Third Issue of 2011's ICLQ

The last issue (July 2011) of the *International and Comparative Law Quarterly* was just released. It offers two articles discussing private international law issues.

The first is authored by Sirko Harder, who is a Senior Lecturer at Monash Law School: Statutes of Limitations Between Classification and Renvoi – Australian and South African Approaches Compared.

> *This article compares the ways in which Australian and South African courts have approached issues of classification and renvoi where a defendant argues that the action is time-barred. There are two differences in approach. First, Australian courts classify all statutes of limitation as substantive, whereas South African courts distinguish between right-extinguishing statutes (substantive) and merely remedy-barring statutes (procedural). Second, the High Court of Australia has used renvoi in the context of the limitation of actions whereas South African courts have yet to decide on whether to use renvoi. This article assesses the impact of those differences in various situations.*

The second article is authored by Gerard McCormack, who is Professor of International Business Law at the University of Leeds: American Private Law Writ Large? The UNCITRAL Secured Transactions Guide.

> *This article provides a critical evaluation of the main provisions of the UNCITRAL Legislative Guide on Secured Transactions. It examines the Guide in the context of other international and national secured transactions instruments including article 9 of the United States Uniform Commercial Code. The clear objective of the Guide is to facilitate secured financing. It is very facilitating and enabling, and permits the creation of security in all sorts of situations. Security is seen as a good thing, through enhancing the availability of lower-cost credit. The paper suggests that this closeness in approach to article 9 is likely to militate against the prospects of the Guide gaining widespread international acceptance. This is the case for various interlocking reasons including the battering that American legal and financial norms have taken with the global financial crisis.*

Zick on Trans-Border Expression

Timothy Zick, who is a professor of law at William and Mary Law School, has posted Falsely Shouting Fire in a Global Theater: Emerging Complexities of Trans-Border Expression on SSRN. The abstract reads:

In Schenck v. United States (1919), Justice Holmes wrote that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." Owing to globalization, the digitization of expression, and other modern conditions a metaphorical global theater is emerging. In this theater, speakers' voices and the physical and psychological effects of domestic expressive activities will frequently traverse or transcend territorial borders. This Article draws upon several recent events — the Quran burning in Florida, the international reaction to an Internet posting calling for a "Draw Mohammed Day" event, the criminalization of the provision of expressive assistance to designated foreign terrorist organizations, the posting of potentially inciting speech on the Internet, and the WikiLeaks disclosures — to examine how First Amendment doctrines relating to offensive expression, incitement, hostile audiences, treason, and the distribution of secret or potentially harmful information might apply in the global theater.

The Article makes four general claims or observations regarding these doctrines. First, although in rare instances the government could punish domestic incitement that causes harmful extraterritorial effects, in general expression that breaches global peace or order by producing distant offense and other harms ought to remain fully protected in the global theater. Second, owing to the instantaneous trans-border flow of offensive and incendiary expression, speakers will frequently have to assess in advance whether they are willing to risk the possibility of harm from distant threats, while officials will need to consider whether to offer some protection to domestic speakers in response to explicit threats from foreign hecklers. Third, the expanding category of proscribed enemy-aiding expression, which now includes the provision of "material support" (including otherwise lawful expression) to terrorists and may include a form of cyber-treason, must be defined as narrowly

as possible in the global theater. In general, laws ought to be drafted and enforced such that only intentional enemy-aiding conduct, rather than speech or expressive association, is proscribed. Fourth, with regard to the trans-border exposure of governmental secrets, the United States ought to focus primarily upon improving its processes for protecting secrecy rather than on prosecuting the publishers, whether foreign or domestic, of such information.

The Article also draws some broader free speech, association, and press lessons from recent events and controversies in the emerging global theater. Public officials, courts, and commentators must begin to think more systematically about trans-border speech, association, and press concerns. The First Amendment's trans-border dimension must be defined and incorporated into political, legal, and constitutional discussions regarding global information flow in the twenty-first century. In the global theater, America's exceptional regard for offensive expression will be vigorously challenged both at home and abroad. We must be prepared to explain and defend our exceptional First Amendment norms, principles, and values to both domestic and global audiences. Recent episodes confirm that core First Amendment principles, including marketplace justifications for protecting offensive speech, will retain considerable force in the global theater. The Article also discusses various lessons for the press, as it continues its transformation from a domestic information hub and local watchdog to a loosely bound international distribution network. As this transformation occurs, the press will need to be more circumspect in its reporting on matters of global concern, such as religion, and with regard to the nature and character of its relationships with some foreign sources. Moreover, the press's own commitment to the free flow of information will be tested, as new sources and publishers, operating on different models and in pursuit of different missions, continue to materialize.

