To steward or not to steward, that is the question

Some thoughts on the ATS by James Armstrong. James has been working internationally as a business process coordinator responsible for a major Oil and Gas company since 2000 in countries such as Korea, Angola, Malaysia and more recently Papua New Guinea. He is currently working as an advisor, and completing an LLM on international law with a focus on Conflicts of law and the application and use of the ATS.

The Alien Tort Claims Act (ATS) was passed in 1789 and did in effect sit on the statute shelves for nearly two centuries, until the Filartiga case. The main impact of this Act has been to grant US Federal Courts the ability to hear cases dealing with private claims for a reasonable number of international law violations, provided they are in breach of the Law of Nations or a treaty of the United States. The synergy between ATS and conflicts of law issues, I would suggest, have now come to forefront; forum shopping has been seen as a defining factor with the applications of ATS and the US courts have recently, in the Kiobel case, provided us rules, namely the "touch and concern", that would seem, prima facie, to bring ATS in line with the British rules on conflicts of law. After all jurisdictional questions are about selecting the correct forum.

A recent case which has some significance here is *Al Shimari v CACI*[1], where Iraq national brought a case against CACI and L-3 services for torts, namely torture, war crimes, crimes against humanity, sexual assault and cruel, inhuman treatment[2]. The plaintiffs were former prisoners at the Abu Ghraib prison in Iraq; this prison was run and managed by US military personnel and or their contractors from 2003 until 2006; it has now been closed[3]. The plaintiffs claim that they suffered mistreatment at the hands of the servicer personnel and contractors responsible for the management of the prison and the prisoners. This case is significant as Justice Breyer[4] made the statement that the "*claim*" must "*touch and concern*", therefore extended, correctly so, the rationale behind the application of the "*touch and concern*" rule developed by *Kiobel*. He went further to look at the parties and indicated that that US Congress had taken a strong

position against the offense of torture and had created a statute dealing specifically with Torture, the Torture Victims Protection Act 1991. The key distinction between *Kiobel* and *CACI* is that *CACI* is an American corporation; the senior management are located within America; the employees for the prison where recruited in America; the senior management were made aware of the actions and events that had taken place in the prison. Adding all these elements up Justice Breyer concluded that congress has taken a strong position against torture and wanted to ensure that any American participating in such act would be brought to justice[5]. America should steward Americans: citizenship is a key factor.

Recently the American courts have applied the rules initially defined within *Kiobel* and subsequently applied and developed in *CACI*[6] to the *Chevron*[7] case. On reading this case the failings of the court to apply their own rules became apparent: they have failed to take into consideration not only the application of forum selection, as per their own rulings, but they have also failed to demonstrate a desire to steward their own, Americans, when their actions have, or may have, breached internationally accepted standards and laws. Stewardship of a countries individual, both natural and legal, should, I would suggest, be paramount when looking at the conflicts and trying to assess jurisdictional applications.

In my view, the US Courts are now demonstrating a desire -or at least are heading down a route- to remove the rational and possibility of giving jurisdiction for actions under ATS as opposed to looking to steward and control the actions of their own citizens, be these natural or legal. I was appalled to read the views of the Second Circuit Court of Appeals in *Mastafa v. Chevron Corp*[8]. This, as I am assure your are aware, was a joint case with Chevron and BNP claiming that they had aided and abetted human rights abuses by the Government of Iraq during the Saddam Hussein's regime. This case was brought under the ATS; the court looked to apply the decision from *Kiobel*[9] and stated that the citizenship, element as identified in *CACI*[10], was not relevant. They reiterate that for a case to be given jurisdiction by ATS it must a) touch and concern the United States with sufficient force to displace the presumption against extraterritoriality and: b) demonstrate that the conduct, prima facie, breaches a law of nations or treaty of the United States.

The main issue, I would suggest, for the application of ATS is now the

disagreement between the second and fourth circuit on the application of citizenship -the second circuit court clearly stating that the citizenship should have no bearing on the application of "*touch and concerns*".

I would suggest this is wholly wrong: a given country should take responsibility for stewarding the actions of their own citizens, especially when the other country has a less than acceptable legal system. I believe this view is in alignment with the UK courts and the views expressed by Justice Breyer in the CACI case; I would further suggest that this should be of paramount importance, and therefore this is a fundamental failing by the court that will adversely affect the ability of the courts to hear cases under ATS.

In the recent case of Abdul-Hakim Belhaj[11] the [UK] Court of Appeal has clearly indicated that there if no remedy is left open the home country should be able to hear the case; they were actually considering action against UK officials and agencies, here we are looking for the American courts to steward their own citizens, both legal and natural. I would go further and state that the American courts could well learn from the view taken by the [UK] Court of Appeal, who considered the implications of not accepting jurisdiction, and stated that this would have an adverse effect on the international view on British justice[12].

I therefore put it forward that the courts have not applied the findings in *Kiobel* correctly, as discussed and applied by *CACI*. *Kiobel* states that a "*mere corporate presents*"[13] should not be an indication of jurisdictionally liability; Shell only has a minor office in the USA and is in fact a Dutch company, not a wholly owned American corporation. This view is correct: a mere presence should not give arise to jurisdiction; however, Chevron has more than a mere presence and therefore the Court is in error regarding this element. Chevron can be identified as being an American corporation all the way back to 1876[14], unlike Shell which shows that its history and heritage is outside the USA[15].

At the end of the day, it seems that major corporations and the dollar are openly controlling the US courts: *CACI* is a small company with lots of media attention; *Chevron* is a major international oil company that brings in billions of dollars into the American market.

These are my views on what I can only describe as a vibrant and interesting time, although things are not moving in the right direction here. This reminds me of a

favorite phrase of mine

“The only thing necessary for the triumph of evil is for good men to do nothing.” ? Edmund Burke

[1] Suhail Najim Abdullah Al Shimari; Taha Yaseen Arraq Rashid; Salah Hasan Nusaif Al-Ejaili; Asa’ad Hamza Hanfoosh Al Zuba’e v CACI Premier Technology, Inc. CACI International, Inc. 13-1937

[2]
www.business-humanrights.org/en/abu-ghraib-lawsuits-against-caci-titan-now-I-3-0#c17777

[3]
http://www.nytimes.com/2014/04/16/world/middleeast/iraq-says-abu-ghraib-prison-is-closed.html?_r=0

[4] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013) Justice Breyer Opinion, Chapter 2 , B

[5]Suhail Najim Abdullah Al Shimari; Taha Yaseen Arraq Rashid; Salah Hasan Nusaif Al-Ejaili; Asa’ad Hamza Hanfoosh Al Zuba’e v CACI Premier Technology, Inc. CACI International, Inc. 13-1937 page 31

