Declaration of Committee of Ministers on Libel Tourism

The Committee of Ministers of the Council of Europe has adopted on July 4th a Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, "Libel Tourism", to Ensure Freedom of Expression.

1. The full respect for the right of all individuals to receive and impart information, ideas and opinions, without interference by public authorities and regardless of frontiers constitutes one of the fundamental principles upon which a democratic society is based. This is enshrined in the provisions of Article 10 of the European Convention on Human Rights ("the Convention", ETS No. 5). Freedom of expression and information in the media is an essential requirement of democracy. Public participation in the democratic decision-making process requires the public to be well informed and to have the possibility of freely discussing different opinions.

2. Article 10 of the Convention also states that the right to freedom of expression "carries with it duties and responsibilities". However, States may only limit the exercise of this right to protect the reputation or rights of others, as long as these limitations are "prescribed by law and are necessary in a democratic society". In this respect, in its reply to Parliamentary Assembly Recommendation 1814 (2007) "Towards decriminalisation of defamation", adopted on 7 October 2009, the Committee of Ministers endorsed the Parliamentary Assembly's views and called on member States to take a proactive approach in respect of defamation by examining domestic legislation against the case law of the European Court of Human Rights ("the Court") and, where appropriate, aligning criminal, administrative and civil legislation with those standards. Furthermore, the Committee of Ministers recalled Parliamentary Assembly Recommendation 1589 (2003) on "Freedom of expression in the media in Europe".

3. The European Commission of Human Rights and the Court have, in several cases, reaffirmed a number of principles that stem from paragraphs 1 and 2 of Article 10. The media play an essential role in democratic societies, providing

the public with information and acting as a watchdog,1 exposing wrongdoing and inspiring political debate, and therefore have specific rights. The media's purpose is to impart information and ideas on all matters of public interest.2 Their impact and ability to put certain issues on the public agenda entails responsibilities and obligations. Among these is to respect the reputation and rights of others and their right to a private life. Furthermore, "subject to paragraph 2 of Article 10 (art. 10-2), [freedom of expression] is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population".3

4. In defamation cases, a fine balance must be struck between guaranteeing the fundamental right to freedom of expression and protecting a person's honour and reputation. The proportionality of this balance is judged differently in different member States within the Council of Europe. This has led to substantial variations in the stringency of defamation law or case law, for example different degrees of attributed damages and procedural costs, varying definitions of first publication and the related statute of limitations or the reversal of the burden of proof in some jurisdictions. The Court has established case law in this respect: "In determining the length of any limitation period, the protection of the right to freedom of expression enjoyed by the press should be balanced against the rights of individuals to protect their reputations and, where necessary, to have access to a court in order to do so. It is, in principle, for Contracting States, in the exercise of their margin of appreciation, to set a limitation period which is appropriate and to provide for any cases in which an exception to the prescribed limitation period may be permitted".4

Libel tourism and its risks

5. The existing differences between national defamation laws and the special jurisdiction rules in tort and criminal cases have given rise to the phenomenon known as "libel tourism". Libel tourism is a form of "forum shopping" when a complainant files a complaint with the court thought most likely to provide a favourable judgment (including in default cases) and where it is easy to sue. In some cases a jurisdiction is chosen by a complainant because the legal fees of the applicant are contingent on the outcome ("no win, no fee") and/or because the mere cost of the procedure could have a dissuasive effect on the defendant. The risk of forum shopping in cases of defamation has been exacerbated as a

consequence of increased globalisation and the persistent accessibility of content and archives on the Internet.5

6. Anti-defamation laws can pursue legitimate aims when applied in line with the case law of the Court, including as far as criminal defamation is concerned. However, disproportionate application of these laws may have a chilling effect and restrict freedom of expression and information. The improper use of these laws affects all those who wish to avail themselves of the freedom of expression, especially journalists, other media professionals and academics. It can also have a detrimental effect, for example on the preservation of information, if content is withdrawn from the Internet due to threats of defamation procedures. In some cases libel tourism may be seen as the attempt to intimidate and silence critical or investigative media purely on the basis of the financial strength of the complainant ("inequality of arms"). In other cases the very existence of small media providers has been affected by the deliberate use of disproportionate damages by claimants through libel tourism. This shows that libel tourism can even have detrimental effects on media pluralism and diversity. Ultimately, the whole of society suffers the consequences of the pressure that may be placed on journalists and media service providers. The Court has developed a body of case law that advocates respect for the principle of proportionality in the use of fines payable in respect of damages and considers that a disproportionately large award constitutes a violation of Article 10 of the Convention.6 The Committee of Ministers also stated this in its Declaration on Freedom of Political Debate in the Media of 12 February 2004.7

7. Libel tourism is an issue of growing concern for Council of Europe member States as it challenges a number of essential rights protected by the Convention such as Article 10 (freedom of expression), Article 6 (right to a fair trial) and Article 8 (right to respect for private and family life).