Finally, new threats to free speech and information flow will arise in the global theater. We ought to be paying more attention to the influence of private intermediaries on the trans-border flow of information, and to new forms of governmental information control such as prosecution of information distributors and extra-judicial means of punishing speakers (including targeted executions).

The paper is forthcoming in the *Vanderbilt Law Review*.

Jurisdiction Based on a Domain Name

In *Tucows.Com Co. v. Lojas Renner S.A.*, 2011 ONCA 548 (available here) the Court of Appeal for Ontario considered whether to take jurisdiction in a dispute over the ownership of an internet domain name.

Tucows is a Nova Scotia corporation with its principal office in Ontario. Renner is a Brazilian corporation operating a series of retail department stores. Tucows bought 30,000 domain names from another corporation, and one of the names was renner.com. Tucows is the registrant of that domain name with the internationally-recognized non-profit organization, the Internet Corporation for Assigned Names and Numbers (ICANN). Renner complained to WIPO and in response Tucows sued in Ontario, seeking a declaration that it was the owner of the domain name. Renner objected to Ontario's jurisdiction over the dispute.

The core issue was whether this dispute concerned "personal property in Ontario". An earlier decision of the Ontario Superior Court, *Easthaven Ltd. v. Nutrisystem.com Inc.* (2001), 55 O.R. (3d) 334 (S.C.J.), had concluded that because a domain name lacks a physical existence it was not "property in Ontario" and the mere fact the domain name was registered through a corporation that happened to carry on business in Ontario (the domain name Registrar) did not give it a physical presence here.

The court reviewed several scholarly articles on the issue from around the world and also considered jurisprudence from several other countries, including the United States, the United Kingdom and Australia. It concluded that the emerging consensus appears to be that domain names are a form of property. After a further analysis of the nature of personal property, the court concluded that a domain name is personal property. Further, the connecting factors favouring location of the domain name in Ontario were held to be the location of the registrant of the domain name and the location of the registrar and the servers as intermediaries. On this basis the court found the domain name in issue to be

personal property in Ontario, and thus took jurisdiction under the approach in *Van Breda* (discussed in an earlier post).

The case discusses several other issues, including (i) the relationship between the dispute settlement mechanism provided by WIPO and civil litigation and (ii) the propriety of a claim to obtain a declaration as a remedy.

Issue 2011.1 Nederlands Internationaal Privaatrecht

The first issue of 2011 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht*, which was published in April of this year (apologies for the late posting), was a special issue on Human Rights and Private International Law.

It includes the following interesting contributions:

Laurens Kiestra, Article 1 ECHR and private international law, p. 3-7. The conclusion reads:

In this paper, the role of Article 1 ECHR, which defines the scope of the instrument, with regard to private international law has been discussed. When a court of one of the Contracting Parties either applies a foreign law or recognizes a foreign judgment originating from a third State, there is no reason not to apply the ECHR to such cases. Even though such a third State has never signed the ECHR, it would ultimately be the court of one of the Contracting Parties whose application of a foreign law or recognition of a foreign judgment violating one of the rights guaranteed in the ECHR that would breach the ECHR. This follows from the Court's case law concerning the extraterritorial effects of the ECHR which has been confirmed by the little case law that specifically deals with private international law. Even in circumstances in which there is only a negligible connection with the Contracting Party, the situation does not change appreciably.

Such situations still come within the jurisdiction of the Contracting Party and the ECHR is thus applicable to such cases. This does not mean that there cannot be any consideration of specific private international law issues, but only that such concerns should be dealt with within the system of the ECHR. Therefore, one could question whether the public policy exception resulting in the non-application of the ECHR, because of the relative character of the exception, is permissible in light of Article 1 ECHR.

Michael Stürner, Extraterritorial application of the ECHR via private international law? A comment from a German perspective, p. 8-12. The conclusion reads:

In Article 1 the ECHR binds Contracting States to the observance of its provisions. Authorities of each such State must duly respect and foster Convention rights, implying that the entire legal order of that State must comply with Convention standards. Consequently, the ECHR influences private international law along with other branches of such legal systems. Its rules and provisions must equally avoid contradicting Convention rights. Within such legal orders, the ECHR applies to national and transnational cases alike. As soon as there is jurisdictional competence in the Contracting State's courts, a judge acts as part of the State organs bound by the Convention. The operation of choice-of-law rules as applied by national courts and the ensuing results must be in accordance with Convention standards, just as much as the operation of any other national law of such State. If the consequence of the application of foreign law is a violation of the Convention, the forum judge has to see to it that this violation is avoided or corrected. This can be achieved via the public policy exception which is, in its turn, heavily influenced, inter alia, by ECHR standards. However, such an alteration of the resulting application of foreign law referred to through the rules of private international law does not in itself entail an extraterritorial application of the ECHR. There is, as concluded above, no obligation upon a State under public international law to install or apply choice-of-law rules at all; thus there can be no violation of generally accepted principles of international law through a State's application of a public policy exception emerging from its own legal system, including (in the case of the ECHR) its own obligations assumed under public international law.