[6] Suhail Najim Abdullah Al Shimari; Taha Yaseen Arraq Rashid; Salah Hasan Nusaif Al-Ejaili; Asa’ad Hamza Hanfoosh Al Zuba’e v CACI Premier Technology, Inc. CACI International, Inc. 13-1937

[7] Mastafa v. Chevron Corp., No. 10-5258-cv, 2014 WL 5368853 (2d Cir. Oct.23, 2014)

[8] Mastafa v. Chevron Corp., No. 10-5258-cv, 2014 WL 5368853 (2d Cir. Oct.23, 2014)

[9] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013)

[10] Suhail Najim Abdullah Al Shimari; Taha Yaseen Arraq Rashid; Salah Hasan Nusaif Al-Ejaili; Asa’ad Hamza Hanfoosh Al Zuba’e v CACI Premier Technology, Inc. CACI International, Inc. 13-1937

[11]Belhaj & Boudchar -v- The Rt. Hon Jack Straw, Sir Mark Allen (CMG) and others [2014] EWCA Civ 1394

[12] Belhaj & Boudchar -v- The Rt. Hon Jack Straw, Sir Mark Allen (CMG) and others [2014] EWCA Civ 1394, para 120

[13] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013) Para 14 IV

[14] http://www.chevron.com/about/history/1876/

[15]http://www.shell.com/global/aboutshell/who-we-are/our-history/the-beginnings.html

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Third Issue of 2014's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The third issue of 2014 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features one article, the transcript of a public interview celebrating the 120th Anniversary of The Hague Conference on Private International Law, and three comments.

Cristina Campiglio, Professor at the University of Pavia, examines the issue of assisted procreation and recent jurisprudence in **"Norme italiane sulla procreazione assistita e parametri internazionali: il ruolo creativo della giurisprudenza"** (Italian Provisions on Assisted Procreation and International Parameters: The Creative Role of the Courts).

Law No 40/2004 on medically assisted conception was adopted to fill-in a major

gap in the Italian legal system, putting an end to the so-called "procreative wild west". However, its provisions had left the majority's expectations largely unfulfilled. The decade following the entry into force of the law was marked by a number of – national and international – judicial decisions which produced a progressive attrition of the law's prohibitions. The interaction between the Italian Constitutional Court and the European Court of Human Rights has thus made it possible for judges to consent – in part and as a matter of urgency – to requests of couples who, being carrier of a genetic disease, are willing to have children while avoiding to incur into the risk of transmitting the disorder. Pivotal was certainly decision No 151/2009 whence the Constitutional Court relativized the protection of the embryo. For their part, in 2012 the European Court judges emphasized the disproportion in the Italian legislation of the protection of the embryo, as compared to the other interests at stake. This creative case-law, by assimilating supranational principles, sacrifices the certainty of the law in the name of equitable justice, overcoming the inaction of the Italian Parliament.

Fausto Pocar, Professor Emeritus at the University of Milan and Editor in Chief of the *Rivista* and *Hans van Loon*, Secretary General of the Hague Conference, in the transcript of a public interview walk us through the many and significant achievements of The Hague Conference on Private International Law in **"The 120th Anniversary of The Hague Conference on Private International Law"** (in French and English).

On the occasion of a workshop convened for the celebration of the 120th Anniversary of the Hague Conference on Private International Law, the Editor in Chief of the Rivista Fausto Pocar and the Secretary General of the Hague Conference Hans van Loon held a public interview on the achievements of the Conference – from its foundation, to the establishment of the Permanent Secretariat in 1955, to modern days – as well as its future goals. The detailed report of the interactive and captivating dialogue that ensued to this encounter spans from the efforts and challenges of transforming the Conference into a global organization, to the Conference's achievements in the unification of conflict of law rules and in the effective enhancement of inter-State cooperation in civil procedure matters as well as in judicial and administrative assistance. Providing valuable examples of the Conference's tangible impact on the States' effort to establish and achieve common goals in private international law

matters, this interview provides a precious and rare insight on the Conference's activity and mechanisms shared by two of the most significant contributors to the Conference's activity in modern times.

In addition to the foregoing, three comments are featured:

Eva De Götzen, PhD at the University of Milan, addresses cross-border employment contracts and relevant connecting factors in light of the ECJ's recent case-law in **"Contratto di lavoro, criteri di collegamento e legge applicabile: luci e ombre del regolamento (CE) n. 593/2008"** (Employment Contract, Connecting Factors and Applicable Law: Lights and Shadows of Regulation (EC) No 593/2008).

The article faces several issues concerning the choice-of-law rules, provided for by the Rome Convention and the Rome I Regulation, in employment matters. In the first place, an overview of the special connecting factors devoted to employment contracts set forth by the abovementioned uniform instruments is given and their current interpretation (see the Koelzsch, Voogsgeerd and Schlecker cases) is analyzed. In this respect, the article focuses on the relationship between the connecting factors of the locus laboris and the engaging place of business as well as on the interpretational difficulties arising from the application of the so-called escape clause. Moreover, the issue concerning the role played by some Recitals of the Rome I Regulation and by collective agreements in determining the law applicable to relationships between private parties in addition to the rules at hand will be addressed as well. The final question the article refers to is to assess whether the application of the conflict-of-laws rules in employment matters restricts the fundamental freedoms provided for by the EU Treaties or whether it strikes a balance between the free movement of workers and services in the EU internal market and the protection of the weaker party.

Giovanni Zarra, PhD candidate at the University of Naples "Federico II", analyses anti-suit injunctions in jurisdictional conflicts within the European boarders and in the international context in **"Il ricorso alle anti-suit injunction per risolvere i conflitti internazionali di giurisdizione e il ruolo dell'international comity"** (Recourse to Anti-Suit Injunctions to Solve Conflicts on Jurisdiction and the Role of International Comity).

This article analyses the anti-suit injunction, an equitable tool used by common law courts in order to restrain a party from commencing or continuing a national judgement or an arbitral proceeding abroad, the issuance of which is seen by many foreign courts as an offence and an attempt to their sovereignty. After having described the development and the main features of the anti-suit injunction, this article focuses on the possibility and the opportunity for English courts to issue anti-suit injunctions in jurisdictional conflicts within the European boarders and in the international context. With particular regard to intra-EU conflicts of jurisdiction, this article mainly focuses on the effects of the new Regulation (EU) No 1215/2012, whose Recital 12, according to certain scholars, might be interpreted as recognising again the power of English courts to issue anti-suit injunctions after the Court of Justice of the European Union forbade the use of such orders under Regulation (EC) No 44/2001. This article argues that, in a context of global economy, anti-suit injunctions should be used only in exceptional circumstances, in particular when their issuance is in accordance with the principle of international comity, which is proposed as the criterion that should usually guide common law judges when considering issuing an anti-suit injunction. In light of the above, the article eventually tries to make a practical assessment of the situations in which the use of anti-suit injunctions is permitted by the principle of international comity.

