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.*

Roundtable on the Proposal for a Common European Sales Law

On Friday, 9 December 2011 the Maastricht European Private Law Institute (M-EPLI) will host a roundtable on the Proposal for a Common European Sales Law. The conference will take place on the Brussels Campus of Maastricht University. Here is the programme:

12.30 Reception

12.45 Welcome Address by Prof. Jan Smits

Panel 1

13.00 Prof. Eric Clive – *A General Perspective on the CESL*

13.30 Prof. Giesela Rühl – *Aspects of Private International Law*

14.00 Ms Fatma Sahin (Discussant)

14.15 Mr Stefaan Verhamme (Discussant)

14.30 General Discussion

15.00 Coffee Break

Panel 2

15.30 Mr. Gary Low – *The Choice of Legal Basis for the CESL*

16.00 Dr. Nicole Kornet – *The CESL and the CISG*

16.30 Ms Ursula Pachl (Discussant)

17.00 Ms Simone Cuomo (Discussant)

17.30 General Discussion

18.00 Closing Words & Reception

More information is available here.

Hovenkamp on U.S. Antitrust's Jurisdictional Reach Abroad

Herbert J. Hovenkamp, who is a professor of law at University of Iowa – College of Law, has posted Antitrust's "Jurisdictional" Reach Abroad on SSRN. Here is the abstract:

> *In its Arbaugh decision the Supreme Court insisted that a federal statute's limitation on reach be regarded as "jurisdictional" only if the legislature was clear that this is what it had in mind. The Foreign Trade Antitrust Improvement Act (FTAIA) presents a puzzle in this regard, because Congress seems to have been quite clear about what it had in mind; it simply failed to use the correct set of buzzwords in the statute itself, and well before Arbaugh assessed this requirement.*
>
> *Even if the FTAIA is to be regarded as non-jurisdictional, the constitutional extraterritorial reach of the Sherman Act is hardly unlimited. It reaches only to restraints affecting commerce "with" foreign nations rather than those affecting commerce "among" the several states. At the same time, however, the canon of construction against extraterritorial application should not apply to the Sherman Act. First, the statutory language condemning restraints of trade or monopolization of commerce "among the several States, or with foreign nations" is not boilerplate and clearly extends to foreign commerce. Second, the FTAIA itself expressly recognizes or grants the Sherman Act's extraterritorial reach to "import trade or import commerce."*
>
> *The implications for interpreting the FTAIA as limiting the antitrust law's*

subject coverage rather than the court's jurisdiction are mainly that, even if the language of the complaint states a claim, the district court will be able to conduct its own jurisdictional fact findings. Further, this inquiry may occur at any time during the proceeding, may occur on the court's own motion, and cannot be waived. A nonjurisdictional interpretation of the FTAIA will thus make it more difficult for defendants to obtain dismissals at an earlier stage. Even here, however, the Supreme Court Twombly and Iqbal decisions require greater specificity in pleading, and will thus serve to diminish the difference between the standards for a motion to dismiss for lack of jurisdiction, and a motion to dismiss for failure to state a claim.

Third Issue of 2011's Revue Critique de Droit International Privé



The last issue of the *Revue critique de droit international privé* was just released. It contains two articles addressing private international law issues and several casenotes. The full table of contents can be found here.

The first article is a presentation of the new French legislation on arbitration by Professor Sylvain Bollee (Paris I University).

The second article is a study of the international dimension of the liability of rating agencies by Professor Mathias Audit (Paris X University).

French Plaintiffs Drop Jewish or Not Jewish App Lawsuit

French Jewish and anti-racism organizations have dropped the proceedings that they initiated in France against Apple.

The French plaintiffs sought an injunction enjoining Apple from selling its application "Jewish or not Jewish" anywhere in the world. Earlier this fall, at the outset of the proceedings, Apple had already stopped making available the App not only in France, but also in Europe. The plaintiffs did not consider it to be enough and had sought a worldwide injunction.

The French press reports that the French plaintiffs have dropped the case after Apple informed them that it would stop selling the App elsewhere in the world.



From a conflict perspective, the outcome of the case is truly remarkable. The allegation that the App violated the law of one (small) market has led one of the biggest corporations in the world to withdraw the product worldwide.

New Draft Report of European Parliament on Future Choice of Law Rule for Privacy and

Personality Rights

The Committee on Legal Affairs of the European Parliament has issued a new Draft Report with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II). The new report takes into account the recent *E-Date Advertising* judgment of the European Court of Justice.

The Draft Report proposes to add the following provision to the Rome II Regulation:

> *Article 5a – Privacy and rights relating to personality*
>
> *(1) Without prejudice to Article 4(2) and (3), the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, shall be the law of the country in which the rights of the person seeking compensation for damage are, or are likely to be, directly and substantially affected.*
> *However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by the first sentence.*
>
> *(2) When the rights of the person seeking compensation for damage are, or are likely to be, affected in more than one country, and that person sues in the court of the domicile of the defendant, the claimant may instead choose to base his or her claim on the law of the court seised.*
>
> *(3) The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.*
>
> *(4) The law applicable under this Article may be derogated from by an agreement pursuant to Article 14.*

Many thanks to Jan von Hein for the tip-off.

PIL Seminar at the Universidad Complutense of Madrid, March 2012. Call for Papers

A new edition of the International Seminar on Private International Law (Universidad Complutense de Madrid) is to be held on March 2012, the 22 and 23. Venue will be the faculty of Law at the Universidad Complutense of Madrid – some sessions may take place elsewhere in Madrid.

Organizers, Prof. Fernández Rozas and Prof. de Miguel Asensio, have opted to follow last year's pattern: a mixed model which combines a general approach allowing reflection on recent developments and the future of PIL, and a special focus on highly topical issues, as well as issues in need of particular study, such as torts and successions.

As in previous editions the seminar counts with several general lectures: some of the speakers will be Fausto Pocar (University of Milan), Michael Wilderspin (European Commission), Dário Moura Vicente (University of Lisboa), Sabine Courneloup (University of Bourgogne) and Eva Inés Obergfell (Humboldt-Universität Berlín). The seminar is otherwise open to scholars, either Spanish or foreigners, willing to participate. Papers can be presented in Spanish, English or French. Proposals are to be sent by email to Patricia Orejudo Prieto (patricia.orejudo@der.ucm.es), no later than December 15, 2011, including both the title and a brief summary.

Subject to prior scientific evaluation, papers will be included in the 2011 volume of the Anuario Español de Derecho Internacional Privado. The written version of the papers must be sent to Patricia Orejudo before April 1, 2012; this deadline is non-extendable due to the closure requirements of the Yearbook.

For more information see here.

Dickinson on Territory in Rome I and II

On Monday, November 28, Andrew Dickinson will give a presentation on “Territory in the Rome I and II Regulations” at the Max Planck Institute for Comparative and Private International Law in Hamburg. More information is available on the institute’s website.

PILAGG Website

The Private International Law as Global Governance project (PILAGG) of Sciences Po Law School has now its own website where the programme of the workshops and the papers can be found.