Ioanna Thoma, The ECHR and the *ordre public* exception in private international law, p. 13-18. Here is an abstract from the introduction:

The purpose of this paper is to crystallize whether the ECHR claims an autonomous and direct application superseding the theoretical premises and technical construction of the conflicts rule itself or whether there is an intertwining interplay between the Convention's ordre public européen and the ordre public exception clause as understood in private international law. First, some examples from domestic case law will demonstrate the methodological approach taken vis-à-vis the interaction between the ECHR and the exception clause of ordre public). Second, further examples from the case law of the ECHR will highlight the position taken by the ECtHR on this question. On the basis of this bottom up and top-down approach our observations and conclusions will be presented.

Patrick Kinsch, Choice-of-law rules and the prohibition of discrimination under the ECHR, p. 19-24. The abstract included on SSRN reads:

This article deals with the relevance, or irrelevance, of the principle of non-discrimination to that part of private international law that deals with choice of law. Non-discrimination potentially goes to the very core of conflict of laws rules as they are traditionally conceived – that, at least, is the idea at the basis of several academic schools of thought. The empirical reality of case law (of the European Court of Human Rights, or the equally authoritative pronouncements of national courts on similar provisions in national constitutions) is to a large extent different. And it is possible to adopt a compromise solution: the general principle of equality before the law may be tolerant towards multilateral conflict rules, but the position will be different where specific rules of non-discrimination are at stake, or where the rules of private international law concerned have a substantive content.

A welcome comment on ECJ's

“Berliner Verkehrsbetriebe” ruling

Last Friday the Spanish magazine *La Ley-Unión Europea* published a comment on ECJ case C- 144/10 by Professor Rafael Arenas (Universidad Autónoma, Barcelona). Prof. Arenas provides some welcome, useful keys on the understanding of the relationship between ECJ rulings in cases C- 04/03, *GAT,* and C-144/10 *BVG;* he also takes into account the reference for a preliminary ruling from the Supreme Court of the United Kingdom (C-54/11) in the same case, still pending before the ECJ. A little reminder: five years ago, in *GAT,* the ECJ established that art. 16(4) of the Brussels Convention applies to any proceedings on the validity of a patent , even if this validity is discussed by way of a plea in objection. On May, 12 2011, the ECJ issued a ruling on C-144/10, *BVG v. JPMorgan,* a case in which a contractual claim was contested by the defendant -a company-, on the basis that the agreement was not valid because the decisions of the society’s organs, which had led to the conclusion of the contract, were null and void. The defendant tried to avoid the London jurisdiction, arguing that the only competent courts were the German ones since the defendant was a German company, and one of the issues under discussion was the validity of decisions of its organs. According to the defendant, article 22(2) of the Regulation applies although the doubts on the validity of the company’s decisions was just a preliminary question. Apparently, the ECJ’s ruling in *GAT* supports the defendant’s arguments. The ECJ established, however, that in the case *BVG v. JPMorgan* article 22(2) of Regulation 44/2001 does not apply. The ECJ maintains that this decision does not contradict his previous ruling in case 4/03, *GAT*; but it is obvious that the compatibility of both judgments requires some explanation. That is why we recommend Prof. Arenas’s comment.

Radicati on Arbitration and the

draft Brussels I Review

Luca G. Radicati di Brozolo, who is a professor of law at the Catholic University of Milan and a partner at Bonelli Erede Pappalardo, has posted Arbitration and the Draft Revised Brussels I Regulation on SSRN. The abstract reads:

> *This paper discusses the provisions on arbitration of the European Commission's December 2010 draft review of Reg. (EC) 44/2001 against the backdrop of the earlier proposals on the inclusion of arbitration within the scope of the Regulation. The analysis focuses principally on the functioning and implications of the lis pendens mechanism laid down by Article 29(4) of the draft, pointing out the analogy between the role conferred on the law and forum of the seat of the arbitration and the mechanism of home country control that is at the heart of European Union law. The article also analyzes the reasons and positive consequences of the Commissions' restraint in not extending the scope of the Regulation to other arbitration – related issues, especially the circulation of judgments dealing with the validity of arbitration agreements and awards. The article's conclusion is that the Commission proposal is well balanced. Whilst it does not solve all problems relating to conflicts between court proceedings and arbitration within the EU, it addresses the most pressing one, that of concurrent court and arbitration proceedings. Moreover, it does so in terms which, in contrast to the use of anti-suit injunctions in aid of arbitration, are reconcilable with the basic tenets of European Union law. Its approach is indisputably favorable to the development of arbitration and does not jeopardize the acquis in terms of arbitration law of the more advanced member States.*

Retirement of J J Spigelman as

Chief Justice of New South Wales

It is appropriate to note on this blog the recent retirement of J J Spigelman as Chief Justice of New South Wales. A number of his judgments and speeches over the course of his tenure as Chief Justice constitute significant contributions to Australian private international law.

They are identified in his chapter entitled 'Between the Parochial and the Cosmopolitan' in the recently published collection *Constituting Law: Legal Argument and Social Values* (Federation Press, 2011) edited by Justin Gleeson and Ruth Higgins. That chapter also provides an overview of the former Chief Justice's views on the approach of the judiciary to the foreign elements that arise in cases, including cross-border issues, venue disputation, enforcement of judgments, judicial co-operation and determining questions of foreign law. The chapter is based on a speech given by the former Chief Justice in June 2010, the text of which may be found here.

Australian article round-up 2011: International co-operation

Concluding the Australian article round-up, readers may be interested in the following articles raising points about international co-operation on conflicts issues:

- Rosehana Amin, 'International Jurisdiction Agreements and the Recognition and Enforcement of Judgments in Australian Litigation: Is There a Need for the Hague Convention on Choice of Court Agreements?' (2010) 17 *Australian International Law Journal* 113

> *One of the difficulties faced by judges and practitioners when dealing with disputes arising from international commercial transactions is in the application and enforcement of a choice of court or foreign jurisdiction clause to determine*

the relevant court to adjudicate the dispute. This article explores the process undertaken by Australian courts when deciding whether they should exercise jurisdiction. In addition, the legal uncertainty arising from the distinction drawn between exclusive and non-exclusive jurisdiction clauses, and the ambiguous approach employed in the enforcement of a jurisdiction clause is considered. The Hague Conference on Private International Law has developed the Hague Convention on Choice of Courts Agreement 2005 and it is intended to promote the enforceability of exclusive choice of court agreements and establish the international recognition and enforcement of resulting judgments. This article considers whether Australia should, like its American and European counterparts, take steps to sign and ratify the Hague Convention. Further, the article also assesses the impact the Convention will have in resolving jurisdictional issues faced by Australian courts and the recognition and enforcement of a resulting decision. Finally, the article posits that the Hague Convention will clarify the uncertainties facing Australian courts in international jurisdictional disputes.

- Gina Elliott and David Hughes, 'Australia joins the Hague Service Convention' (2010) 84 *Australian Law Journal* 532:

The Hague Service Convention will come into force for Australia on 1 November 2010. The Convention presently has 61 states parties, and is the most important multilateral convention in the field of transnational services of process. This article sets out the main features of the Convention, including when it applies, the manner in which the Convention will interact with Australian law, and the methods provided by the Convention for the transmission of documents for service abroad. The article also discusses foreign case law that has developed in connection with key issues that arise under the Convention.

Van Den Eeckhout on Corporate Human Rights Violations

Veerle Van Den Eeckhout (Leiden and Antwerp) has posted Corporate Human Rights Violations and Private International Law – The Hinge Function and Conductivity of PIL in Implementing Human Rights in Civil Proceedings in Europe: A Facilitating Role for PIL or PIL as a Complicating Factor? on SSRN. Here is the abstract:

In this article the author explores the role private international law ('PIL') could play in addressing human rights violations committed by a multinational company operating outside Europe ? possibly in a conflict zone ? in a civil action in Europe. The article examines the feasibility of civil recourse in a European country seen from the perspective of PIL. Is PIL functioning as a neutral hinge – identifying the competent court(s) and the applicable law in a neutral way ? or does PIL lend itself rather to function as a tool, either serving the economic concerns of multinational companies, or the aims of plaintiffs who wish to hold companies accountable? To answer this question, the author analyzes PIL rules and PIL techniques in a technical-legal way and evaluates them with a critical eye. In the analysis, the concept of 'access to justice' is used as a central key concept; access to justice is linked both with PIL rules on jurisdiction and PIL rules on applicable law: rules of jurisdiction are decisive in 'opening' the door to proceedings in a European country, in which subsequently – to the extent that the rules of applicable law allow this – human rights may be invoked and the interests of third-country victims as 'weaker parties' may be protected.