8. Given the wide variety of defamation standards, court practices, freedom of speech standards and a readiness of courts to accept jurisdiction in libel cases, it is often impossible to predict where a defamation/libel claim will be filed. This is especially true for web-based publications. Libel tourism thereby also demonstrates elements of unfairness. There is a general need for increased predictability of jurisdiction, especially for journalists, academics and the media.

9. The situation described in the previous paragraph has been criticised in many instances. Further, in a 2011 Joint Declaration, the United Nations (UN) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Organisation for Security and Co-operation in Europe (OSCE) Representative on freedom of the media, the Organisation of American States (OAS) Special Rapporteur on freedom of expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on freedom of expression and access to information in Africa stated that jurisdiction in legal cases relating to Internet content should be restricted to States to which those cases have a real and substantial connection.

10. Procedural costs may discourage defendants from presenting a defence thus leading to default judgments. Compensations may be considered disproportionate in the member State where the claim is being enforced due to the failure to strike an appropriate balance between freedom of expression and protection of the honour and reputation of persons.

Measures to prevent libel tourism

11. The prevention of libel tourism should be part of the reform of the legislation on libel/defamation in member States in order to ensure better protection of the freedom of expression and information within a system that strikes a balance between competing human rights.

12. With a view to further strengthening the freedom of expression and information in member States, an "inventory" of the Court's case law in respect of defamation could be established with a view to suggesting new action if need be. Further, if there is a lack of clear rules as to the applicable law and indicators for the determination of the personal and subject matter jurisdiction, such rules should be created to enhance legal predictability and certainty, in line with the requirements set out in the case law of the Court. Finally, clear rules as to the proportionality of damages in defamation cases are highly desirable.

13. Against this background, the Committee of Ministers:

– alerts member States to the fact that libel tourism constitutes a serious threat to the freedom of expression and information;

– acknowledges the necessity to provide appropriate legal guarantees against awards for damages and interest that are disproportionate to the actual injury, and to align national law provisions with the case law of the Court;

– undertakes to pursue further standard-setting work with a view to providing guidance to member States.

1 Goodwin v. United Kingdom, European Court of Human Rights, 27 March 1996, paragraph 39.

2 De Haes and Gijsels v. Belgium, European Court of Human Rights, 24 February 1997, paragraph 37.

3 Handyside v. United Kingdom, European Court of Human Rights, 7 December 1976, paragraph 49.

4 Times Newspapers Ltd. (Nos. 1 and 2) v. United Kingdom, European Court of Human Rights, 10 March 2009, paragraph 46.

5 Times Newspapers Ltd. (Nos. 1 and 2) v. United Kingdom, European Court of Human Rights, paragraph 45.

6 Tolstoy Miloslavsky v. United Kingdom, European Court of Human Rights, 13 July 1995, paragraph 51.

7 "Damages and fines for defamation or insult must bear a reasonable relationship of proportionality to the violation of the rights or reputation of others, taking into consideration any possible effective and adequate voluntary remedies that have been granted by the media and accepted by the persons concerned."

Latest Issue of "Praxis des

Internationalen Privat- und Verfahrensrechts" (4/2012)

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

- ***Eva-Maria Kieninger***: "Das auf die Forderungsabtretung anzuwendende Recht im Licht der BIICL-Studie" – the English abstract reads as follows:

In the Rome I Reg., the question of the law applicable to priority conflicts arising from the assignment or subrogation of claims has deliberately been left open (see Art. 27 (2) Rome I Reg.). As a first step towards a future solution, the EU-Commission has requested the British Institute of International and Comparative Law (BIICL) to prepare an empirical and legal study and to elaborate options for a legislative solution. The article presents the study and partly criticises its proposals. The introduction of a restricted choice of law seems overly complex and may lead to unforeseeable results, so that the rather limited addition of flexibility seems to be outweighed by its drawbacks. The alternatively suggested applicability of the law governing the claim goes not far enough in its exemptions of bulk assignments whereas the last proposal, putting forward the law of the assignor's domicile is accompanied by exemptions which are not elaborated with the necessary precision and possibly too broad. The article welcomes, however, the BIICL's proposal to extend any future rule on priority conflicts in Art. 14 Rome I Reg. to all proprietary relationships including that between assignor and assignee.