Cristina Grieco, PhD Candidate at the University of Macerata, addresses the new Italian legislation on e-proceedings in **"Il processo telematico italiano e il regolamento (CE) n. 1393/2007 sulle notifiche transfrontaliere"** (Italian E-Proceedings and Regulation (EC) No 1393/2007 on the Service in the Member States of Documents in Civil and Commercial Matters).

This paper analyzes the new Italian legislation on e-proceedings and the admissibility of the use of electronic instruments for the transmission of judicial documents in compliance with European requirements. The enquiry starts from the scope of application of Regulation No 1393/2007, as outlined by the ECJ in its Alder judgment. First, this paper provides an overview of the rules laid down by the Italian Code of Civil Procedure concerning cross-border notifications, in order to analyze the impact of the legislation on e-proceedings on existing domestic legislation. Then, this study attempts a brief overview of the level of computerization of justice achieved by the Member States and of the initiatives undertaken by the European institutions in this respect. Lastly, the present

work explores the possibility of encompassing the tools of electronic communication within the scope of application of Regulation No 1393/2007, with regard to a literal and a systematic interpretation of the relevant provisions. The enquiry focuses particularly on the possibility, at present, to use the tools available for the computerized transmission of judicial documents within the European judicial area and on whether any obstacles to such use are attributable to legal grounds rather than to purely technical considerations.

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale. This issue is available for download on the publisher's website.

The French Cour de cassation and the « Thalys babies »

I am glad to post this comment by F. Mailhé, Associate Professor Paris 2, Panthéon-Assas

On September 22, 2014, the French *Cour de Cassation* (Supreme Court for civil and criminal matters) published two prejudicial opinions on the validity, in a same-sex couple, of the adoption by a woman of a child born to her wife thanks to a foreign medically-assisted procreation (Avis n°15010 and 15011, ECLI:FR:CCASS:2014:AV15010 and ECLI:FR:CCASS:2014:AV15011).

Despite its relatively restricted purpose, the French Same-Sex Marriage Act of May 17, 2013, just starts to give its first private international law consequences (On that law and private international law, see e.g. H. Fulchiron, *JDI* 2013. 1055 ; P. Hammje, *RCDIP* 2013. 774 ; S. Godechot and J. Guillaumé, *D.* 2013. 1756).

Indeed, avoiding any fundamental change in French family law, the Act was only meant to enable same-sex couples to get married. As a consequence, same-sex couples are for example still not allowed to get medically-assisted procreation

(MAP) techniques by Article 2141-2 of the Public Health Code ("Code de la Santé Publique", CSP), according to which:

"The purpose of [MAP] is to remedy a couple's infertility which pathological character was medically diagnosed or to avoid the transmission of a particularly severe disease to the child or to the other member of the couple".

Some things changed in adoption law, though. Among other provisions, in order for lonely parents getting married to provide the child with a second parent when the other parent was unknown or deceased, the 2013 Act allowed for their husband or wife to adopt the child in those situations.

The adoption procedure has therefore been used by a number of women in situations where the father was not known… because the baby was born from an insemination with anonymous donor, an MAP, abroad, especially in Belgium. Contrary to France, Belgium had authorized MAP for lonely mothers since July 2007. Called "Thalys babies", by the name of the train which connects Paris to Brussels, a certain number of babies were born from such travels in the last years.

In July, almost 300 files for adoption had apparently been enrolled in different courts of first instance in France, and the reaction and interpretation of the law was quite diverging. For most, the interest of the child and the evolution of the law asked for the adoption to be allowed (see e.g. TGI Nanterre, July 8, 2014, *D*. 2014. 1669, note Ph. Reigné). For some others, to the contrary, the situation was a plain fraud, since it was the conclusion of a procedure by which the couple simply tried to bypass different French law prohibitions (MAP by a lonely woman or same-sex couple). After the press echoed the emotion of couples blaming a "two tier justice", two courts (Avignon and Poitiers) decided to use a specific prejudicial procedure to ask the *Cour de cassation* to issue an opinion on the matter.

On Sept. 22, 2014, the *Cour de cassation* answered in its uniquely concise style:

"Having resort to medically-assisted procreation, in the form of artificial insemination with anonymous donor abroad, does not bar the mother's wife from adopting the child born from this procreation, as long as the adoption's legal conditions are fulfilled and that it is in line with the child's interest".

The arguments in defense of the prohibition to adopt were indeed rather weak and it is no surprise that this decision of autumn 2014 was in favor of the adoption.

First, the prohibition of Article 2141-2 CSP is of ambiguous nature. Instead of regulating MAP as a filiation issue, it is regulated as a technical one, and destined to medical professionals, not to parents. Its consequence is therefore not a civil one for the parents, but a sort of disciplinary penalty for the professionals. Designed for purely domestic matters, it is therefore not as assertive as it needs to be in international matters: Does it concern the persons getting an MAP abroad, or is it just organizing French clinics and hospitals' life?

Second, and as a consequence, contrary to the sister question of surrogacy, the international public policy is not at stake. Its foundation in Article 2141-2 CSP is too fragile. Actually, the problem does not seem to come so much from the foreign MAP itself than from the fact that a French mother, with no ties to Belgium, went abroad to get what she could not get in France, i.e. a problem of fraud. This is a much harder question in purely philosophical and political terms. What does "forbidden in France" mean in that context? Should a person be allowed to "internationalize" the situations to bend the law to its will? One of the arguments of counsel for defense in those cases was that freedom of movement within Europe allows for such "legal optimization". If the Court of Justice has approved the reasoning in company law since Centros (Aff. C-212/97), and has peeped into family and personal matters with cases such as Garcia-Avello (Aff. C-148/02), pure choice of law in family matters (and MAPs) does not seem the rule yet, if only because the European private international law regulations in family matters have not provided for such a complete freedom. Unfortunately for the debate, it comes at a time when France was already punished on a neighboring matter where the *Cour de cassation* had used the same rationale, so that, in the eyes of that Court, the door to negotiations seemed closed.

As readers of Conflictoflaws.net have noticed, in *Menesson vs. France* and *Labassée vs. France*, the European Court of Human Rights (ECHR) recently condemned France for refusing to recognize the filiation of the "parents of intent" (here an heterosexual couple) with the children born in the United States from a surrogate mother. The decisions are actually not as assertive as it has been said in the press, the ECHR judging only that the children should each get at least recognition of their filiation with their father (who happened to be both father of

intent and biological father). But the ECHR paid scant regard, in both cases, to the argument the *Cour de cassation* has used in more recent ones : fraud.

