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.

Australian article round-up 2011: Conflicts within the Australian federation

Continuing the Australian article round-up, readers may be interested in the following article and recently published book raising points about conflicts within

the Australian federation:

- Geoffrey Lindell and Sir Anthony Mason, 'The Resolution of Inconsistent State and Territory Legislatoin' (2010) 38 *Federal Law Review* 391:

[W]e have chosen to discuss an important aspect of the subject [of federalism] which has become even more important since the High Court recognised that State legislation is capable of operating beyond the territorial limits of the enacting State. That aspect is how conflicts are resolved between overlapping State and Territory civil and criminal legislation which is capable of operating beyond the territorial limits of the enacting State or Territory. Our aim is to identify the principles which govern, or should govern, the resolution of such conflicts. As will appear, the governing principles which we favour are as follows:

(1) a State (or Territory, if authorised by the Australian Parliament) can, subject to some limitations, legislate with extraterritorial effect in another State (or Territory); primacy will be accorded, in a case of direct or indirect inconsistency, to the law of the State (or Territory) legislature which has competence to legislate in the geographical area in which the law of the former State (or Territory) purports to operate (our 'main solution');

(2) the closer connection test suggested in Port MacDonnell Professional Fishermen's Association Inc v South Australia ('closer connection test') applies only where the same inconsistency arises with respect to legislation which seeks to operate outside the geographical area of both the jurisdictions mentioned in the first principle, for example Australian offshore areas; and

(3) principles (1) and (2) only operate in the absence of uniform choice of law rules prescribed by federal legislation which displaces them.

- Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011):

An important feature in all legal systems, but especially in federations whose polities have overlapping legislative powers, is that those laws regularly conflict – or at least are claimed to conflict. Any coherent legal system must have principles for resolving such conflicts. Those principles are of immense practical as well as theoretical importance. This book, which straddles

constitutional law and statutory interpretation, describes and analyses those principles.

This book does not merely address the conflicts between Commonwealth and State laws resolved by the Constitution (although it does that and in detail). It analyses the resolution of all of the conflicts of laws that occur in the Australian legal system: conflicts between laws enacted by the same Parliament and indeed within the same statute, conflicts between Commonwealth, State, Territory, Imperial laws and delegated legislation.

After identifying the laws in force in Australia, the chapters deal with:

- *conflicts in laws made by the same legislature, focussing on the interpretative process of statutory construction;*
- *repugnancy, a doctrine with continuing vitality in the areas of s79 of the Judiciary Act, delegated legislation and Territory laws;*
- *conflicts between laws of the Commonwealth and State laws, proposing that the categories of inconsistency (commonly three: direct, indirect and 'covering the field') are best seen aspects of a single constitutional concept;*
- *conflicts between the laws of two States, and*
- *conflicts involving the laws of the self-governing Territories.*

New Book on the Prohibition of Abuse of Law in EU Law

Is the Prohibition of Abuse of Law a New General Principle of EU Law? This was the topic of a conference which took place in Oxford in October 2008 and now the subject of this recently released volume in the Studies of the Oxford Institute of European and Comparative Law.

The Court of Justice has been alluding to 'abuse and abusive practices' for more

> *than thirty years, but for a long time the significance of these references has been unclear. Few lawyers examined the case law, and those who did doubted whether it had led to the development of a legal principle. Within the last few years there has been a radical change of attitude, largely due to the development by the Court of an abuse test and its application within the field of taxation. In this book, academics and practitioners from all over Europe discuss the development of the Court's approach to abuse of law across the whole spectrum of European Union law, analysing the case-law from the 1970s to the present day and exploring the consequences of the introduction of the newly designated 'principle of prohibition of abuse of law' for the development of the laws of the EU and those of the Member States.*

The book, which was edited by Rita de la Feria and Stefan Vogenauer (Oxford), covers the whole spectrum of EU law, which includes quite a few topics of interest for private international law scholars: company law, insolvency, civil procedure, and private law in general.

The full table of contents can be found here.

EESC Opinion on the Brussels I Review published yesterday

The Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' was published yesterday (OJ, C, 218). Though the Committee warmly welcomes the Commission's proposal and supports it, it nevertheless critisises the following aspects:

.- the exclusion of collective proceedings when abolishing the exequatur (art. 37)
.- the extent of the defamation exception (art. 37)
.- the drafting of the new mechanism for legal cooperation (art. 31)

.- the vagueness of the requirement that ‘coordination’ should be ensured between the court with jurisdiction on the substance and the court in another Member State which is seised with an application for provisional measures.
.- the insuficiency of the new rule on the recognition of arbitration agreements

According to the EESC, the Commission should also

.- consider amending Article 6 of Regulation 44/2001 in order to allow actions brought by different claimants to be dealt with collectively

.- keep a particularly close eye on the conduct of courts in the Member States, to ensure that the principle of mutual recognition of judgments is implemented correctly whenever decisions are made on jurisdiction for reasons of public policy

.- promote the development of a communication or guide on how to interpret Article 5 of the proposal

.- review the wording of Art. 24, in order to strengthen the legal position of consumers and employees and ensure that the same procedure is followed, regardless of which court has jurisdiction.

Simon on Fair Use under the UDRP

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

> *For over ten years, the Uniform Domain-Name Dispute-Resolution Policy (UDRP) has resolved nearly 20,000 domain-name disputes brought before the World Intellectual Property Organization (WIPO), a United Nations organization that arbitrates UDRP disputes. The UDRP allows the holder of a legally protectable trademark to initiate proceedings to cancel the domain name or have it transferred to the trademark owner. Domain-name holders, though,*

have a number of defenses, including using their domain names in a noncommercial, fair manner. Although several empirical studies have analyzed various aspects of the UDRP, none has specifically examined this fair use defense.

