AG's Conclusions in eDate Advertising

The Conclusions of Advocate General Pedro Cruz Villalon in the *eDate Advertising* (case C-509/09) and *Martinez* (case C-161/10) cases were presented on March 29th, 2011. They are not available in English as of yet.

The issue before the European Court of Justice in these cases is the application of private international law rules to internet websites, and more specifically in defamation cases.

The opinion of Advocate General Cruz Villalon can be summarized as follows:

Jurisdiction: Applying Art. 5.3 of the Brussels I Regulation to Internet

In *Fiona Shevill*, the ECJ ruled that the court of the place where the event giving rise to the damage occurred has jurisdiction to compensate the entirety of the loss, while the courts of the places where losses were suffered each have jurisdiction to compensate for the loss suffered in the relevant jurisdiction.

The AG proposes to add a new head of jurisdiction for defamation cases. The court of the place of the "center of gravity of the conflict" would also have jurisdiction to compensate for the entirety of the loss. The conflict would be the conflict between the freedom of information and privacy. According to AG Cruz Villalon, this conflict would be located where the alleged victim would have the center of his life and activities, if the media could have predicted that the information would be relevant in that jurisdiction. For the purpose of determining whether information should be considered as relevant in a given jurisdiction, the AG offers to take into account a variety of factors such as the language used, the content of the information (allegations in respect of the life of an Austrian are relevant in Austria). The AG insists, however, that the point would not be to determine the intention of the media, which would not be directly relevant for the purpose of Art. 5.3 (as opposed to Art. 15) of the Regulation.

Choice of Law: on the Impact of the E-Commerce Directive

The German supreme court for civil matters has also interrogated the ECJ on the

impact of the 2000 E-Commerce Directive on choice of law. Although Article 1-4 of the Directive provides that the Directive "does not establish additional rules on private international law", Article 3-2 provides:

> *2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.*

It has therefore long been wondered whether Art. 3-2 did in fact establish a choice of law rule providing for the application of the law of the service provider (ie in defamation cases the law of the publisher) or, at the very least, whether Article 3-2 imposes on Member states to amend their choice of law rules insofar as they would stand against the European freedom of service.

In the opinion of AG Cruz Villalon, the answer is no to each of these two questions. As Article 1-4 expressly provides, there is no hidden choice of law rule in the Directive. And Article 3-2 should not even be interpeted as imposing on Member states to amend their own choice of law rules accordingly.

Second Issue of 2011's Journal du Droit International

The second issue of French *Journal du droit international* (*Clunet*) for 2011 was just released.

It includes five articles, one of which only explores a conflict issue. It is an article presenting the new Chinese law on private international law (*La nouvelle loi chinoise de droit international privé du 28 octobre 2010 : contexte législatif, principales nouveautés et critiques*). It is authored by Chen Weizuo, who is a professor of law at Tsinghua University School of Law, and Lydia Bertrand, who practices in Paris.

> *This article begins by briefly describing the legislative history of China's new*

private international law statute, i.e. the Statute on the Application of Laws to Civil Relationships Involving Foreign Elements of the People's Republic of China of 28 October 2010, which entered into force on 1 April 2011. It will then undertake a study on the main novelties of China's new private international law statute for the Chinese private international law system. Finally, it concludes with critical comments on this new statute.

State Immunity in Australia

A recent decision of the Full Court of the Federal Court of Australia considers an unusual area of private international law, namely the applicability of foreign state immunity to government-owned airlines in the context of civil proceedings for breach of competition laws. The case was brought by the Australian competition regulator against two airlines—Garuda Indonesia and Malaysian Airlines—in relation to a cartel for the fixing of air freight prices.

In Australia, the law of foreign state immunity is largely in statutory form by virtue of the *Foreign States Immunities Act 1985* (Cth). That act extends immunity in some circumstances to a 'separate entity' of foreign states, defined as being an agency or instrumentality of the foreign State which is not part of that State's executive government.