- ***Peter Mankowski***: "Zessionsgrundstatut v. Recht des Zedentensitzes – Ergänzende Überlegungen zur Anknüpfung der Drittwirkung von Zessionen" – the English abstract reads as follows:

The proprietary aspects erga omnes of the assignment of debts have not been dealt with by Art. 14 Rome I Regulation. They are a topic of constant debate which appears to have come to some stalemate in recent times, though. But there still are some aspects and issues which deserve closer inspection than they have attracted yet, in particular the interfaces with the European Insolvency Regulation and the UN Assignment Convention.

- ***Kilian Bälz***: "Zinsverbote und Zinsbeschränkungen im internationalen Privatrecht" – the English abstract reads as follows:

This article challenges the widely held opinion that provisions prohibiting and restricting interest are mandatory provisions in the sense of Art. 9 Rome I Regulation. According to this opinion, provisions prohibiting and restricting interest at the debtor's seat may apply also in the case another law has been determined as the proper law of the contract.Prohibitions on taking interest which are based on the Islamic legal tradition, however, demonstrate that it is not appropriate to treat respective restrictions generally as mandatory. Normally, there are far reaching exemptions, so that one cannot speak of a prohibition of interest of general application in Muslim jurisdictions. Against this backdrop it is more than questionable whether the respective provisions are mandatory in the sense of Art. 9 (1) of the Rome I Regulation.

Further, interest rate caps normally are determined in view of a specific currency. From this it follows that under Art. 9 (3) Rome I Regulation interest rate caps can only be recognised in cases where there is a congruence of applicable law and currency. Finally, interest rate caps cannot be recognised where local banks are exempted from the respective restrictions. In the latter case, the interest rate cap merely serves the purpose of protecting the local credit market. As a result, provisions prohibiting or restricting interest can only be recognised as "mandatory provisions" in very exceptional circumstances.

- ***Stefan Arnold***: "Entscheidungseinklang und Harmonisierung im internationalen Unterhaltsrecht" – the English abstract reads as follows:

Within a world which becomes smaller and smaller, Private International Law also gains importance with respect to the area of maintenance obligations. Harmonization measures – like the new European rules on the law applicable to maintenance obligations – promise legal certainty here. The new regime established by the Hague Protocol from November 23rd 2007 is not sufficiently coordinated with the European Regulation No. 4/2009 on Maintenance Obligations, however. This paper introduces into the main aspects of the new rules on the law applicable to maintenance obligations and suggests a way to establish better coherence between the Conflict of Laws rules and the procedural possibilities established by the Regulation No. 4/2009.

- ***Kurt Siehr***: "Kindesentführung und EuEheVO – Vorfragen und gewöhnlicher Aufenthalt im Europäischen Kollisionsrecht" – the English abstract reads as follows:

The annotated cases deal with alleged child abductions covered by the Hague Abduction Convention of 1980 and the Brussels II Regulation of 2003. The case McB. of the European Court of Justice (ECJ) had to decide whether an Irish unmarried father of three children had custody rights with respect to his children in order to qualify him to prevent a removal of the children from their home in Ireland and, if removed to England, ask for return to Ireland under the Hague Abduction Convention of 1980 and the Brussels II Regulation of 2003. The ECJ decided very quickly in the PPU-proceedings (procédure préjudicielle d'urgence) and found that at the time of removal the father had no right of custody under Irish law and therefore could not blame the mother of having illegally removed the children to England. This is correct. In the PPU-proceedings the ECJ could not go into details and evaluate Irish law under the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights.

In the cases of the ECJ in Mercredi v. Chaffe and of the Austrian Supreme Court of 16 November 2010 the term "habitual residence" was correctly defined and could be applied by the lower national courts. In Mercredi v. Chaffe the English Court of Appeal finally raised doubts whether there was a wrongful removal of the child from England to the French overseas department La Réunion at all.