In 3 decisions of Sept. 13, 2013 and March 19, 2014 on another foreign surrogacy case, the *Cour de cassation* had preferred to argue that the parents of intent could not avoid the French interdiction of gestational surrogacy by going to get one in the United States and then ask recognition of the American decision in France (on those decisions, see e.g. L. Gannagé, *RCDIP* 2013. 587 ; J. Guillaumé, *JDI* 2014. 1 ; J. Heymann, *JCP* 2014. 613 ; H. Fulchiron et Ch. Bidaud-Garon, *D*. 2014. 905). This change of rationale (from international public order to fraud) was understood by some authors as showing a change in the strategy of the *Cour de cassation* to persuade the ECHR who was already seized of the *Menesson* and *Labassée* cases. But if this was the aim, it failed. Its case-law was condemned nonetheless.

The consequence of the *Menesson* and *Labassée* cases on the issue of the adoption of a child born by artificial insemination with anonymous donor was of course not obvious, but the analogy is strong. In both cases, parents had gone abroad to get a child through a medical procedure they could not get in France. How could the *Cour de cassation* therefore decide otherwise than for its validity, when the value argument (through international public order) was so weak, and when the political argument (fraud) had already been knocked down by the European Court of Human Rights for an analog and much stronger case?

One last word, though. This was just a prejudicial opinion. Opinions by the *Cour de cassation* are not issued by plenary sessions of the Court, and do not bind its judging Chambers. It is therefore possible that (as has been seen in other matters) some Chambers will not follow the Opinion and decide otherwise. But, after the EHCR decision in *Menesson* and *Labassée*, after the refusal of the French government to appeal of those decisions (the government actually seems favorable to it), after this Opinion by some members of the *Cour de cassation*, and if the evolution of the French society keep on the same way in the years to come, years which would be needed before the *Cour de cassation* may be seized in its judging formation of the matter, such a reluctance would certainly go against the tide, if not too late, after the tide.

Reminder: Conference on Minimum Standards in European Civil Procedure Law

As mentioned earlier on this blog, Matthias Weller from EBS Law School and Christoph Althammer (now) from the University of Regensburg will host a conference on minimum standards in European Civil Procedure in Wiesbaden on 14 and 15 November 2014. Further information is available on the conference website. Registration is still open.

The conference language will be German.

The programme reads as follows:

Friday, 14 November, 2 – 4 p.m.:

Welcome remarks
Prof. Dr. Matthias Weller, EBS Law School

Minimum standards und core procedural principles from a German law perspective: European Convention on Human Rights/German constitutional law/German national law
Prof. Dr. Christoph Althammer, University of Regensburg

Minimum standards und core procedural principles from a French law perspective: European Convention on Human Rights/French constitutional law/French national law
Prof. Dr. Frédérique Ferrand, Université Jean Moulin, Lyon

Friday, 14 November, 5 – 7 p.m.:

Minimum standards und core procedural principles from a UK law perspective: European Convention on Human Rights/UK constitutional law/UK national law

Prof. Dr. Matthias Weller, EBS Law School

Transnational synthesis: ALI/UNIDROIT Principles of Civil Procedure
Prof. Dr. Thomas Pfeiffer, Ruprecht-Karls-University Heidelberg

Friday, 14 November, 7 p.m.:

Panel Discussion

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Saturday, 15 November, 9 – 11 a.m.:

Minimum standards and procedural principles in criminal law proceedings under European influence
Prof. Dr. Michael Kubiciel, University of Cologne

Minimum standards and procedural principles in administrative law proceedings under European influence
Prof. Dr. Andreas Glaser, University of Zurich

Saturday, 15 November, 11.30 a.m. – 1.30 p.m.:

Minimum standards and procedural principles in public and private antitrust law proceedings under European influence
Prof. Dr. Friedemann Kainer, University of Mannheim

Minimum standards and procedural principles in intellectual property law under European influence
Prof. Dr. Mary-Rose McGuire, University of Mannheim

Saturday, 15 November, 2.30 – 3.30 p.m.:

European law synthesis: Minimum standards and procedural principles in the aquis communautaire/ conclusions for European Principles of Civil Procedure
Prof. Dr. Burkhard Hess, Director of the Max Planck Institute Luxemburg for International, European and Regulatory Procedural Law

Saturday, 15 November, 3.30 p.m.:

Panel Discussion

Second Issue of 2014's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The second issue of 2014 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features one article and three comments.

Angela Del Vecchio, Professor at LUISS – Guido Carli University, addresses recent cases of conflict of criminal jurisdiction and piracy in **"Il ricorso all'arbitrato obbligatorio UNCLOS nella vicenda dell'*Enrica Lexie*"** (Recourse to UNCLOS Compulsory Arbitration in the *Enrica Lexie* Case)

> *The* Enrica Lexie *incident has given rise to two disputes between Italy and India, one concerning the violation of the United Nations Convention on the Law of the Sea ("UNCLOS") rules on piracy and criminal jurisdiction in the case of an incident of navigation on the high seas, and the other concerning the violation of the international rules on the sovereign functional immunity of military personnel abroad. Regarding the first dispute, there is a difference of opinion between Italy and India as to the interpretation of the UNCLOS provisions that govern the jurisdiction of domestic courts to adjudicate on the merits of the case. This has led to a conflict of jurisdiction between the two States that, as examined in this article, could be resolved by recourse to the compulsory arbitration provided for in Annex VII to UNCLOS. Such arbitration*

may be commenced even by just one of the parties. By contrast, as concerns the second dispute recourse to compulsory dispute resolution mechanisms would appear quite problematic as a result of the gradual erosion of the principle of sovereign functional immunity of State organs.

Georgia Koutsoukou, Research Fellow at the Max Planck Institute Luxembourg, and *Nikolaos Askotiris*, Ph.D. Candidate at the International Investment Law Centre Cologne, examine waivers of sovereign immunity in light of the most recent jurisprudence in **"Tightening the Scope of General Waivers of Sovereign Immunity from Execution"** (in English)

The establishment, under international law, of the proper interpretive approach to broadly phrased waivers of sovereign immunity from execution is an unsettled issue, which was not addressed in legal theory or practice until recently. However, this issue became practically relevant in the wake of certain hedge funds' strategy to seek the collection of defaulted sovereign debt in any available jurisdiction. Most important in this respect are the recent judgments of the French Court of Cassation in NML v. Argentine Republic*, where the Court held, in fact, that, under customary international law, waivers of execution immunity may not extend to a particular category of state assets, unless expressly referred to. The present article examines the accuracy of the Court's proposition in light of the major parameters for the determination of the relevant standards of interpretation: the 2004 UN Convention on Jurisdictional Immunities of States and Their Property as well as the pre-existing state practice,* i.e. *the settled case law regarding the interpretation of general immunity waivers in light of the diplomatic and consular law principle* ne impediatur legatio*, and the submission of execution immunity waivers to certain restrictions under domestic statutes. The Authors take the view that the interpretive criteria of the Vienna Convention on the Law of Treaties are applicable by analogy to immunity waivers inserted in government bonds, leading to the adoption of a rather narrow approach. It is further suggested that, under the well-established principle that the plaintiff bears the burden of proof with respect to any exception to execution immunity, the "asset specificity" requirement may reasonably be seen as the allocation of the risk of ambiguity of immunity waivers to the judgment creditor. Finally, the Authors argue that the restrictive interpretation of general immunity waivers may serve as a functional substitute for lacking*

clear-cut international law rules on state insolvency, insofar as no international law rule protecting good faith restructuring procedures from the speculative tactics of vulture funds is yet in force.