The Full Court considered that (contrary to the trial judge's ruling) Garuda was such an agency or instrumentality of Indonesia, but that (in accordance with the trial judge's ruling) Malaysian Airlines was
not such an agency or instrumentality of Malaysia. Nevertheless, because the conduct in question fell within the commercial transaction exception in s 11 of the Act, Garuda was not entitled to foreign state immunity.

Lander and Greenwood JJ considered that 'agency' and 'instrumentality' were two separate concepts. By contrast, Rares J declined to draw this distinction between the two terms. The joint judgment stated:

"We think the difference is in their constitution. An instrumentality is a body created by the State as an instrumentality for the purpose of performing a function for the State. … An instrumentality of the State cannot be created by an organ other than the State. A natural person or a corporation cannot create an instrumentality and certainly not an instrumentality of the State.

"An instrumentality is created by the State for the purpose of carrying out functions on behalf of the State and is not available to carry out any functions for any other State, person or corporation. …

"An agency may have the same characteristics as an instrumentality, but not necessarily so. An agency of the State, in our opinion, does not necessarily have to have been created by the State itself. It may be, but need not be. … [at [36]-[39]]

This distinction had one important consequence for the test to determine whether an entity was the instrumentality or agency of a foreign state, namely that the question of ownership and control was in their Honours' opinion less important than the trial judge may have assumed:

"Ownership cannot be determinative of the question whether a person or corporation is an agency or instrumentality of a foreign State. A natural person will not have an owner. Australian law does not countenance ownership of a person. An instrumentality will usually be created by legislation. It may have "an owner". In many cases it will not have "an owner" but will simply be a creation of statute. An agency may or may not be owned by the State. If it is then it is more likely to be found to be an agency of the State. But if it is not owned by the State that is not determinative of the question whether the person or corporation is an agency of the State. The agency might exist as a result of a contractual relationship between the State and the person or corporation. It follows that ownership cannot be the sole criteria in determining whether a natural person or a corporation is an agency or instrumentality of a foreign State. …

"Like Rares J, we do not, with respect, agree with the primary judge that the test whether a natural person or a corporation of the kind referred to in the definition is to be determined by reference to whether the foreign State has the day-to-day management control of the agency or instrumentality. We think, as

we have said, such a holding is inconsistent with s 3(2), which contemplates that a separate entity may be the agency of more than one foreign State and, indeed, numerous foreign States, not all of which presumably would have the actual day-to-day control of that foreign entity.

"Ownership and control will be important in determining whether a natural person or a corporation is an agency or instrumentality of a foreign State. However neither, in our opinion, can be determinative factors. [at [44], [46]-[47]]

Rares J reached the same conclusion, but without the need to distinguish between 'agencies' and 'instrumentalities', since both connoted a 'means to achieve some purpose or end of [the foreign] State'. For that reason,

"the primary judge erred in construing the definition of "separate entity" as containing requirements that the foreign State own and control a corporation to the point where it exerted a real or tangible level of day-to-day management control over it. Those requirements are not contained in express or implied terms in the Act. They are not necessary to give the Act effect. They are inconsistent with the express provision that an individual, who cannot be owned, can be a separate entity. They assimilate the position of a corporation to an organ of the foreign State, contrary to the exclusion of such a body in the express words of the definition. …

"The correct approach is to consider, on the whole of the evidence, whether the person is acting for, or being used by, the foreign State as its means to achieve some purpose or end of that State in the relevant circumstances." [at [124], [128]]

Significantly, the Court held that a dealing did not cease to be a 'commercial transaction' simply because it was unlawful. This was relevant because the 'transaction' in question was the formation of an anti-competitive cartel. As the joint judgment remarked:

"It would be curious if the effect of s 11 is to except from the general claim for immunity a lawful transaction for the provisions of services but provides an immunity for a contract, arrangement or

understanding which is unlawful" [at [63]]

Or, as Rares J expanded:

