Judicial Cooperation in Civil Matters and Private International Law in the 2008-2011 case-law of the ECJ

The School of Law of the Autónoma University of Madrid (UAM) will host the first *UAM International Conference on European Union Law. Recent trends in the case law of the Court of Justice of the European Union (2008-2011)* on July, the 14th and 15th . Besides the opening and closing lectures by prominent jurists, there are panels on the institutional system of the EU, competition law, citizenship and free movement of persons, external action, social policy and internal market. Most interesting for the readers of this blog, there is also a panel on "Judicial cooperation in civil matters and Private International Law", which will be chaired by *Paul R. Beaumont* (Aberdeen University) and *Francisco Garcimartín Alférez* (Autónoma University of Madrid). *Elena Rodríguez Pineau* (Autónoma University of Madrid) will be the speaker in the panel. Andrej Savin (Copenhagen Business School), Giacomo Biagioni (University of Cagliari) and Luis Carrillo (University of Girona) and Patricia Orejudo (Complutense University of Madrid) will also intervene.

Registration forms must be submitted before July 1, 2011. For more information about the congress and to register for the event please visit: www.uam.es/cidue.

Monestier on the Illusory Search for Res Judicata of Transnational

Class Actions

Tanya J. Monestier, who teaches at the Roger Williams University School of Law, has posted Transnational Class Actions and the Illusory Search for Res Judicata on SSRN. The abstract reads:

> *The transnational class action – a class action in which a portion of the class consists of non-U.S. claimants – is here to stay. Defendants typically resist the certification of transnational class actions on the basis that such actions provide no assurance of finality for a defendant, as it will always be possible for a non-U.S. class member to initiate subsequent proceedings in a foreign court. In response to this concern, many U.S. courts will analyze whether the "home" courts of the foreign class members would accord res judicata effect to an eventual U.S. judgment prior to certifying a U.S. class action containing foreign class members. The more likely the foreign court is to recognize a U.S. class judgment, the more likely that an American court will include those foreigners in the U.S. class action.*
>
> *Current scholarship accepts propriety of the res judicata analysis, but questions the manner in which the analysis is carried out. This Article breaks from the existing literature by arguing that the dynamics of class litigation render the res judicata effect of an eventual U.S. class judgment inherently unknowable to a U.S. court ex ante. In particular, I argue that certain "litigation dynamics" – specifically the process of proving foreign law via experts, the principle of party prosecution, and the litigation posture of the action – complicate the transnational class action landscape and prevent a court from accurately analyzing the res judicata issues at play. This is exacerbated by the "structural dynamics" of class litigation: the complexity of foreign law on the recognition and enforcement of judgments; the newness of class action law in most foreign countries; and the distinction between general and fact-specific grounds for non-enforcement of a U.S. class judgment. Accordingly, I argue that U.S. courts should abandon their illusory search for res judicata. Instead, courts should avoid the res judicata problem altogether by employing an opt-in mechanism for foreign class plaintiffs, whereby such plaintiffs are not bound unless they affirmatively undertake to be bound by U.S. class judgment. An opt-in mechanism for foreign plaintiffs also provides several advantages over the current opt-out mechanism: it allows all foreign claimants to participate in U.S.*

> *litigation if they so choose; it provides additional protections for absent foreign claimants; it respects international comity; and it sufficiently deters defendant misconduct.*

The paper is forthcoming in the *Tulane Law Review* (Vol. 86, p. 1).

Tip-off: Antonin Pribetic

New Alien Tort Statute Case At The United States Supreme Court: Kiobel, et al., v Royal Dutch Petroleum Petition Filed

In *Kiobel, et al., v Royal Dutch Petroleum, et al.*, lawyers for 12 individuals seeking to hold major oil companies legally responsible for human rights abuses in Nigeria in the 1990s have asked the Supreme Court to overturn a federal appeals court's ruling that corporations are immune to such claims in U.S. courts. The law at issue is the Alien Tort Statute, a law that dates from the first Congress in 1789 but has grown in importance after a wave of lawsuits over the past three decades — lawsuits that were originally aimed at individuals, and then began targeting corporations in 1997. Prior coverage of the ATS has appeared on this site here and here, and discussions of this very case have appeared here, here, here, here and here. As Lyle Denniston at the SCOTUSBlog puts it, "[t]he new petition raises what may be the hottest international law issue now affecting business firms," and is "[i]n essence, the . . . ultimate test of what Congress meant when . . . it gave U.S. courts the authority to hear claims by foreign nationals that they were harmed by violations of international law."

Last September, the Second Circuit Court became the first federal court to rule that ATS does not apply at all to corporations, but only to individuals. The panel

split 2-1, and the en banc Court divided 5-5 in refusing to reconsider the panel result. The Petitioners at the Supreme Court now seek to challenge that result and argue that "[c]orporate tort liability was part of the common law landscape in 1789 and is firmly entrenched in all legal systems today. The notion that corporations might be excluded from liability for their complicity in egregious human rights violations is an extraordinary and radical concept."