Antonio Leandro, Researcher at the University of Bari, addresses the impending reform of EC Regulation No 1346/2000 in **"Amending the European Insolvency Regulation to Strengthen Main Proceedings"** (in English)

EC Regulation No 1346/2000 on insolvency proceedings allows for the coexistence of different proceedings with respect to the same debtor. This engenders certain problems in terms of efficiency of the insolvency administration within the European Judicial Space, thus menacing the "effet utile" of the Regulation. This article focuses on such problems, explaining the shortcomings which affect the Regulation and wondering whether ECJ managed a solution for them. As a matter of principle, preventing the opening of secondary proceedings seems in several cases to be a suitable means for protecting the main proceedings' purposes. However, at the same time, not opening secondary proceedings could hamper the interests of local creditors, which rely on them to safeguard rights and priorities on the grounds of the local lex concursus*. The Author addresses the main aspects of this tension. The Regulation is under revision as result of the 2012 Proposal of the European Commission, which,* inter alia*, aims to strike a balance between the aforesaid interests at odds. In this paper, the Author carries out a critical appraisal of the envisaged amendments, taking also into account the recent reactions of the other European Institutions, so as to ascertain whether they could really achieve such a balance.*

Arianna Vettorel, Fellow at the University of Padua, discusses the protection of the unity of one's personal name in **"La continuità transnazionale dell'identità personale: riflessioni a margine della sentenza *Henry Kismoun*"** (Pesonal Identity's Continuity across Borders: Remarks on the *Henry Kismoun* Judgment")

This paper focuses on the novelties introduced by the European Court of Human Rights' judgment in Henry Kismoun v. France*, which concerns the issue of transnational continuity of names: in* Henry Kismoun v. France *the Court recognized the need of protecting the unity of a personal name on the basis of Article 8 ECHR, also with regard to the secondary name conferred on*

a person, in the State of the person's second citizenship. The novelties introduced by this judgment could influence the future jurisprudence of the European Court of Justice which has granted protection to the unity of the name firstly attributed on the basis of the EC Treaty (now TFEU) without referring to fundamental human rights. At the domestic level, fundamental human rights have been used to grant protection to transnational continuity of names of non EU citizens by the Italian courts, first, and by the Minister for Internal Affairs, then. Moreover, Article 8 ECHR constituted the legal basis to grant new Italian citizens the right to maintain the name they were assigned abroad. In addition to introducing new interpretational perspectives about the issue of continuity of name across borders, the above mentioned judgment and the new Italian practice seem to constitute an additional step in the direction of the establishment of the "method of recognition" based on the vested rights theory, and bear a great impact on the issue of continuity of personal status across borders.

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale. This issue is available for download on the publisher's website.

Another Opinion Limiting the Alien Tort Statute

Today, Judge Scheindlin of the United States District Court for the Southern District of New York dismissed a case filed by a class of South Africans against Ford Motor Company and IBM (see here SDNY SAAL. Those companies had been sued under the Alien Tort Statute for allegedly aiding and abetting human rights violations during the Apartheid regime. Put simply, the plaintiffs alleged that Ford and IBM oversaw operations of a subsidiary in South Africa that led to human rights violations in South Africa. Given that the plaintiffs were unable to

plead relevant conduct in the United States that would give rise to a violation of customary international law, the case was dismissed. According to Judge Scheindlin, "That these plaintiffs are left without relief in an American court is regrettable. But I am bound to follow *Kiobel II* and *Balintulo*, no matter what my personal view of the law may be."

In addition to this case, the Eleventh Circuit recently dismissed a case against Chiquita for similar reasons.

Besides these two cases, the Fourth Circuit permitted a case to go forward against CACI Premier Technology for alleged abuse and torture occurring at Abu Gharib. See here for a roundup on the Chiquita and CACI cases.

Latest Issue of RabelsZ: Vol. 78 No 3 (2014)

The latest issue of "Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabel Journal of Comparative and International Private Law" (RabelsZ) has recently been released. It contains the following articles:

- *Klaus Bartels,* **Zum Rückgriff nach eigennütziger Zahlung auf fremde Schuld – Anleihen bei DCFR und common law für das deutsche Recht** (Recourse After Self-serving Payment on Another's Debt – German Law Borrowing From the DCFR and the Common Law) pp. 479-507(29)

> *Under German law, the self-serving payment on another's debt must be regarded as a performance (Leistung) of the payer to the creditor. The payment leads to a discharge of the debt (§ 267 of the German BGB). A cessio legis, being incompatible with discharge, takes effect only under the exceptions provided by law. A third party may claim reimbursement from the original debtor only under the regime of benevolent intervention in another's affairs (Geschäftsführung ohne Auftrag). But the criteria for determining the meaning*

of concepts such as "another's affairs" and the "intention of benefiting another" are widely challenged. And having a recourse plan in mind, also positive effects on the debtor's issues, which could support the criteria of § 683 sentence 1 BGB, are regularly missed.

The prevailing German doctrine is comfortable with the Rückgriffskondiktion (§ 812 (1) sentence 1, alternative 2 BGB), hereby enabling, subsidiarily, recourse to the benefit of the true debtor. The common law has traditionally been averse to this approach. And the Draft Common Frame of Reference avoids this condictio entirely. It is obvious that the English rules on legal compulsion (with their reservation vis-à-vis full restitution as under continental regimes) are substantially convincing. And despite its cautious approach, the Draft Common Frame of Reference offers similar solutions regarding payments of a third party, who did not consent freely (Art. VII.-2:101(1)(b) DCFR). In cases involving, for instance, an "execution interest", a corresponding interpretation is needed, perhaps even an analogous application of this rule. A similar approach is taken by the German doctrine following § 814 alternative 1 BGB by lowering the restitution barrier for cases of pressure caused by a conflict or compulsion. The already very narrow scope of application of the German Rückgriffskondiktion is thus further and markedly circumscribed: The law of unjust enrichment recognizes gratuitous interference in another's affairs only if the intervener presents substantial reasons to let his conduct be regarded as consistent.