> *"The exception provided in s 11(1) is not for a commercial transaction, as that expression is defined in s 11(3). Rather, the subject-matter of the exception from immunity is the proceeding "in so far as [it] … concerns a commercial transaction". The airlines were carrying on business, offering for sale and selling air freight services. The proceedings concerned the allegation that the cartel conduct was an activity that affected the ordinary market price setting mechanisms. That allegation concerned what was inherently an activity of a commercial, trading or business kind." [at [205]]*

PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission [2011] FCAFC 52 (19 April 2011)

Spanish Draft Law on Mediation

The Spanish Draft Law on Mediation in Civil and Commercial Matters was published on the BOCG OF APRIL 29, 2011 (see here). The future Act would incorporate into Spanish law Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (just for the record, the deadline for bringing into force the laws, regulations, and administrative provisions necessary to comply with the Directive is May 21, 2011, so we will be late). However, the proposed regulation goes beyond the content of the Directive, in line with the third additional provision of Law 15/2005 of 8 July, amending the Civil Code and Civil Procedure Act relating to separation and divorce. While Directive 2008/52/EC lays down only minimum standards to encourage mediation in cross-border civil and commercial matters, the Spanish regulation sets a general scheme that takes into account the provisions of the UNCITRAL Model Law on International Commercial Conciliation, and would be applicable to any mediation (limited to the field of civil

and commercial matters) that takes place in Spain and intends to be legally binding.

Some interesting provisions of the draft read as follows:

Article 2. In the absence of express or tacit submission to this law, it shall apply when at least one of the parties is domiciled in Spain and the mediation is to be conducted in Spanish territory.

Article 3. Cross border conflicts mediation.

1. For the purposes of mediation governed by this law, "cross-border conflict" means a conflict in which at least one party is domiciled or habitually resident in a State other than that in which any of the other affected parties is domiciles or has habitually residence at the time they agree to use mediation (or they have to use it in accordance with the applicable law).

2. In cross border disputes between parties residing in different Member States of the European Union, domicile will be determined in accordance with Articles 59 and 60 of Regulation (EC) no. 44/2001 of 22 December 2000 on the jurisdiction and recognition and enforcement of judgments in civil and commercial matters.

Article 28. Enforcement of cross border mediation agreements.

1. Without prejudice to the rules of the European Union and international conventions in force in Spain, a mediation agreement that has already become enforceable in another State shall only be executed in Spain where such enforceability results from the intervention of an authority competent to perform functions equivalent to those played by Spanish authorities.

2. A mediation agreement that has not been declared enforceable by a foreign authority will only be executed in Spain after having been notarized by a Spanish notary public at the request of the parties, or of one of them with the express consent of the other.

3. The foreign document will not be executed if it is manifestly contrary to the Spanish ordre public.

First Issue of 2011's Belgian PIL E-Journal

The first issue of the Belgian bilingual (French/Dutch) e-journal on private international law *Tijdschrift@ipr.be / Revue@dipr.be* was just released.

The journal essentially reports European and Belgian cases addressing issues of private international law, but it also offers academic articles. This issue includes two casenotes, one in Dutch and one in French, commenting on the *Pammer / Alpenhof* case.

Reinhard Steennot – *Hof van Justitie verduidelijkt toepassingsvoorwaarde bijzondere IPR-regelen consumentenovereenkomsten*

Malgorzata Posnow Wurm – *La protection des consommateurs en droit international privé européen suite aux arrêts Pammer – Hotel Alpenhof: la notion d? "activité dirigée"*

The issue can be freely downloaded here.

"The Future of Private International Law in Australia" — Seminar in Sydney

Australian readers, and others who happen to be here on 16 May 2011, may be interested in a seminar to be held at Sydney Law School (Camperdown Campus) on that day from 6-7.30pm.