The *Kiobel* petition puts two questions before the Justices. The first issue is jurisdictional, and questions whether the Circuit Court should have reached the issue of corporate immunity at all. Indeed, neither side had raised the issue of whether ATS applied to corporations in the district court; that question was accordingly not decided by the district judge, and was not an issue sent up to the Circuit Court. The Circuit Court panel majority, without deciding any of the issues actually sent up on appeal, acted *sua sponte* to conclude that it had no jurisdiction to decide the case because the ATS did not apply to corporations. The petition suggests that the Justices should summarily overturn the Circuit Court on this basic procedural point and remand the case for further proceedings.

The second question is the merits question: whether corporations are immune from tort liability for war crimes, crimes against humanity, and other human rights abuses perhaps even amounting to genocide, or whether they are liable as any private individual would be under ATS. On that point, there is a direct conflict between rulings of the Second Circuit and the Eleventh Circuit, and the issue is currently under review in the D.C., Seventh and Ninth Circuits as well. "Today," the petition says, "corporations may be sued under the ATS for their complicity in egregious international human rights violations in Miami or Atlanta, but not in New York or Hartford. This is contrary to the congressional intent that the ATS ensure uniform interpretation of international law in federal courts in cases involving violations of the law of nations."

The corporate defendants will have a chance to oppose the petition before the Justices act on it, and it is also possible that the Justices may seek the views of the federal government. No action on the petition will come until the Court's next Term, starting in October.

Morrison Scorecard: One Year In Review

It has been nearly a year since the United States Supreme Court issued its decision in *Morrision v. National Australia Bank Ltd*., 561 U.S. __ (June 24, 2010), pulling back the extraterritorial effect of Section 10(b) of the Securities and Exchange Act of 1934. The Court in *Morrison* commanded that "when a statute gives no clear indication of an extraterritorial application, it has none." Then, in determining whether the particular claim at issue sought an extraterritorial application of a federal statute, the Court looked to the "focus" of that statute, which is not necessarily the "bad act" prohibited by the statute, but "the object[] of the statute's solicitude." The statute at issue in *Morrison* was § 10(b) of the Securities Exchange Act, which makes it illegal for "any person . . . to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance." The Court noted that § 10(b) focused "not upon the place where the deception originated, but upon purchases and sales of securities," and thusly concluded that "[t]hose purchase-and-sale transactions are the objects of the statute's solicitude. It is those transactions that the statute seeks to regulate; it is parties or prospective parties to those transactions that the statute seeks protect." Accordingly, the Court determined that § 10(b) was limited in scope "to purchases and sales of securities in the United States." Because the sales of securities at issue in Morrison occurred on a foreign stock exchange, the Court affirmed dismissal of the plaintiffs' claims even though the deceptive conduct occurred in Florida. Previous coverage of the decision in *Morrison* has appeared on this site here, here, here, here, here and here

At the time it was decided, the broader impact of *Morrison* was uncertain. It is now apparent, however, that the decision has had a significant impact on limiting the extraterritorial application of a number of federal statutes providing civil remedies to private plaintiffs—not just the antifraud provisions of the Securities and Exchange Act. Criminal statutes, as we will see, have fared better in

Morrison's wake.

As it might be expected, *Morrison* has had a dramatic impact on securities fraud cases with foreign elements. *Morrison* itself was an "f-cubed' case, meaning that it involved foreign plaintiffs, a foreign defendant and foreign securities. More "f-cubed" cases have followed suit, and been dismissed from the federal courts. *See In re Vivendi Universal, S.A. Securities Litigation*, 02-CV-05571 (S.D.N.Y. Feb. 22, 2011). All the same, however, the presence of one or more domestic elements has not been sufficient to overcome the strong presumption against extraterritoriality expressed in *Morrison*. The placement of a "buy order" in the United States by U.S. citizens does not render the transaction at issue a domestic one, and bring the case within the purview of U.S. securities laws. *See In re Alstom SA Sec. Litig.*, No. 03 Civ. 6595 (VM) (S.D.N.Y. (Sept. 13, 2010) (dismissing claims even though the stock transactions at issue here were "initiated in the United States") and *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance co., et al.*, No. 08 Civ. 1958 (JGK) (S.D.N.Y. Oct. 4, 2010) ("the mere act of electronically transmitting a purchase order from within the United States" to a foreign exchange does create a "domestic purchase." "[J]ust as the situs of the a defendant's allegedly deceptive conduct is irrelevant to the transactional test [developed in *Morrison*], so too is the situs of the plaintiffs' alleged injury."). Nor does the closing of a transaction in the United States, *see Quail Cruise Ship Management Ltd. v. Agencia de Viagens CVC Tur Limitada*, No. 09-23248-CIV (S.D. Fla. Aug. 6, 2010) (holding that "*Morrison*'s central holding would be undermined if parties could elect United States securities law merely by designating" the United States as the place to close a transaction that otherwise has no connection to this country); the choice of U.S. law and forum in a stock purchase contract, *see Elliott Associates, et al. v. Porsche Automobil Holding SE, et al.*, 10 Civ. 0532 (HB) (S.D.N.Y. Dec. 30, 2010); and the listing of the same or similar securities on a U.S. exchange. *See Absolute Activist Value Master Fund Ltd. v. Florian Homm, et al.*, 09 CV 08862 (S.D.N.Y. Dec. 22, 2010) (holding that the "mere fact that a stock is listed on a domestic exchange does not give rise to a claim under domestic securities laws when the shares are purchased elsewhere"); *In re Vivendi Universal, S.A. Securities Litigation*, 02-CV-05571 (S.D.N.Y. Feb. 22, 2011) (admitting that the fact that foreign shares were "listed" on the NYSE and "registered" with the SEC gave the court "pause," but holding that such listing and registration alone "cannot carry the freight that plaintiffs ask it to bear" because it is "contrary to the spirit" of *Morrison*); *In re Royal Bank of Scotland*