- ***Francis Limbach***: "Nichtberechtigung des Dritten zum Empfang einer der Insolvenzmasse zustehenden Leistung: Zuständigkeit, Qualifikation und Berücksichtigung relevanter Vorfragen" – the English abstract reads as follows:

Upon opening German insolvency proceedings, the insolvency debtor loses the right to dispose of his assets. Thus, holding a claim against another person, the insolvency debtor is legally unable to instruct the latter to pay a third party the sum owed. In such an event, the insolvency administrator may demand recovery of the amount received by the third party on the grounds of Paragraph 816(2) of the German Civil Code. The Higher Regional Court of Hamm had to deal with

such a case: It involved an insolvency debtor who had presumably instructed a party with a debt to her to perform not to herself but to her mother who eventually received the payment. The insolvency administrator then filed a claim against the mother to recover the respective sum. As the amount paid might have originated in a contract governed by Portuguese law, the Court had to consider whether the filed action appeared as an "annex procedure" related to an insolvency case, implying an international jurisdiction on the grounds of Article 3(1) of the European Insolvency Regulation. Furthermore, in order to identify the applicable law in this matter, the Court had to determine whether the respective legal relationship was to be qualified as of insolvency or as of general private law. At last, it had to consider relevant preliminary questions regarding the source of the claim filed.

- ***Tobias Helms***: "Vereinbarung von Gütertrennung durch Wahl des Güterstandes anlässlich einer Eheschließung auf Mauritius" – the English abstract reads as follows:

In this case the German-based parties (the husband being a German citizen and the wife a Mauritian national) appeared before the Federal Supreme Court (Bundesgerichtshof) to contest whether they had validly agreed on the matrimonial property regime of Gütertrennung (separation of goods) when they concluded their marriage in Mauritius. Mauritian law does not provide for a default statutory matrimonial property regime. The engaged couple is instead given a choice between separation of goods and community of goods. The courts of lower instance considered the fact that the couple had chosen separation of goods while concluding their marriage in Mauritius to be irrelevant as the matrimonial property regime in this case is governed by German law according to Art. 15 Sect. 1 EGBGB in connection with Art. 14 Sect. 1 No. 2 EGBGB. However, the Federal Supreme Court correctly disagreed with this assessment and held that the parties had validly agreed to adopt the German Gütertrennung. It was held that the deciding factor was that the spouses had given mutual declarations of their intent to regulate their property regime. This procedure was held to be equivalent to the conclusion of a marriage contract under German law (§ 1408 BGB).

- ***Rolf Wagner***: "Vollstreckbarerklärungsverfahren nach der EuGVVO und

Erfüllungseinwand – Dogmatik vor Pragmatismus?" – the English abstract reads as follows:

Article 45 of Council Regulation (EC) No 44/2001 (Brussels I-Regulation) deals with the limits within which the national courts of the State of enforcement may refuse or revoke a declaration of enforceability. The European Court of Justice (ECJ) had to decide whether this provision precludes the court with which an appeal is lodged under Article 43 or Article 44 of that regulation from refusing or revoking the declaration of enforceability on the ground that there had been compliance with the judgement in respect of which the declaration of enforceability was obtained. The article discusses the decision of the ECJ and raises the question whether the German law has to be changed.

- ***Katharina Hilbig-Lugani***: "Forderungsübergang als materielle Einwendung im Exequatur- und Vollstreckungsgegenantragsverfahren" – the English abstract reads as follows:

The German Federal Supreme Court's decision concerns a complaint against a declaration of enforceability pronounced for a Swiss judgement under the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations and the German execution provisions, contained until 18 June 2011 in the AVAG, now in the new AUG. The case raised the well-discussed questions of whether the court deciding on enforceability could take into account defenses of the debtor based on a modification of the judgement, on partial performance of the maintenance and on reasons to modify the judgement. But it particularly raised the new question of the effect of the legal transfer of the debt enshrined in the judgment to the public authority who has provided the maintenance creditor with subsidiary social security benefits. Convincingly, the Federal Supreme Court decided that this as well qualified as a defense to be taken into account in the exequatur decision (under Section 12 AVAG). As before, the court seems to limit its statements to those defenses which are undisputed or which are based on circumstances having acquired the force of res iudicata. Pursuant to the author, the legal appreciation of the claim's transfer should be the same as the one provided by the Federal Supreme Court under the new German execution provisions in the AUG and under the maintenance regulation 4/2009.