The seminar is entitled “The Future of Private International Law in Australia”. The speakers are:

- The Honourable Justice Paul Le Gay Brereton AM RFD, Judge of the Supreme Court of New South Wales and co-author of *Nygh’s Conflict of Laws in Australia* (8th ed);
- Dr Andrew Bell SC, New South Wales Bar and co-author of *Nygh’s Conflict of Laws in Australia*;
- Thomas John, head of the Private International Law Section of the Commonwealth Attorney-General’s Department; and
- Professor Andrew Dickinson, Professor in Private International Law at Sydney Law School and one of the specialist editors of *Dicey, Morris & Collins: The Conflict of Laws*.

A brochure can be found here.

Childress on the Alien Tort Statute and the Next Wave of International Litigation

Donald Earl Childress III (Pepperdine University School of Law) has posted The Alien Tort Statute, Federalism, and the Next Wave of International Law Litigation on SSRN.

> *This Article examines the question of what role international law should play in domestic courts through the lens of the Alien Tort Statute (“ATS”) and points to the next battlegrounds for transnational litigation under state and foreign law. The Article provides clarity as to why federal appellate courts have limited ATS cases. In light of federal retrenchment, this Article uniquely explores the potential for a new wave of international law litigation under state and foreign law and the potential for that wave to reach state courts. The Article analyzes forthcoming issues of federalism, choice of law, preemption, and due process*

that will arise as part of the next wave of international law litigation. After critically evaluating these areas, the Article provides a scholarly agenda for further study related to the question of international law in domestic courts. The Article seeks to apply the rich academic literature produced to date by such eminent scholars as Curtis Bradley, Jack Goldsmith, Harold Koh, and others to this new wave of transnational litigation. In so doing, it creates a new legal and normative framework for further studies regarding the role of international law in U.S. courts. The Article concludes by proposing a congressional fix that uses the Class Action Fairness Act of 2005 as a model for alleviating federalism concerns that exist when international law cases are brought in domestic courts.

The paper is forthcoming in the *Georgetown Law Journal*.

The final CLIP Draft

The European Max-Planck Group on Conflict of Laws in Intellectual Property (CLIP) has recently published its final Draft Principles for Conflict of Laws in Intellectual Property (refered to by the Group as "the Draft"), which came after the the Third Preliminary Draft of the Principles we reported on here. The text of the Draft, available here, is supposed to remain substiantially the same in the 2012 commented version of the "Principles for Conflict of Laws in Intellectual Property" except for the editorial changes.

The main changes made in the newest Draft include: Article 2:206 (2) and (3) on multiple defendants, Article 3:401 on initial co-ownership, Article 3:604 on secondary infringement, Articles 3:801 and 3:802 (2) (e) on security rights, Article 4:201 on the verification of jurisdiction of foreign courts, and Article 4:501 (2) on other grounds for non-recognition of foreign judgements. As you can see, most of these changes were more of a fine-tuning nature.

I thank Thomas Petz for the tip off.

Fawcett & Torremans on Intellectual Property and Private International Law (2nd edn)

James Fawcett (*Nottingham*) and Paul Torremans (*Nottingham*) have published the second edition of their monograph on ***Intellectual Property and Private International Law*** (2011, OUP). The blurb:

- *Offers a comparative approach of private international law and intellectual property law and assesses how these disciplines impact on and co-operate with the other*
- *A new edition of a major work by top figures in the field which was the first full account in the legal literature and remains the only significant systematic treatment*
- *Addresses the large number of intellectual property cases that now involve foreign law, particularly in commercial courts and which are now of increasinging significance to practitioners*

New to this edition

- *Updated to take into account the replacement of the Brussels Convention by the Brussels I Regulation*
- *Updated to take into account the introduction of the Rome II Regulation dealing with the applicable law in relation to non-contractual obligations*
- *Includes coverage of the extensive case law from national courts and the ECJ*
- *Brings case law on the issue of the Community Trade Mark and Directive up to date*
- *Includes all the major new Directives, eg implementing the WIPO treaties 1996*
- *Considers the development of the case law on the interaction between*

trade marks and domain names

- *New chapters added; jurisdiction and validity of rights; jurisdiction, the internet and intellectual property rights; current proposals for jurisdictional reform; choice of law and the internet; reform in relation to the applicable law*
- *Fully updated and substantially rewritten to take account of the many major changes in the law over the past ten years*

Intellectual property has traditionally been regulated on a territorial basis. However, the protection and commercial exploitation of intellectual property rights such as patents, trade marks, designs and copyright occurring across borders are now seldom confined to one jurisdiction. This book considers how the introduction of a foreign element inevitably raises potential problems of private international law, ranging from establishing which court has jurisdiction and which is the applicable law to securing the recognition and enforcement of foreign judgments.