(RBS) Group PLC Securities Litigation, 09 Civ. 300 (S.D.N.Y. Jan. 11, 2011) (same).

Morrison has been applied to limit the extraterritorial reach of other federal statutes as well. The Racketeer Influenced Corrupt Organizations Act (RICO) is notoriously silent as to any extraterritorial application. Federal courts have consistently held post-*Morrison* that the RICO Act's "solicitude" is the how a pattern of racketeering acts affects an domestic enterprise, not how those acts effect a domestic plaintiff. Like the location of the relevant stock exchange in the securities context, the important point for determining the extraterritorial effect of RICO claims is the location of the enterprise. *See Cedeno, et al. v. Intech Group, Inc.*, 09 Civ. 9716 (S.D.N.Y. Aug. 25, 2010) (RICO does not "evidence any concern with foreign enterprises," and thus does not apply extraterritorially to claims by a foreign plaintiff against a RICO enterprise comprised of the "[t]he foreign exchange regime of the government of Venezuela." It is not enough to allege that predicate acts of money laundering involved transfers into and out of the District by U.S. banks); *European Community v. RJR Nabisco, Inc.*, 2011 U.S. Dist. LEXIS 23538 (E.D.N.Y. Mar. 8, 2011) (holding that it is the location of the RICO enterprise that mattered to the extraterritoriality analysis under *Morrison*, and that making that determination "should focus on the decisions effectuating the relationships and common interest of its members, and how those decisions are made." Plaintiffs' RICO claims were dismissed because "the Complaint, when read as a whole, strongly suggests [that] the money laundering cycle [engaged by the alleged enterprise] was directed by South American and European criminal organizations, . . . [and] not [by] Defendants in the United States"). These courts have eschewed any continued reliance on the "conduct and effect test" traditionally used to determine RICO's extraterritorial application. *See Norex Petroleum Limited v. Access Industries, Inc., et al.*, No. 07-4553-cv (2d Cir. Sept. 28, 2010) (applying *Morrison's* "bright line rule" as to extraterritoriality and holding that RICO does not reach the alleged conduct of an enterprise "to take over a substantial portion of the Russian oil industry". The statute's express reference to "foreign commerce" and the explicit extraterritorial effect of certain predicate acts in the RICO statute were not enough to demonstrate that the statute had extraterritorial effect).

Finally, and most recently, *Morrison* has been applied to narrow the reach of the Robinson-Patman Act, which proscribes the payment of bribes and kickbacks. The

court dismissed a claim concerning the payments made to Iraqi and Indonesian officials because "the language of [that Act] contains no intention that it is to apply extraterritorially." *See Newmarket Corp. v. Afton Chemical Corp.*, 2011 U.S. Dist LEXIS 54901 (E.D. Va. May 20, 2011).

Of course, in many of these same contexts (and a few others), courts have rejected Defendants' attempts to dismiss federal civil claims on the basis of *Morrison*. *See, e.g., In re Le Nature's Inc. v. Krones, Inc.*, 2011 U.S. Dist. LEXIS 56682 (W.D. Pa. May 26, 2011) (holding that a domestic RICO enterprise still falls within the ambit of the RICO statute, despite the presence of foreign predicate acts); *Stansell v. BGP, Inc.*, No. 8:09-cv-2501-T-30AEP (M.D. Fla. Mar. 31, 2011) (holding that, despite Morrison, "Congress . . . clearly intended the ATA have extraterritorial application" and "provide[] civil remedies for victims of international terrorism"); *Love v. Associated Newspapers, Ltd.*, 611 F.3d 601 (9th Cir. July 8, 2010) (due to the "sweeping language" of the Lanham Act, "we see no need to revisit our case law regarding extraterritorial application" as a result of Morrison's holding with respect to the Securities and Exchange Act) And, to be sure, many of the decisions discussed above are presently on appeal. So, at the time of writing, the long-lasting effect of *Morrison* remains to be seen. But on the basis of what we are seeing so far, *Morrison* appears to be having a dramatic impact on limiting the subject matter jurisdiction of U.S. courts in a variety of civil cases.