- *Tanja Domej*, D**ie Neufassung der EuGVVO – Quantensprünge im europäischen Zivilprozessrecht** (The Recast Brussels I Regulation – Quantum Leaps in European Civil Procedure) pp. 508-550(43)

In November and December 2012, the European Parliament and the Council adopted the recast Brussels I Regulation (Regulation 1215/2012). The main feature of the reform is the abolition of the exequatur procedure. With this step, one of the main political goals in the field of European judicial cooperation, the abolition of ,,intermediate procedures" standing in the way of cross-border enforcement of judgments, has been achieved – at the price, however, of retaining the grounds for refusal of recognition and enforcement. In other respects as well, the changes introduced by the recast Regulation are modest, compared to the Commission's original political intentions. Instead of a "great

leap forward", the European legislator chose incremental change. The plans to extend the rules on jurisdiction to third-state defendants were largely abandoned. The attempt to create new rules on the interface with arbitration was also unsuccessful. The changes with regard to jurisdiction agreements and provisional measures turned out more moderate than proposed by the Commission. This article discusses the innovations introduced by the recast Regulation. It analyses the upsides and downsides of the new rules and points out lost opportunities and avenues for further reforms.

- *Claudia Mayer*, **Ordre public und Anerkennung der rechtlichen Elternschaft in internationalen Leihmutterschaftsfällen** (Ordre public and Recognition of Legal Parenthood in International Surrogacy Cases), pp. 551-591(41)

Through the use of gestational surrogacy modern artificial reproductive technology provides infertile couples with new opportunities to become parents of children who are genetically their own. While surrogacy is lawful under certain circumstances in a limited number of countries worldwide, in others – including Germany – it is prohibited. Consequently, international surrogacy tourism to countries that allow surrogacy, such as India, the United States, or Ukraine, is booming. However, there is no legal regulation at the international level regarding this matter.

Due to the current legal situation in Germany, infertile couples face severe difficulties in view of the recognition by German courts or by public authorities of their legal parenthood of a child born abroad through surrogacy: Not only is surrogacy illegal in Germany, its prohibition is also considered as part of the German ordre public. Based on this perception, German authorities deny the recognition of existing foreign judgments conferring legal parenthood upon the intended parents, as well as the application of more liberal foreign substantive law, thus paving the way for a recourse to German law: According to the relevant German provisions, the woman who gave birth to the child – i.e. the surrogate mother – is to be considered as the legal mother, and her husband is the legal father. As a consequence, in many cases the child does not acquire German nationality by birth and is thus denied the right to a German passport and the right to enter Germany. In the worst case, the child does not acquire any nationality at all, leaving him or her stateless, which constitutes an

unacceptable situation. This article shows that the German ordre publicshould not be considered as an obstacle to the procedural recognition of foreign decisions on legal parentage, nor should it hinder the application of foreign substantive law (designated by the German conflict of law rules) conferring legal parentage on the intended parents. Instead, already de lege lata the welfare of the child must be considered the primary and decisive concern in surrogacy cases. This also results from Article 8 of the European Convention on Human Rights, guaranteeing the right to respect for one's family life.

Regulation at the international level is overdue, and it is to be welcomed that international institutions have started to give attention to the matter. However, until an international consensus is reached, the national legislator should be called upon to revise the German law on descent, and to provide provisions legalizing surrogacy under certain conditions.

- *A. (Teun) Struycken V.M.*, **The Codification of Dutch Private International LAw- A Brief Introduction to Book 10 BW**, pp. 592-614(23)

Guest Post by Professor Vivian Grosswald Curran: The French Supreme Court Reverses Itself in an Islamic Veil Case in « L'Affaire Baby Loup »

Professor Curran is a Distinguished Faculty Scholar and Professor of Law at the University of Pittsburgh School of Law. The Editors are grateful for this

contribution.

France's Cour de cassation decided yesterday (June 25, 2014) in plenary session that a private day care center could terminate an employee for wearing an Islamic veil (or outward sign of another religion) where the latter contravenes company rules deemed to be reasonable and proportionate in terms of the employer's mission. The case had made its way to the Supreme Court once before, in March of 2013. At that time, the Court had held that the employee could not be terminated because the private company's prohibition against outward signs of religion infringed its workers' religious freedom. A key word here is « private.» Where the employer is public, by contrast, the principle of laïcité , or secularism in the public space, is deemed to justify the absence of manifestations of religious conviction.

Yesterday, however, the Court reversed itself, finding for Baby Loup, a rare day care center open seven days a week and around the clock, so that poorer women and especially single mothers, sometimes working night shifts, can find a place for their young children. The Court approved the lower court's finding that the restriction on religious freedom at issue was justified inasmuch as the center was a small business whose employees come into continual contact with young children and their parents, such that the day care center has a legitimate interest in trying to make parents from all backgrounds feel welcome.

A note on French procedure may be of interest. Since the Supreme Court can only in the rarest of cases directly decide the substantive result of cases, in 2013 it had remanded to the Court of Appeals for further decision-making. In France, moreover, courts of appeal need not agree with the Supreme Court in its initial ruling, and the second appellate court rejected the high court's ruling, thus leading the plaintiff to appeal to the Supreme Court a second time, yielding yesterday's decision.

The facts of the case beyond those mentioned above add a potentially pragmatic cast to the plaintiff's quest. She had been an assistant manager of the day care center before taking three years of maternity leave, followed by another three years of parental leave. When she returned after six years, she asked her employer to release her from her contract through a rupture conventionnelle, which would have guaranteed her certain benefits. The company refused, saying she would have to resign. Instead, she returned to work wearing an Islamic veil,

knowing that it violated the company's rules because she had helped draft those rules. When the company then terminated her employment for violating the prohibition, she sued.

A last legal option remaining to the plaintiff is an appeal to the European Court of Human Rights. Baby Loup, meanwhile, according to press accounts, is skirting financial failure due to the accumulated costs of its legal defense.

For those who read French, the decision is Arrêt n° 612 du 25 juin 2014 (13-28.369) – Cour de cassation – Assemblée Plénière – ECLI:FR:CCASS:2014:AP00612, and is available here.

First Issue of 2014's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The first issue of 2014 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features three articles, one comment and two reports.

Alberto Malatesta, Professor at the University Cattaneo-LIUC in Castellanza, examines the interface between the new Brussels I Regulation and arbitration in **"Il nuovo regolamento Bruxelles I-bis e l'arbitrato: verso un ampliamento dell'*arbitration exclusion*"** (The New Brussels I-bis Regulation and Arbitration: Towards an Extension of the Arbitration Exclusion; in Italian).