- ***Andreas Piekenbrock***: “Ansprüche gegen den ausländischen Schuldner in der deutschen Partikularinsolvenz”
- ***Eva-Maria Kieninger***: “Abtretung im Steuerparadies” – the English abstract reads as follows:

The Austrian Supreme Court has held that the account debtor of a claim in damages cannot rely on provisions subjecting the effectiveness of an assignment to the (prior) consent of the account debtor, if those provisions do not form part of the law governing the assigned claim (art 12 (2) Rome Convention). The case note discusses the possible impact of the decision on the presently debated reform of art 14 Rome I Reg. It suggests that the term “assignability” in art 14 (2) Rome I Reg. should be replaced by a more precise definition of those rules which limit or exclude the assignability of claims in the interest of the debtor.

- ***Helen E. Hartnell:*** U.S. Court of Appeals Rules on Effect of One Country’s Article 96 Reservation on Oral Contract Governed by the CISG (in English)

The U.S. Court of Appeals for the Third Circuit has decided an important case on Article 96 CISG, which permits a State “whose legislation requires contracts of sale to be concluded in or evidenced by writing” to make a declaration of inapplicability in regard to any CISG provision that disavows a writing requirement for international sales contracts. Only 11 Contracting States have such declarations in effect. In Forestal Guarani S.A. v. Daros International, Inc. (2010), the court addressed the question of how to apply Article 96 to a case involving one party with its place of business in Argentina, which made an Article 96 declaration, and one based in the U.S., which made no such declaration. The court embraced what it called the “majority approach” and held that the Article 96 declaration did not absolutely bar an action to enforce the oral contract. Rather, the court held that Article 96 CISG gives rise to a gap that permits resort to the forum’s private international law rules per Article 7(2), and remanded to the lower court with instructions on how to proceed. If Argentine law governs, then the lower court should examine Argentine domestic law to ascertain the enforceability of the oral contract. However, if U.S. law governs, then the lower court should apply the U.S. domestic law to the issue of enforceability, in lieu of CISG provisions disavowing a writing

requirement. The article criticizes the result for its turn to domestic law in the latter situation, and questions the viability of Article 96 declarations by States that do not totally prohibit oral contracts.

- ***Hans Jürgen Sonnenberger***: "Deutscher Rat für Internationales Privatrecht – Spezialkommission „Drittwirkung der Forderungsabtretung"
- ***Hans Jürgen Sonnenberger***: "German Council for Private International Law – Special Committee: "Third-party effects of assignment of claims"

Issue 2012.2 Nederlands Internationaal Privaatrecht

The second issue of 2012 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* includes the following articles on Recognition of (Dutch) Mass Settlement in Germany, the CLIP Principles, the European Patent Court and case note on Brussels I and the Unknown Address (Lindner):

Axel Halfmeier, Recognition of a WCAM settlement in Germany, p. 176-184. The abstract reads:

The Dutch 'Wet Collectieve Afwikkeling Massaschade'(WCAM) [Collective Settlements Act] has emerged as a noteworthy model in the context of the European discussion on collective redress procedures. It provides an opportunity to settle mass claims in what appears to be an efficient procedure. As the WCAM has been used in important transnational cases, this article looks at questions of jurisdiction and the recognition of these court-approved settlements under the Brussels Regulation. It is argued that because of substantial participation by the courts, such declarations are to be treated as 'judgments' in the sense of the Brussels Regulation and thus are objects of recognition in all EU Member States.

Written from the perspective of the German legal system, the article also takes the position that the opt-out system inherent in the WCAM procedure does not violate the German ordre public, but is compatible with fair trial principles under the German Constitution as well as under the European Human Rights Convention. The WCAM therefore appears as an attractive model for the future reform of collective proceedings on the European level.

Mireille van Eechoud & Annette Kur, Internationaal privaatrecht in intellectuele eigendomszaken – de 'CLIP' Principles, p. 185-192. The English abstract reads:

The European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP) presented its Principles in November 2011 to an international group of legal scholars, judges, and lawyers from commercial practice, governments and international organisations. This article sets out the objectives and principal characteristics of the CLIP Principles. The Principles are informed by instruments of European private international law, but nonetheless differ in some important respects from the rules of the Brussels I Regulation on jurisdiction and the Rome I and II Regulations on the law applicable to contractual and non-contractual obligations. This is especially so in situations where adherence to a strict territorial approach creates significant problems with the efficient adjudication of disputes over intellectual property rights or undermines legal certainty. The most notable differences are discussed below.