Criminal cases, however, have been treated a bit differently. Soon after the *Morrison* decision, the Dodd-Frank Act revived extraterritorial application of the anti-fraud provisions of the securities laws by authorizing actions brought by the Securities and Exchange Commission involving "conduct occurring outside the U.S. [that] has a foreseeable substantial effect within the U.S." In other criminal and enforcement contexts, too, federal courts have been more willing to find that criminal statutes express a "clear indication of . . . extraterritorial application." *See United States v. Weingarten*, No. 09-2043-cr (2d Cir. Jan. 18, 2011) (holding that 18 U.S.C. § 2423(b) was intended by Congress to criminalize travel by a U.S. citizen between two foreign countries to have sex with a minor) and *United States v. Finch*, 2010 U.S. Dist LEXIS 104496 (D. Haw. Sept. 30, 2010) (holding that 18 U.S.C. §§ 201(b)(2)(A) and (C), concerning bribery and fraud committed against the United States by an officer of the United States, is not "limit[ed] to domestic enforcement"). Courts have also been willing to find that the application of

certain criminal statutes to foreign schemes does not offend the holding in *Morrison. See United States v. Coffman*, 2011 U.S. Dist LEXIS 14600 (E. D. Ky Feb. 14, 2011) (the use of U.S. mail to effect a foreign scheme to defraud does not offend Morrison) and *United States v. Mandell*, 2011 U.S. Dist LEXIS 27064 (S.D.N.Y. Mar. 16, 2011) ("The fact that defendants engaged in some conduct abroad does not mean that that conduct and conduct here in the United States is not covered by the [criminal] mail and wire fraud statutes."). The outcomes of these cases suggest that criminal laws are being treated differently than civil laws, and that courts have continued to expand the extraterritorial application of U.S. criminal law in *Morrison*'s wake. *But see U.S. v. Philip Morris USA, Inc.*, No. 99-2496 (D.D.C. Mar. 2011) (nullifying its prior decision applying prospective injunctive relief against a foreign criminal RICO defendant)

Intersection of Child Abduction Process and Refugee Claim

The Court of Appeal for Ontario has released its decision in *A.M.R.I. v. K.E.R.* (available here). The decision deals with the intersection of the law relating to children who advance a refugee claim and the law on returning abducted children under the Hague Convention.

A girl of 12 had travelled from Mexico, where she lived with her mother (who had custody), to Ontario to visit her father (who had access rights). There she disclosed that she had been abused by her mother. She made a refugee application and the Immigration and Refugee Board of Canada found her to be a refugee as a result of the abuse. After she had lived in Ontario for about 18 months, the mother applied under the Hague Convention for her return to Mexico. The Superior Court of Justice ordered that she be returned, and she was – in quite a remarkable way which violated her right to dignity and respect (para. 7). On appeal, the Court of Appeal reversed that decision. It set aside the order of return and ordered a new hearing on the Hague Convention application.

One of the key concerns for the court was the child's lack of participation in the Hague Convention application. That application was, in effect, heard ex parte, with no submissions in support of the child's remaining in Ontario (para. 31). The court set out some important procedural protections that must be provided to the child (para. 120).

The court also had to grapple with the interplay of the statutes that implemented the Refugee Convention and the Hague Convention. It rejected the argument that the implementation of the latter (provincial law) was unconstitutional by virtue of it violating the implementation of the former (federal law). The court held that the two could be read and applied together without a division of powers conflict (paras. 62-71).

The court held that when a child has been determined to be a refugee, a rebuttable presumption arises that there is a risk of persecution if the child is returned (para. 74) and thus a risk of harm (para. 78). This then must impact the analysis under the Hague Convention.

The application judge had not accorded any weight to the refugee status and accordingly had erred in law. The judge also failed to consider the exceptions in the Hague Convention that allowed the court to refuse to order a child's return.

Punitive Damages and French Ordre Public

F.X. Licari's article "The Difficulty to Enforce US Punitive Damages Award in France: A Critical Comment of the First Ruling of the French Court of Cassation (La Compatibilité de Principe des Punitive Damages Avec l'Ordre Public International: Une Décision en Trompe-L'oeil de la Cour de Cassation?)", published in *Recueil Dalloz*, No. 6, p. 423-427, 2011, is now available at SSRN . The abstract reads:

> *"In an important decision issued on December 1st, 2010, the Cour de cassation*

held that an award of punitive damages is not, per se, contrary to public policy, adding however that this principle does not apply when the amount awarded is disproportionate with regard to the damage sustained and the debtor's breach of his contractual obligations.