The Internet has brought a significant increase in the scale of this phenomenon and valuable new chapters have been added to this edition to reflect this. Nationally protected trade marks are now used globally on websites and copyright material is distributed, communicated and copied in a world without borders. Patents have already been licensed on a transnational basis for several decades. All this raises questions of jurisdiction and applicable law. The well-respected and expert author team address such questions as; which court will have jurisdiction to deal with the issues arising from intellectual property rights and their exploitation in an international context? And which national law will the court with jurisdiction apply? Private international law questions increasingly arise and the two disciplines that previously operated in different spheres are increasingly obliged to co-operate.

Although such issues are becoming increasingly important, a dearth of literature exists on the subject. Fawcett and Torremans remedy that neglect and provide a systematic and comprehensive analysis of the topic that will be welcomed by practitioners and scholars alike.

Chapter 4 is available as a sample PDF. You can purchase it from Amazon UK for £185.25, or from OUP for £195.

Rühl on Consumer Protection in Choice of Law

Giesela Rühl, who is a professor of law at the Friedrich-Schiller-University in Jena (Germany), has posted Consumer Protection in Choice of Law on SSRN. The abstract reads:

Consumer protection in choice of law is a fairly young concept. In fact, the idea that consumers might be as much in need of protection in choice of law as in other areas of law did not loom large before the second part of the 20th century. However, after the consumer protection movement gained pace in the 1960ies and 1970ies, academics, courts and legislators were quick to transfer the concept into choice of law. First legislative provisions were enacted in the 1970ies with § 41 of the Austrian Act of Private International Law as well as Article 5 of the European Convention on the Law Applicable to Contractual Obligations (Rome Convention). In the 1980ies Switzerland followed suit with the adoption of Art. 120 of the new Swiss Act on Private International Law.

Today, consumer protection in choice of law is an integral part of legal systems around the world. Thus, it comes as a surprise that up to now the pertaining rules and regulations have received very little attention from economic theory. Even though there is – by now – a substantial body of literature that deals with different aspects of conflict of laws from an economic perspective, the question of whether and – if so – how consumer should be protected in choice of law has been neglected.

In the paper at hand I fill this gap. More specifically, I analyse how choice of law rules should be designed in order to protect consumers in an efficient way. To this end, I proceed in three steps: In the first step I analyse the economic rationale for consumer protection in choice of law. I show that consumers are in need of protection because they suffer from information asymmetries. In the second step, I analyse how consumer protection can and should be afforded from an economic perspective. I focus on three mechanisms: first, self-healing

powers of markets, second, duties of information, and, third, direct regulation of consumer contracts. I conclude that neither markets nor information duties are likely to limit the risks flowing from information asymmetries. As a result, I argue that the economically best way to protect consumers is to directly regulate consumer contracts. In the third and final step, I therefore analyse different models of consumer protection in view of their economic efficiency. I conclude that the European model of limiting party autonomy with the help of the so-called preferential law approach (Art. 6 Rome I-Regulation) is a good economic compromise. The same holds true for the – in practice very similar – American model of limiting party autonomy with the help of the fundamental public policy doctrine (§ 187 Restatement (Second) of Conflict of Laws). Both models trump all other ways of regulating choice of law in consumer contracts, most importantly the Swiss solution of excluding party autonomy in consumer contracts all together.

The paper is forthcoming in the *Cornell International Law Journal*.