M.C.A. Kant, A specialised Patent Court for Europe? An analysis of Opinion 1/09 of the Court of Justice of the European Union from 8 March 2011 concerning the establishment of a European and Community Patents Court and a proposal for an alternative solution, p. 193-201. The abstract reads:

Attempts have been made for decades to establish both a Community patent and a centralised European court which would have exclusive jurisdiction in this matter. However, none of these attempts has ever been fully successful. In its Opinion 1/09 from 8 March 2011, the Court of Justice of the European Union (hereinafter CJEU) held, inter alia*, that the establishment of a unified patent litigation system as planned in the draft agreement on the European and Community Patents Court would be in breach of the rules of the EU Treaty and the FEU Treaty. However, it is argued in this paper that also in view of Opinion 1/09 the creation of a unified court has not become* per se *unattainable. After clarifying in whose interest effective patent protection in Europe should primarily be formed, different*

constellations of judicial systems shall be discussed. The author will deliver his own proposal for a two-step approach in structure and time, comprising, in a first step, the creation of a specialized chamber of the CJEU for patent litigation, and in a second step the creation of a central EU Court for all EU intellectual property litigation. The paper will finish with an analysis of how the requirements for a unified patent litigation system (indirectly) set up by the CJEU in its Opinion 1/09 could be taken into consideration, and with some further deliberations on effective patent protection and enforcement.

Jochem Vlek, De EEX-Vo en onbekende woonplaats van de verweerder. Hof van Justitie EU 17 november 2011, zaak C-327/10 (*Lindner*) (Case note), p. 202-206. The English abstract reads:

The author reviews the decision of the ECJ in the case of Hypotecni banka/Udo Mike Lindner *in which the ECJ ruled on the application of the jurisdictional rules of the Brussels I Regulation in the case of a consumer/defendant with an unknown domicile. Several issues are highlighted: first, the existence of an international element in the case of a defendant with unknown domicile whose nationality differs from the state of the court seized; secondly, the application of Article 4(1) Brussels I Regulation if the domicile of the defendant is unknown and (since the ECJ does not apply Article 4(1) in this regard) the interpretation of Article 16(2) Brussels I Regulation; thirdly, the requirement that the rights of the defence are observed, as also laid down in Article 47 of the Charter of Fundamental Rights of the EU. Additionally, the article briefly mentions the subsequent case of* G/Cornelius de Visser*, in which a German Court resorted to public notice under national law of the document instituting the proceedings in the case of a defendant with an unknown address.*

Kiobel Supplemental Briefs

For those interested in summer beach reading, I wanted to note that all briefs in the *Kiobel* case, including the supplemental briefs on the extraterritoriality question, are being compiled by SCOTUSBlog and can be accessed here. For an

interesting comparative examination of the case, Jodie Kirshner has an article entitled "Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe? Extraterritorialism, Sovereignty, and the Alien Tort Statute." Here is the abstract:

> *The United States has policed the multinational effects of multinational corporations more aggressively than any other coun-try, but recent decisions under the Alien Tort Statute indicate that it is now backtracking. Europe, paradoxically, is moving in the other direction. Why do some countries retract extraterritorial jurisdiction while others step forward? The article traces the opposing trends through corporate human rights cases and suggests that the answer may lie in attitudes towards national sovereignty. The developments raise important questions regarding the position of the United States in a globalizing world and its role in upholding international norms.*

Muir Watt on Private International Law Beyond the Schism

Horatia Muir Watt (Sciences Po Law School) has published Private International Law Beyond the Schism in the last issue of *Transnational Legal Theory*. The abstract reads:

> *The aim of this project is to explore the ways in which, in the absence of traditional forms of government in a global setting, the law can discipline the transnational exercise of private power by a variety of market actors (from rating agencies, technical standard-setters and multi-national agribusinesses to vulture funds). Traditionally, the cross-border economic activities of non-state actors fall within the remit of an area of the law known as 'private international*