The area of PIL rules to be studied is ? mainly – the area of torts, with special attention for issues of negligence, omission, duty of care and complicity. As the PIL rules of European Member States are increasingly being 'communitarized', the main PIL rules to be studied and analyzed in this article are sources of European PIL. Thus, the focus will be on the Brussels I Regulation (including aspects of the ongoing revision process of this Regulation, particularly proposals which could either broaden or limit the possibility of starting proceedings in a European country) and the Rome II Regulation as unified European PIL sources, albeit with attention for potential national differences

with respect to the application of the Rome II Regulation: evaluating the plausibility of various results is important, because it is conceivable that plaintiffs may choose between several European courts, taking into account in their choice the advantages or disadvantages of the specific way in which national courts will apply the Rome II Regulation ('shopping' possibilities for plaintiffs) and because it is conceivable that companies will take into account these differences in their decision where to 'establish' their headquarters and where to 'take decisions' etc. And indeed, the system of the Rome II Regulation makes it conceivable that different results are obtained depending on the European court that hears the case.

But what is more: the current literature is for the most part rather sceptical about the possibilities the Rome II Regulation offers to third-country victims of violations of human rights committed by companies outside Europe. Accordingly, although the author argues that some of the avenues for plaintiffs allowed by the system of the Rome II Regulation appear to be underestimated in the literature – and although the author also argues that even the current version of the Rome II Regulation has the potential to enhance human rights – it will be recognized that there are hurdles to be taken. This raises the question whether the system of the Rome II Regulation needs to be amended or needs to be 'fleshed out' by a set of specific rules. This could comprise actions such as broadening the scope of Article 7 of the Rome II Regulation; unification of mandatory rules – e.g. similar to the way in which the European legislator intervened in international labour law by unifying mandatory rules in the Posting Directive ? see the opening offered by the 'overriding mandatory rules' of Article 16 of the Rome II Regulation; promulgation – on a European level? – of statutory duties for companies with regard to extraterritorial compliance with human rights standards and creating more possibilities to take into account national or European rules on extraterritorial corporate criminal responsibility for human rights violations ? see the opening offered by the 'rules of safety and conduct' of Article 17 of the Rome II Regulation; unification of 'surrogate law' for cases where the plea of public order of Article 26 of the Rome II Regulation is successfully invoked.

Freeze! EU Proposal to Block Debtors' Accounts

The European Commission has adopted a Proposal for a Regulation creating a European Asset Preservation Order. As the press release accompanying the Proposal explains:

> *The Regulation would establish a new European Account Preservation Order that would allow creditors to preserve the amount owed in a debtor's bank account. This order can be of crucial importance in debt recovery proceedings because it would prevent debtors from removing or dissipating their assets during the time it takes to obtain and enforce a judgment on the merits. This will raise the prospects of successfully recovering cross-border debt.*
>
> *The new European order will allow creditors to preserve funds in bank accounts under the same conditions in all Member States of the EU. Importantly, there will be no change to the national systems for preserving funds. The Commission is simply adding a European procedure that creditors can chose to use to recover claims abroad in other EU countries. The new procedure is an interim protection procedure. To actually get hold of the money, the creditor will have to obtain a final judgment on the case in accordance with national law or by using one of the simplified European procedures, such as the European Small Claims Procedure.*
>
> *The European Account Preservation Order will be available to the creditor as an alternative to instruments existing under national law. It will be of a protective nature, meaning it will only block the debtor's account but not allow money to be paid out to the creditor. The instrument will only apply to cross-border cases. The European Account Preservation Order will be issued in an ex parte procedure. This means that it would be issued without the debtor knowing about it, thus allowing for a "surprise effect". The instrument provides common rules relating to jurisdiction, conditions and procedure for issuing an order; a disclosure order relating to bank accounts; how it should be enforced by*

national courts and authorities; and remedies for the debtor and other elements of defendant protection.

The proposed European Account Preservation Order Regulation will now pass to the European Parliament and the Council of the EU for adoption under the ordinary legislative procedure and by qualified majority.

Good news, it seems, for Italian cheesemakers, but less so for French frozen pizza manufacturers planning to default on mozzarella invoices.

There will, no doubt, be more discussion of the Proposal on this site, once all have had a chance to digest its contents.