In this case, the foreign judgment was from California. The plaintiffs had been awarded $1.39 million USD in compensatory damages and $1.46 million USD in punitive damages. This was found to be clearly disproportionate because, as the Court held, the amount of punitive damages was clearly higher than the amount of compensatory damages (a very large difference of $70,000 USD). It dismisses an appeal from a judgment from the Poitiers Court of appeal."

F.X Licari is maître de conférences at the University of Metz.

Commercial Conflict of Laws Course – Sydney Summer School in Oxford, July 2011

As part of the University of Sydney's Summer School Programme, there will be a Commercial Conflict of Laws course at Magdelen College, Oxford on 11-12 and 14-15 July 2011. It will be taught by Andrew Bell and Andrew Dickinson. From the website:

Objectives

- *Focus on commercial disputes with a transnational dimension.*
- *Determine the features which characterise transnational commercial litigation, where the forum is itself a matter of dispute.*
- *Identify and apply techniques for determining the law applicable to contractual and non-contractual claims.*

- *Compare and contrast the approaches to commercial private international law topics in Australia, UK and the European Union*

Content

The importance of venue in commercial litigation; Australian, UK and European approaches to jurisdiction; techniques of forum control; the law relating to anti-suit injunctions; the role of jurisdiction and arbitration agreements; introduction and ascertainment of foreign law; provisional measures, including freezing injunctions; rules of applicable law for contractual and non-contractual claims; and the distinction between substance and procedure..

The course is open to everyone, and may be of special interest to Australian lawyers working in London. Further details can be found on Sydney's website.

Radicati on Res Judicata of Arbitral Awards

Luca Radicati di Brozolo, who is a professor of law at the Catholic University of Milan and a partner at Bonelli Erede Pappalardo, has posted Res Judicata in International Arbitral Awards on SSRN. The abstract reads:

The paper analyses the sources of the res judicata effect of international arbitral awards. It discusses the problems inherent in the application of the rules of domestic law governing the res judicata effects of national judgments and the approach of international arbitrators and of national courts. It then proposes the development of ad hoc transnational principles to govern the subject matter, and focuses in particular on the Recommendations on Res Judicata in International Commercial Arbitration of the International Law Association.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2011)

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

Here is the contents:

- ***Catrin Behnen***: "Die Haftung des falsus procurator im IPR – nach Geltung der Rom I- und Rom II-Verordnungen" – the English abstract reads as follows:

The extensive reform of the international law of obligations by the Rome I and Rome II-Regulations raises the question of the future classification of the liability of the falsus procurator under international private law. Since the new regulations entered into force, the problem of classification has not only arisen at national law level, but also at the level of European Union Law. Most importantly, it must be questioned, whether the new Regulations contain overriding specifications regarding the classification of the liability of the falsus procurator that are binding for the Member States. This article discusses the applicable law on the liability of an unauthorised agent and thereby addresses the issue of whether normative requirements under European Union law are extant. Furthermore, the Article illustrates how the proposed introduction of a separate conflict of laws rule on the law of agency in the Draft Rome I-Regulation impinges on this question, even though this rule was eventually not adopted.

- ***Ansgar Staudinger:*** "Geschädigte im Sinne von Art. 11 Abs. 2 EuGVVO" – the English abstract reads as follows:

The present essay discusses the decision of the European Court of Justice in the case of Voralberger Gebietskrankenkasse/WGV-Schwäbische Allgemeine –

C-347/08. In this case, the court was concerned with the question whether, under Article 11 Paragraph 2 of the Council Regulation (EC) No. 44/2001 of 22 December 2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters a social insurance agency acting as the statutory assignee of the rights of the directly injured party has the right to bring an action directly against the insurer in the courts of its own Member State. The ECJ denies such a privilege, which is the correct decision in the author's opinion, who, after having reviewed the ECJ's judgement, also discusses the assignability of the decision to other conventions. Afterwards he raises the question to what extent legal entities, heirs or persons who claim compensation for immaterial damages, damages resulting of shock or alimony are allowed to sue the injuring party's insurer at their own local forum.

- ***Maximilian Seibl***: "Verbrauchergerichtsstände, vorprozessuale Dispositionen und Zuständigkeitsprobleme bei Ansprüchen aus c.i.c." – the English abstract reads as follows:

The article firstly deals with the question as to whether and to what extent international jurisdiction can be affected by pre-trial dispositions regarding the asserted claim by the parties to a lawsuit. Secondly, it examines the consequences resulting from the new EC Regulations Rome I and Rome II to the classification of claims out of culpa in contrahendo in terms of international jurisdiction. The background of the article consists of two decisions, one by the OLG (Higher Regional Court) Frankfurt/Main and one by the OLG München. The former concerned a case in which the defendant had pursued commercial resp. professional activities in the Member State of the consumer's domicile in accordance with Art. 15 sec. 1 lit. c) of the Brussels I Regulation at the time he concluded a contract with a consumer, but had ceased to do so before he was sued for damages in connection with the very contract. The latter – against which an appeal has meanwhile been dismissed by the BGH (German Federal High Court of Justice), cf. BGH, 10.2.2010, IV ZR 36/09 – concerned a case in which the party of a consumer contract had assigned his claim based on culpa in contrahendo to the plaintiff, so that the plaintiff could file a lawsuit against the other party of the contract. Here the question arose as to whether or not the jurisdiction norm of § 29a ZPO (German Code of Civil Procedure) – which provides a special forum for cases concerning consumer contracts negotiated away from business premises – was also applicable, if the plaintiff was not the

person who had concluded the contract. The OLG München negated this question. Apart from that the court decided that jurisdiction in this case could not be based on § 29 ZPO which provides a special forum at the place of the performance of the contract, either. This part of the decision gives reason to the examination as to whether or not all claims based on culpa in contrahendo can still be subsumed under § 29 ZPO. Since these claims are now subject to Art. 12 of the Rome II Regulation, it appears to be doubtful whether the traditional German classification of culpa in contrahendo as a contractual claim in terms of jurisdiction can be upheld.

- ***Ivo Bach: "***Die Art und Weise der Zustellung in Art. 34 Nr. 2 EuGVVO: autonomer Maßstab versus nationales Zustellungsrecht" – the English abstract reads as follows:

Article 34 (2) Brussels I in principle allows courts to deny recognition and enforcement of a foreign (default) judgment when the defendant was not served with the document which instituted the proceedings "in a sufficient time and in such way as to enable him to arrange for his defence". As an exception to this principle, courts must not deny recognition and enforcement if the defendant failed to challenge the judgment in the country of origin. In its decision of 21 January 2010, the German Bundesgerichtshof (BGH) dealt with both aspects of Art. 34 (2) Brussels I. Regarding the defendant's obligation to challenge the judgment, the BGH – rightfully – clarified that the obligation exists even when the defendant does not gain knowledge of the judgment before the enforcement proceedings. In such a case the defendant may request a stay of the enforcement proceedings while challenging the judgment in the country of origin. Regarding the time and manner of the service, the BGH relied on the formal service requirements as provided in the German code of civil procedure (ZPO) – Germany being the country where service was effected. The latter part of the decision calls for criticism. In this author's opinion, in interpreting Art. 34 (2) Brussels I courts should not rely on national rules, but rather should look to autonomous criteria. As regards the manner of service, such autonomous criteria may be taken from the minimum standards-catalogue in Arts. 13 and 14 EEO.

- ***Rolf A. Schütze:*** "Der gewöhnliche Aufenthaltsort juristischer Personen

und die Verpflichtung zur Stellung einer Prozesskostensicherheit nach § 110 ZPO" – the English abstract reads as follows:

Under § 110 ZPO (German Code of Civil Procedure) the court – on application of the defendant – has to make an order for security for costs if the claimant is resident abroad but not resident in an EU or EWR Member State. The ratio of this provision is that the defendant who successfully defends a baseless claim should be able to enforce a cost order against the claimant. Residence means the place where a person habitually and normally resides. The decision of the Oberlandesgericht Munich rules that a company (or other legal entity) is ordinarily resident in a place if its centre of management is at that place. Whilst the former Reichsgericht and the Bundesgerichtshof rule that the amount of the security must cover the possible claim of the defendant for recompensation of costs for all possible instances, the Oberlandesgericht Munich states that only the costs for the current instance and the appeal up to the time when the defendant can file a new application for security can be included in the calculation. The decision in both of its aspects is in accordance with the ratio of § 110 ZPO.

- ***Peter Mankowski/Friederike Höffmann***: "Scheidung ausländischer gleichgeschlechtlicher Ehen in Deutschland?" – the English abstract reads as follows:

Same-sex marriages are on the rise if seen from a comparative perspective. In contrast, German constitutional law strictly reserves the notion of "marriage" to a marriage celebrated between man and woman. This must also have its impact in German PIL. Same-sex marriages are treated like registered partnerships and subjected to the special conflicts rule in Arts. 17b EGBGB, not to the conflicts rules governing proper marriage as contained in Art. 13–17 EGBGB. Hence, a proper divorce of a same-sex marriage can as such not be obtained in Germany but ought to be substituted with the dissolution of the registered partnership inherent in the so-called "marriage". Although theoretically a principle of recognition might be an opportunity (if one succumbs to the notion of such principle at all), the limits of such recognition would be rather strict in Germany nonetheless.