> *This article covers the "arbitration exclusion" as set out in the new EU Regulation No 1215/2012 of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, recasting the*

old "Brussels I" Regulation, No 44/2001. The new Regulation apparently retains the same solutions adopted by the latter by providing only for some clarifications in lengthy Recital No 12. However, a careful analysis shows that under the new framework the above "exclusion" is more far reaching than in the past and it impinges on some controversial and much debated issues. After reviewing the current background and the 2010 Proposal of the European Commission on this issue – rejected by the Parliament and by the Council –, this article focuses mainly on the following aspects: i) the actions or the ancillary proceedings relating to arbitration; ii) parallel proceedings before State courts and arbitration and the overcoming of the West Tankers judgment stemming from Recital No 12; iii) the circulation of the Member State courts' decisions ruling whether or not an arbitration agreement is "null and void, inoperative or incapable of being performed"; iv) the recognition and enforcement of a Member State judgment on the merits resulting from the determination that the arbitration agreement is not effective; v) the potential conflicts between State judgments and arbitral awards.

Pietro Franzina, Associate Professor at the University of Ferrara, addresses the issue of lis pendens involving a non-EU Member State in **"Lis Pendens Involving a Third Country under the Brussels I-bis Regulation: An Overview"** (in English).

The paper provides an account of the provisions laid down in Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I-bis) to deal with proceedings concurrently pending in a Member State and in a third country (Articles 33 and 34). It begins by discussing the reasons for addressing the issue of extra-European lis pendens and related actions within the law of the European Union. Reference is made, in this connection, to the relevance accorded to third countries' proceedings and the judgments emanating therefrom under the Brussels Convention of 1968 and Regulation (EC) No 44/2001, as evidenced inter alia by the rule providing for the non-recognition of decisions rendered in a Member State if irreconcilable with a prior decision coming from a third country but recognized in the Member State addressed. The paper goes on to analyse the operation of the newly enacted provisions on extra-European lis pendens and related actions, in particular as regards the conditions on which proceedings in a Member State may be stayed; the

conditions on which a Member State court should, or could, dismiss the claim before it, once a decision on the merits has been rendered in the third country; the relationship between the rules on extra-European and intra-European lis pendens and related actions in cases where several proceedings on the same cause of actions and between the same parties, or on related actions, have been instituted in two or more Member States and in a third country.

Chiara E. Tuo, Researcher at the University of Genoa, examines the recognition of foreign adoptions in the framework of cultural diversities in **"Riconoscimento degli effetti delle adozioni straniere e rispetto delle diversità culturali"** (Recognition of the Effects of Foreign Adoptions and Respect for Cultural Diversity; in Italian).

This paper focuses on the protection of cultural identities (or of cultural pluralism) in the context of proceedings for the recognition of the effects of adoptive relationships established abroad. The subject is dealt with in light of the case-law of the European Court of Human Rights (ECtHR) as it has recently developed with regard to Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which, as it is well known, enshrines the right to family life. According to the ECtHR's case-law, a violation of Art. 8 of the Convention may be ascertained when personal status legally and stably constituted abroad are denied transnational continuity. Thus, on the basis of said ECtHR jurisprudence, this paper raises some questions (and tries to provide for the related answers) with regard to the consistency therewith of the conditions that familial relationships created abroad must satisfy when their recognition is sought pursuant to the relevant provisions currently applicable within the Italian legal system.

In addition to the foregoing, the following comment is featured:

Sara Tonolo, Associate Professor at the University of Trieste, **"La trascrizione degli atti di nascita derivanti da maternità surrogata: ordine pubblico e interesse del minore"** (The Registration of Birth Certificates Resulting from Surrogacy: Public Policy and Best Interests of the Child; in Italian).

Nowadays surrogacy is a widespread practice for childless parents. Surrogacy laws vary widely from State to State. Some States require genetic parents to

obtain a judicial order to have their names on the original birth certificate, without the name of the surrogate mother. Other States (e.g. Ukraine) allow putting the name of the intended parents on the birth certificate. In Italy all forms of surrogacy are forbidden, whether traditional or gestational, commercial or altruistic. Act No 40 of19 February 2004, entitled "Rules on medically-assisted reproduction", introduces a prohibition against employing gametes from donors, and specifically incriminates not only intermediary agencies and clinics practicing surrogacy, but also the intended parents and the surrogate mother. Other penal consequences are provided by the Criminal Code for the registration of a birth certificate where parents are the intended ones, as provided by the lex loci actus (Art. 567 of the Italian Criminal Code, concerning the false representation or concealment of status). In the cases decided by the Italian Criminal Courts of First Instance (Milan and Trieste), the judges excluded the criminal responsibility of the intended parents applying for the registration of foreign birth certificates which were not exactly genuine (due to the absence of genetic ties for the intended mothers), affirming in some way that subverting the effectiveness of the Italian prohibition of surrogacy may be justified by the best interests of the child. Apart from the mentioned criminal problems, several aspects of private international law are involved in the legal reasoning of the courts in these cases: among these, probably, the one that the principle of the child's best interests should have been read not like an exception to the public policy clause but like a basic value of this clause, in light, among others, of the case law of the European Court of Human Rights.

Finally, this issue of the Rivista di diritto internazionale privato e processuale features two reports on recent German case-law on private international and procedural issues, and namely:

Georgia Koutsoukou, Research Fellow at the Max Planck Institute Luxembourg, **"Report on Recent German Case-Law Relating to Private International Law in Civil and Commercial Matters"** (in English).

Stefanie Spancken, PhD Candidate at the University of Heidelberg, **"Report on Recent German Case-Law Relating to Private International Law in Family Law Matters"** (in English).

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website of the Rivista di diritto internazionale privato e processuale. This issue is available for download on the publisher's website.

Latest Issue of RabelsZ: Vol. 78 No 2 (2014)

The latest issue of "Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabel Journal of Comparative and International Private Law" (RabelsZ) has recently been released. It contains the following articles:

- *Reinhard Zimmermann*, **Text and Context – Introduction to the Symposium on the Process of Law Making in Comparative Perspective,** pp. 315-328(14)

  On 29 June 2013, on the occasion of the annual meeting of the Association of Friends of the Hamburg Max Planck Institute, a symposium took place on the topic of "The Process of Law Making". This essay is based on the lecture introducing that symposium. First, it provides an overview of the position in Germany: the procedure to be adopted, the different actors involved, and the documents produced in the various stages of law making by means of legislation. Secondly, the essay analyzes the role and influence of legal scholarship in the process of law making by means of legislation. And, thirdly, it reflects on the fact that the application of a statute normally involves two stages. A statute is a text that has been formulated at a specific time by specific persons and in response to, or in contemplation of, specific problems or challenges. It needs to be understood against that background and in that context. This implies a historical approach. Such understanding provides a reliable basis for a critical reflection of that text from today's perspective, and in view of the challenges and problems with which the modern lawyer is faced.