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

Fellowship in Collective Redress

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

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

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

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

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

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

Here is the contents:

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

The designation of the applicable law by European private international law rules is limited by four factors: limits of competence, limits of conflict of laws, limits of substantive law and limits of procedural law. The present article analyses these limits. The exercise of legislative competence by the European Union according to art. 81 (2) lit. c), (3) TFEU is governed by the principles of conferral, subsidiarity and proportionality. Furthermore, the constitutional law of the member state influences the genesis of European private international law rules. Limits of conflict of laws are imposed on the designation of the applicable law by European primary law, public international law and by the domestic law of the member states. The restrictions imposed by substantive law are mainly based on the public policy exemption. International civil procedure law demands for coordination with private international law. Both the procedural treatment of conflict-of-law rules as well as the rules on the proof of foreign law impact how and to what extent the applicable law is actually

applied in court. As regards the creation of a European area of justice, the author underlines that the mere harmonization of conflict of law rules will not be enough to realise this goal. He goes on to discuss the establishment of a special court for civil and private international law matters based on art. 257 TFEU.

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

The German Council of Private International Law contributes to the ,,European Commission Green Paper: Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records – (COM [2010] 747 final)". The Council is an autonomous academic institution, which reports to the German Ministry of Justice. A ,,mutual recognition" of the content of administrative documents, notarial acts, civil status records within civil status matters involves complicated legal issues. The advantage of the unification of the rules on the law applicable to civil status situations, when compared with the so-called principle of ,,automatic recognition", is that a unification would uniformly determine the applicable law in all EU Member States and thereby guarantee identical determination of the civil status of a person throughout the Union. The underlying cause of the divergent approaches taken by EU Member States would be eliminated. This would not be the case with a simple ,,automatic recognition". There is also the risk that an uncoordinated ,,automatic recognition" would encroach on the sovereignty of Member States over their citizens in the field of nationality. Therefore uniform rules on conflict of laws are considered to be an essential prerequisite for the movement of public documents and the application of a principle of mutual recognition in relation to civil status matters.

- ***Heinz-Peter Mansel****: "* Kritisches zur „Urkundsinhaltsanerkennung""
- ***Christoph Althammer***: "Die prozessuale Wirkung materiellrechtlicher

Leistungsortsvereinbarungen (§ 29 Abs. 1, 2 ZPO)" – – the English abstract reads as follows:

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

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

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

The ECJ has effectively overruled its own decision from 2006 concerning the very same proceedings. The court now held that national procedural rules as regards substitution of defendants must not be applied in a way which permits a producer to be sued after the ten-year period of Art. 11 of the Product Liability Directive. This holding is the corollary of interpreting the directive as aiming at full harmonization. Legal certainty is severely undermined, however, by the ECJ postulating an inconsistent and unprincipled exception as regards closely controlled suppliers of the producer.

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

The preliminary procedure in case Purrucker I, conducted by the ECJ in a very convincing way, has lead to clarifications as to fundamental questions concerning the enforcement of provisional measures in parental responsibility cases in other EU Member States. Where a court of a Member State, which has

(expressly) founded its jurisdiction on one of Articles 8–14 of Council Regulation (EC) No 2201/2003, adopts a provisional measure concerning custody, recognition and enforcement of this measure in all other Member States is governed by Article 21 et seq. of the Regulation. In contrast, where a court of a Member State, which has not based its jurisdiction as to the subject matter on Article 8 et seq., adopts a provisional measure under the conditions of Article 20, Article 21 et seq. of the Regulation are not applicable.

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

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

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

Since the coming into force of Regulation (EC) 805/2004 creating a European Enforcement Order for uncontested claims it has been highly discussed in

German literature and jurisprudence, under which circumstances a decision on the costs of litigation can be issued as European Enforcement Order. The problem arises from the fact that according to German law the decision on the costs is rendered in a two-step-procedure. In the first step the court which decides on the merits of the case only determines which of the parties has to bear the costs of litigation, so called Kostengrundentscheidung. In a second step, in a separate procedure according to § 104 ZPO, the court determines the amount of the costs the debtor has to pay, so called Kostenfestsetzungsbeschluss. Whether the Kostenfestsetzungsbeschluss can be issued as European Enforcement Order was the subject of a case, the OLG Nürnberg had to adjudicate on.

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

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

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

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

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

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

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

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

the defamation defendant's free speech expectations in accordance with U.S. federal and state constitutional standards. This article analyzes the new libel tourism legislation on the state and federal level and describes their implications.

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

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

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

> "The principal issues presented by the appeal are whether a corporation or any other entity that is not a natural person (the defendant is a limited liability company rather than a conventional business corporation) can be liable under the Alien Tort Statute, and, if so, whether the evidence presented by the plaintiffs created a triable issue of whether the defendant has violated *customary international law*.
>
> The issue of corporate liability under the Alien Tort Statute seems to have been left open in an enigmatic footnote in Sosa, 542 U.S. at 732 n. 20 (but since it's a Supreme Court footnote, the parties haggle over its meaning,

albeit to no avail). All but one of the cases at our level hold or assume (mainly the latter) that corporations can be liable (…). The outlier is the split decision in Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), which indeed held that because corporations have never been prosecuted, whether criminally or civilly, for violating customary international law, there can't be said to be a principle of customary international law that binds a corporation.

The factual premise of the majority opinion in the Kiobel case is incorrect. (…)

And suppose no corporation had ever been punished for violating customary international law. There is always a first time for litigation to enforce a norm; there has to be. (…)

We have to consider why corporations have rarely been prosecuted criminally or civilly for violating customary international law; maybe there's a compelling reason. But it seems not (…)

The court is satisfied that corporate liability is possible under the Alien Tort Statute".