- ***Alexander R. Markus/Lucas Arnet***: "Gerichtsstandsvereinbarung in

einem Konnossement" – the English abstract reads as follows:

In its decision 7 Ob 18/09m of 8 July 2009 the Austrian Supreme Court of Justice (Oberster Gerichtshof, OGH), judged as substance of the case, the validity of an agreement conferring jurisdiction incorporated in a bill of lading, its character as well as its applicability to a civil claim for damages resulting from a breach of the contract of carriage on which the bill of lading was based. Aside from that, questions concerning the relation between the Lugano-Convention (LC) and the Brussels I Regulation arise in this judgement. An agreement conferring jurisdiction included in a bill of lading issued unilaterally by the carrier fulfils the requirements established in art. 17 par. 1 lit. c LC since in the international maritime trade the incorporation of agreements conferring jurisdiction in bills of lading can clearly be considered to be a generally known and consolidated commercial practice. Concerning the (non-)exclusivity of the agreement conferring jurisdiction (art. 17 par. 1/par. 4 LC) the OGH makes a distinction from its earlier case law and bases the decision on the European Court of Justices judgement of 24 June 1986, case 22/85, Rudolf Anterist ./. Credit Lyonnais. According to the in casu applicable Swiss Law the prorogatio fori in the bill of lading covers the contract of carriage as well, although in principle the contract does not depend on the bill of lading. Lastly, to identify the relation between the LC and the Brussels I Regulation, the analogous application of art. 54b par. 1 LC is decisive.

- ***Götz Schulze:*** "Vorlagebeschluss zur intertemporalen Anwendung der Rom II-VO" – the English abstract reads as follows:

The Engl. High Court in Homawoo v. GMF has referred the question concerning the interpretation of Art. 31 and 32 of the Rome II-Regulation to the European Court of Justice for ay Preliminary Ruling according to Art. 267 TFEU. Judge Slade recommends to specify Art. 31 Rome II-Regulation (entry into force) by the date of application on 11 January 2009 set out in Art. 32 Rome II-Regulation. Judge Tomlinson in Bacon v. Nacional Suiza prefers a strict literal interpretation with an entry into force on 20 August 2007 and a procedural understanding of Art. 32 Rome II-Regulation.

- ***Bettina Heiderhoff: "***Neues zum gleichen Streitgegenstand im Sinne des Art. 27 EuGVVO" – the English abstract reads as follows:

The Austrian High Court (OGH) found that two actions do not involve the same cause of action when an identical claim is based on two different rules from different national laws and these rules stipulate different requirements. The decision is in conformity with the Austrian dogma that identity of the actions and lis pendens do not apply where a party bases a second claim on new facts. In other words, the identity of the cause of action depends on the facts presented to the court, unlike in Germany where the identity depends on the objective factual situation, no matter whether the claimant has presented all facts to the court in the first action or not. This Austrian point of view threatens uniform jurisdiction in the EU. It allows repetitive actions in different member states and, consequently, may lead to contradicting judgements. It encourages forum shopping. Therefore, it is a pity that the OGH did not present the case to the ECJ under Art. 267 TFEU.

- ***Carl Friedrich Nordmeier:*** "Divergenz von Delikts- und Unterhaltsstatut bei tödlich verlaufenden Straßenverkehrsunfällen: österreichischer Trauerschadensersatz und brasilianisches pretium doloris vor dem Hintergrund der Europäisierung des Kollisionsrechts" – the English abstract reads as follows:

Claims for compensation based on the loss of a maintenance debtor in transborder cases demand the coordination of the law applicable to tort and the law applicable to maintenance obligations. In the present case of the Austrian Supreme Court (Oberster Gerichtshof), concerning a fatal traffic accident in Austria, whose victims were Brazilian nationals, Austrian tort law and Brazilian maintenance law had to be applied. From the Austrian perspective, the Hague Convention on the Law Applicable to Traffic Accidents has priority over the national conflict of law rules and over the Rome II Regulation. This raises questions relating to the possibility of a choice of law in cases that fall within the scope of application of the Convention. Austrian law does not provide a pension for the compensation of grief suffered by relatives of a victim of a fatal traffic accident. A pretium doloris of the Brazilian law is to be qualified as a question of tort and was rightly not awarded.

- ***Arkadiusz Wowerka***: "Polnisches internationales Gesellschaftsrecht im Wandel" – the English abstract reads as follows:

The Polish applicable international private law provides no specific regulations on the international private law of companies. Also the judicature has up till now delivered no decisions in this matter. The essential principles of the international private law of the companies were developed by the doctrine. Within the frame of the planned reform of the international private law the government has presented the draft of a new regulation on the international private law which, with its provisions on the legal entities and organised entities, should fill the current gap in the subject area. The present article gives an overview on the autonomous international private law of the companies and its current evolution, dealing with the issues of the definition of the company, rules for determination of the law governing the companies, scope of the law governing the companies and finally the question of recognition of companies, in each case with references to the proposals of the government draft regulation.