- *Jörg Schmid*, **The Process of Law Making in Switzerland,** pp. 329-345(17)

This paper explores the importance of the law-making process from the Swiss perspective. After explaining the term “preparatory works” (*Gesetzesmaterialien*, “legislative materials”, i.e. materials which document the process of the formation of a new act or section) and distinguishing different types thereof, the article presents the formative players in Swiss legislation. In Switzerland, these are the Federal Council (government) and the Federal Assembly (parliament). The Federal Council submits bills to the Federal Assembly which are explained in the Federal Council’s Dispatch (*Botschaft des Bundesrates*). The Federal Assembly (with its two chambers: the National Council and the Council of States) is the formal legislative power on the federal level. The Federal Council’s drafts and explanations are debated by the Federal Assembly and are often explicitly or implicitly approved. In other cases the texts are modified and the Federal Assembly creates its own rationale. As an exception, a statutory rule does not derive from parliament, but from a majority of the electorate and the cantons (approved popular initiative). As there are no law commissions in Switzerland, it is academic opinion and jurisprudence which indicate the need for legal reforms.The article furthermore explores the meaning of the law-making process for the interpretation and gap-filling of statutes. Firstly, the author explains how Swiss law is interpreted in general. Secondly, he examines how the Federal Supreme Court applies a purposive approach particularly when interpreting recently enacted statutory law. However, the Federal Supreme Court employs the purposive approach in a rather “result-oriented” way (called “pluralism of methods”). Thirdly, the author argues that unpublished preparatory documents (i.e. preparatory works that are not open to the public) must not be taken into account for the interpretation of the law.

- *Guillaume Meunier*, ***Les travaux préparatoires*** **from a French Perspective: Looking for the Spirit of the Law,** pp. 346-360(15)

The French Constitutional Supreme Court attributes a constitutional value to the objective of making the law more accessible and more understandable, in order to facilitate its acceptance by the country’s citizens. The European Court of Human Rights has also ruled that the law must be adequately accessible and that a norm cannot be regarded as “law” unless it is formulated with sufficient precision to enable citizens to

regulate their conduct.Yet, it is admitted that when the letter of the law is obscure, ambiguous, or incomplete, denying the judge the power to search for the *ratio legis* may be considered to be a denial of justice. But where can we find the *ratio legis*, if not in the *travaux préparatoires*?

The identification of a theory of *travaux préparatoires* requires, first of all, a definition of that term. This, in turn, requires an overview of the legislative process, from the informal ministerial drafting phase to the formal phase involving the debates before the two chambers of Parliament. The true spirit of the law, i.e.the will of Parliament, can only, of course, be established by documents that are accessible to the public. The principle of secrecy overshadowing parts of the legislative process presents a considerable obstacle.

The merits of interpreting a statute by reference to its *travaux préparatoires* are disputed. A comprehensive investigation into the legislative history of a statute, including its historical context, takes more time than busy practitioners often have. None the less, the *travaux préparatoires* have established themselves as an important interpretative tool when courts have to determine the conformity of a national statute with an international Treaty, or with the Constitution.

- *Jens M. Scherpe,* **The Process of Statute Making in England and Wales,** pp. 361-382(22)

English statutory drafting has traditionally taken the position that the words “for the avoidance of doubt” should not appear in a statutory provision, because to do so implies that without it the words might generate doubt. This article addresses how the traditional approach to statutory drafting can and should continue in England. It first describes the “technical” side of the drafting of statutes in England, by looking in particular at the role of Parliamentary Counsel, bill teams and the Law Commission. Then it examines the interpretation of statutes and especially the roles that Parliamentary debates as recorded in Hansard, explanatory notes and Law Commission papers play in this. The article concludes that while the English system of legislative drafting might have been very effective in the past, this appears not to be the case anymore. The speed with which legislation needs to be drafted and the workload of the

individuals involved means that this system in its current form might not be fit for the 21st century.

- *Hans-Heinrich Vogel,* **The Process of Law Making in Scandinavia,** pp. 383-414(32)

In all Scandinavian Countries (in Denmark with the Faroe Islands and Greenland, in Finland with the Åland Islands, in Iceland, Norway, and Sweden) legislative materials are regarded as very important documents – so important that lawyers sometimes forget that the law primarily has to be identified by means of the enacted text of the statute and not the materials. Law-making procedures are streamlined and similar in all Scandinavian countries and so are the main documents emanating from them. The series of documents usually starts with a report of a government-appointed committee, which will be circulated for comment. Report and comment will be considered by the government, and a government bill will be drafted, which after extensive internal checks and necessary adjustments will be sent to parliament. Members of parliament may propose changes, and their motions will be considered together with the bill by one of parliament's standing committees. The committee will report on the matter to the full house and submit its recommendations for a formal vote. Then, the house will debate the report and the recommendations and will finally vote on the recommendations as such – not on any reasons for or against the legislation. Both the debate and the vote will be recorded in minutes. And finally, parliament will notify the government of its decision. The government then will publish the adopted act in the Official Gazette.Nowadays almost all key documents (committee reports, hearing results, government bills, reports of parliamentary committees, minutes of parliamentary debates, and adopted acts) are highly standardized. All are published, with only very rare exceptions. Extensive publication on internet sites of both the government and parliament is the rule in all Scandinavian countries. Through these interlinked sites all key documents are easily available and accessible for everyone. Professional legal research has traditionally been made easy by footnotes or endnotes to published documents, now elaborate linkage systems across internet sites facilitate it even more. As a consequence, legislative materials have gained enormous importance even for everyday

legal work. The methodological difficulties, which their use had caused earlier and which jurisprudence traditionally had to deal with, are more or less evaporating by means of the ease of use of *travaux préparatoires* in Scandinavia today. But the advice has to be honored that the law must be identified primarily by means of the enacted text.

- *Oliver Unger,* **The Process of Law Making as a Field for Comparative Research,** pp. 415-428(14)

Whereas legal literature considering the legislative process traditionally had more regard to formal parliamentary laws, the recent past has seen the emergence of a comprehensive and more contoured conception of treatises, taking into account the diverse forms that legal provisions assume in modern times (e.g. regulations, by-laws, administrative rules). The role to be played by comparative scholarship in this inquiry is still very much in its early stages of definition. Whereas studies can be found for most European legal systems as regards the various stages of law making and the legislative materials created in this process, comparative analyses that go beyond providing merely a descriptive overview are relatively rare. Such efforts are generally limited to isolated proposals for the reform of a given legal system, aiming at the drafting of "better" laws.Thus, the topics explored at the symposium "The Development of Legal Rules in Comparative Perspective" ("Die Entstehung von Gesetzen in rechts vergleichender Perspektive"), held on 29 June 2013 at the Max Planck Institute in Hamburg, posed distinct challenges for the comparative scholars in attendance. The present paper makes a first attempt at addressing the matter in a systematic manner and should at the same time serve to summarize the conference findings and inspire further work. The article considers six different aspects of law-making which would appear to have particular relevance within a comparative framework: the role of governmental institutions, the role of interest groups and private stakeholders, the language of the law, the relevance of legislative materials, the role of academia and the importance of comparative research.