injunctions to Restrain Foreign Proceedings in Breach of an Arbitration Agreement' (2010) 22 *Bond Law Review* 1:**

The anti-suit injunction is the remedial device available in common law systems to restrain a party from instituting or continuing with proceedings in a foreign court. … [A] recognised category for the issue of an anti-suit injunction is where a plaintiff has commenced proceedings in a foreign court in breach of a contractual promise, for example, in breach of an exclusive jurisdiction clause or an arbitration agreement. In this type of case there is a tension between the interests of comity on the one hand and the policy of upholding contractual undertakings on the other. The English Court of Appeal in Aggeliki Charis Campania Maritima SpA v Pagnan SpA (The Angelic Grace) can be regarded as having inaugurated a more liberal approach to the jurisdiction to grant an anti-suit injunction restraining breach of an arbitration agreement. The tension between comity and contractual bargain was largely resolved in favour of the

latter. This paper examines the nature and extent of the liberalisation worked by The Angelic Grace and subsequent English decisions.

Joslin on Same-Sex Couples and Divorce Jurisdiction

Courtney G. Joslin (University of California, Davis – School of Law) has posted Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts on SSRN. Here is the abstract:

There are tens of thousands of same-sex married couples in the United States. A significant number of these couples, however, cannot divorce. First, many same-sex spouses cannot divorce in their home states because the relevant state law precludes recognition of same-sex marriages. Second, an anomalous jurisdictional rule makes it difficult for these spouses to divorce elsewhere. In contrast to the rules governing other civil actions, one of the spouses must be domiciled in the forum for a court to have jurisdiction over a divorce.

This Article considers the second hurdle – the domicile rule. Previously, divorce jurisdiction was a subject of intense interest to the Court and to legal scholars. But despite an ever increasing disjunction between divorce jurisdiction and general principles of state court jurisdiction, critical examination of the domicile rule has largely disappeared.

This Article responds to recent calls to challenge the myth of family law exceptionalism by critically analyzing the domicile rule. After considering the domicile requirement in the context of state court jurisdiction doctrine more generally, this Article contends the time has come to abandon the domicile rule. Abandonment of the rule alone, however, does not fully resolve the problem. Accordingly, this Article advances a set of normative proposals to ensure that all spouses have a forum in which to divorce.

The article is forthcoming in the *Boston University Law Review*. The author has also written a post here on the same topic.

On the ATS: D.C. Circuit Splits with Second

For another twist of American courts on the Alien Tort Statute (this time, in favour of its applicability to corporations), I suggest reading the D.C. Circuit decision of July, the 8th, *John Doe VIII v. Exxon Mobil Corp* (see here). Also, the recent post of K. Anderson in Opinio Juris, where he speaks his opinion against the majority in John Doe VIII. He concludes that "the corporate liability issue is so fundamental to contemporary ATS litigation – preceding, in a logical sense, the standards found in Sosa – and the split among circuits now so stark, that the [Supreme] Court cannot simply avoid resolving it." (But, as he says himself, such a conclusion might be naive…)

Quintanilla and Whytock on the New Multipolarity in Transnational Litigation

Marcus S. Quintanilla (O'Melveny & Myers LLP) and Christopher A. Whytock (UC Irvine) have posted The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law on SSRN. The abstract reads:

> *Conventional wisdom suggests that the transnational litigation system is essentially unipolar, or perhaps bipolar, with the United States and the United*

Kingdom acting as the leading providers of courts and law for transnational disputes. Our overarching conjecture is that this unipolar (or bipolar) era – if it ever existed at all – has passed, and that transnational litigation is entering an era of ever increasing multipolarity. If this intuition is correct, then it will be increasingly important for U.S. judges and lawyers to be comfortable handling a wide range of conflict-of-laws problems, and prepared to consult closely with their colleagues abroad.

In this Article – based on our remarks at the International Law Weekend-West Conference held at Southwestern Law School in February 2011 – we develop three aspects of this conjecture, corresponding to three dimensions of the new multipolarity in transnational litigation. In Part I, we discuss the growing relative importance of non-U.S. forums for transnational litigation. In Part II, we highlight the potential proliferation of foreign judgments brought to the United States for recognition or enforcement. And in Part III, we consider the pervasiveness of foreign law issues that are likely to confront U.S. judges and lawyers, and the accompanying challenges of making determinations of foreign law in the wake of the Seventh Circuit Court of Appeals' recent decision in Bodum USA, Inc. v. La Cafetière, Inc.

The paper is forthcoming in the *Southwestern Journal of International Law*.

Publication: Biagioni, "La connessione attributiva di giurisdizione nel regolamento CE n. 44/2001"

Giacomo Biagioni (Univ. of Cagliari) has recently published "La connessione attributiva di giurisdizione nel regolamento CE n. 44/2001" (CEDAM, 2011). The volume is the latest in the series "Studi di diritto internazionale – Studies in

international law“, focused on international procedural law and international civil procedure law, promoted by the Fondazione Gaetano Morelli, a foundation dedicated to the memory of one of the most influential Italian international law scholars of the past century.

An abstract has been kindly provided by the author (the complete table of contents is available on the publisher’s website):

Both in civil law and in common law systems, reference is made to connexity when it is deemed advisable to defer to one court related claims so that they may be jointly examined and adjudicated. Connexity can also work as a head of jurisdiction: in those cases a State is conferred jurisdiction on one claim («related claim») since it is connected to another claim («main claim») that falls already under the jurisdiction of that State.

The book addresses that category of provisions as enshrined in the EC regulation No 44/2001, evaluating their scope of application, their conditions of application and their effects. Those heads of jurisdiction fit especially well into the EC regulation No 44/2001. The book emphasises that the principle of free circulation of judgments is the main objective pursued by the regulation and that even the system of provisions about jurisdictional competence must be interpreted in the light of that aim.

In the regulation No 44/2001 the notion of “related actions” may then have two different meanings: some provisions (mainly article 6) recall the connectedness between two claims as a ground for conferring jurisdiction to one court over both claims; article 28 enables the court second seised to stay proceedings while the proceedings in the State first seised come to an end. Even though those provisions operate differently, they pursue two common purposes, namely they aim at preventing the risk of irreconcilable judgments and contribute to procedural economy. The book argues for a broad interpretation of heads of jurisdiction based on connexity, insofar they can lead to improve the sound administration of justice and to avoid conflicting judgments.

However, it must be borne in mind that the regulation No 44/2001 does not consider connexity a general head of jurisdiction. It contains some special provisions about connected claims; those provisions differ from each other for their scope of application ratione materiae and for their procedural requirements. Even the notion of connectedness does not have a uniform meaning in the regulation: every single provision emphasises different

functions of the jurisdiction on the ground of connexity. Some provisions are especially aimed at preventing irreconcilable judgments, like article 6(1) of the regulation; others have a wider scope and pursue procedural economy, like article 6(2). However, those heads of jurisdiction are subject to some limits. In particular, the jurisdiction should not be conferred on the ground of connexity, whenever a provision of the regulation inspired by more prominent values (like the protection of the weaker party, the sovereignty of Member States in some matters and the principle of party autonomy) is applicable.

Title: "La connessione attributiva di giurisdizione nel regolamento CE n. 44/2001", by *Giacomo Biagioni*, CEDAM (Padova), 2011, XIV – 268 pages.

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