- ***Christel Mindach:*** "Anerkennung und Vollstreckung von Drittlandsschiedssprüchen in Handelssachen in den GUS-Mitgliedstaaten" – the English abstract reads as follows:

After the collapse of the Soviet Union, the newly founded States, establishing the Commonwealth of Independent States (CIS), had to build a completely new legal system. Quite naturally the legislation of international commercial arbitration played a secondary role during the first years of transformation, apart from the CIS Members Russia, Ukraine and Belarus. In the course of legislation process the most CIS States couldn't base on own legal traditions or experiences in this field. This insufficient situation changed in principle only just, when these States decided about the accession to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. With the exemption of Tajikistan and Turkmenistan the New York Convention came in force for all CIS Members in the meantime. The following article describes in a concise manner some of the fundamental requirements for the recognition and enforcement of foreign arbitral awards in commercial matters rendered in the territory of a State other than a CIS State under the appropriate national laws of CIS States including the procedure of compulsory enforcement.

- ***Erik Jayme*** on the conference on the Proposal for a Regulation on

jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, which took place in Vienna on 21 October 2010: "Der Verordnungsvorschlag für ein Europäisches Erbkollisionsrecht (2009) auf dem Prüfstand – Tagung in Wien"

- ***Stefan Arnold:*** "Vollharmonisierung im europäischen Verbraucherrecht – Tagung der Zeitschrift für Gemeinschaftsprivatrecht (GPR)" – the English abstract reads as follows:

> *On the 4th and 5th of June 2010, the Zeitschrift für Gemeinschaftsprivatrecht (Journal for EU-Private Law, JETL) and the Frankfurter Institut für das Recht der Europäischen Union (Frankfurt Institute for the Law of the European Union, FIREU) hosted a conference on „Full Harmonisation in European Consumer Law" at the Europa-Universität in Frankfurt (Oder). Prof. Dr. Michael Stürner (Frankfurt/Oder) had invited to the conference. The speakers addressed not only the concept of full harmonisation but also the European framework for the harmonisation of Private Law and the consumer protection achieved by the the rules on Conflict of Laws. Moreover, the Draft Common Frame of Reference and the effect of full harmonisation on specific fields of law were discussed. The participants also debated the practical effects of possible full harmonisation measures.*

- ***Erik Jayme*** on the congress in Palermo on the occassion of the bicentenary of Emerico Amari's birth: "Rechtsvergleichung und kulturelle Identität – Kongress zum 200. Geburtstag von Emerico Amari (1810–1870) in Palermo"

De Miguel on Derecho Privado de Internet (4th edn)

The fourth edition of *Derecho privado de internet*, by Professor Pedro de Miguel (Universidad Complutense de Madrid) has just been published. Eight years have

elapsed since the previous edition, so I would rather say this is a new book in line with the rapid evolution of Internet services, regulatory developments related to it, and caselaw.

The First Chapter examines the legal architecture of the Internet, the role of ICANN and the organizations that develop technical standards as well as the main regulatory challenges raised by Internet activities. Chapter Two focuses on the legal aspects of information society services, including the implications of technological and media convergence and delimitation with electronic communications services and audiovisual services. This chapter contains a detailed analysis of information and other requirements applicable to information society service providers. Issues concerning liability arising out of illicit activities or contents and liability of intermediary service providers receive also special attention. Chapter Three offers a complete study of data protection issues, including an in-depth discussion of the legal treatment of data processing with regard to web pages, social networks, search engines and advertising services. Unfair practices and commercial communications are the subject-matter of Chapter Four. Advertising, spam and special restrictions affecting trade in certain products or services, like gambling and medicines, are among the topics covered. Chapter Five is devoted to industrial property rights. After discussing the role of patents and know-how in the protection of software and Internet business models, this part incorporates a complete analysis of domain name and trademark law, covering issues such as UDRP, use of trademarks as advertising keywords and metatags, and special treatment of certain activities such as auction sites. Chapter Six deals with copyright and related rights. Among the most innovative aspects of the new edition in this area, reference can be made to the in-depth treatment of intellectual property implications of the services related to the so-called Web 2.0 including a critical assessment of creative commons licences. This part incorporates also an analysis of copyright limitations in the context of the most relevant activities and services, such as the functioning of search engines. The responses to the challenges raised by p2p file-sharing are also considered with a critical analysis of the legal measures adopted in several EU countries, including Spain, France and UK. Other issues such as open access to academic works and the legal implications of the Google Book Search Project receive particular attention. Enforcement mechanisms and liability of intermediaries play also a prominent role. The last Chapter is devoted to electronic contracts. After discussing contract formation, information requirements, recourse to standards

terms, requirements related to the performance of obligations, and protection of consumers, Chapter Seven focuses on payment services and electronic money. Electronic signatures and the assessment of their contribution to the development of e-commerce are also the subject of detailed analysis. Finally, it is remarkable that in line with the global reach of the Internet the cross-border implications of all issues mentioned receive special attention all over the book. International jurisdiction, applicable law and recognition of decisions are discussed in detailed in every chapter.

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