law'. However, despite the contemporary juridification of international politics, private international law has contributed very little to the global governance debate, remaining remarkably silent before the increasingly unequal distribution of wealth and authority in the world. By abandoning such matters to its public international counterpart, it leaves largely untended the private causes of crisis and injustice affecting such areas as financial markets, environmental protection, pollution, the status of sovereign debt, the bartering (or confiscation) of natural resources and land, the use (and misuse) of development aid, (unequal) access to food, the status of migrant populations, and many more. On the other hand, public international law itself, on the tide of managerialism and fragmentation, is now increasingly confronted with conflicts articulated as collisions of jurisdiction and applicable law, among which private or hybrid authorities and regimes now occupy a significant place. According to the genealogy of private international law depicted here, the discipline has developed, under the aegis of the liberal divides between law and politics and between the public and the private spheres, a form of epistemological tunnel-vision, actively providing immunity and impunity to abusers of private sovereignty. It is now more than time to de-closet private international law and excavate the means with which, in its own right, it may impact upon the balance of informal power in the global economy. This means both quarrying the new potential of human rights in the transnational sphere, and rediscovering the specific savoir-faire acquired over many centuries in the recognition of alterity and the responsible management of pluralism. In short, adopting a planetary perspective means reaching beyond the schism between the public and private spheres and connecting up with the politics of international law.

ATS and Extraterritoriality: A

Point of View

Profs. Juan José Álvarez Rubio, Henry S. Dahl, José Luis Iriarte Ángel, Olga Martín-Ortega, Alberto Muñoz Fernández , Lorena Sales Pallarés, Nicolás Zambrana Tévar and Francisco Javier Zamora Cabot (Reporter), are members of the *Grupo de Estudio Sobre el Derecho internacional privado y los Derechos Humanos (**Group Of Study On Private International Law And Human Rights**)*. The Group has recently produced some notes on *Kiobel* and the issue of extraterritoriality in response to several *Amicus Curiae*, especially those of Germany, the Netherlands and the UK. Main premise of the paper is that discussion of the ATS should steer clear of the debate on extraterritoriality – id. est., be kept apart from what the group consider a sterile, artificial inclusion in the debate, and go on being applied extraterritorial, as it has occured for many decades. Download here.

When Rome meets Greece: could Rome I help the Greek debt restructuring?

Among all the buzz about a possible (but much feared) 'Grexit', there are two elements in the story of the Greek debt restructuring (diplomatically called 'Private Sector Involvement') which should be of interest for conflict lawyers.

First the fact that the governing law of the Greek bonds was one of the central issues in the discussion which led to the restructuring. The law governing sovereign bonds is usually only a side issue which does not attract much attention – probably because so many of the bonds issued are governed either by English law or the law of New York. The Greek bonds (issued or guaranteed by Greece) which were subject of the restructuring were overwhelmingly governed by Greek law. This peculiar feature gave Greece much more leeway vis-à-vis the bondholders, as Greece could modify its law and by doing so directly impact the

terms of the debt. To give one element of comparison, when Argentina restructured its debt in 2005, the vast majority of the bonds concerned were governed by either English law or the law of New York, as is common in the market.

Greece will, however, no be able to repeat this trick twice. This distinctive feature of the Greek bonds which were eligible for the swap (for a total amount of EUR 206 billion), will indeed disappear. The new bonds which were offered to the existing bondholders as compensation for the substantial haircut they had to swallow, are issued under English law while the older bonds (tendered in the exchange) were mostly Greek law bonds. This choice of law does make a difference as it means that investors holding the new bonds will not be subject to a change in Greek legislation which Greece could unilaterally decide to impose.

The second element worth noticing is the nature of the law adopted by Greece as part of its restructuring operation. The Act which was rushed through the Greek Parliament (but had been anticipated by some highly knowledgeable commentators), inserted so-called collective action clauses (CAC's) in the documentation. This meant altering the terms of the debt, in a retroactive fashion. This move has been much discussed : rating agencies had warned that activating the CAC's would trigger lowering the issue ratings on the debt issues concerned, ISDA's determination committee also decided that the use of collective action clauses meant that a so-called Restructuring Credit Event had occurred and some have even warned that this move could be challenged under the BIT's signed by Greece. Although the use of CAC's has been widely promoted over the past decade, with the EU recently adopting its own versions of the CAC's, the use of these clauses in the sovereign debt market remains a relatively novel phenomenon.

The Greek Act (Law 4050/2012 adopted by the Greek Parliament on 23 February 2012) introducing CACs in the terms of the outstanding Greek bonds allows for one single vote across all issues, an interesting feature. Even more interesting is that the law provides that its provisions

> *"aim to protect the supreme public interest, are mandatory rules effective immediately, prevail any contrary legislation of general or special provisions…" (translation courtesy of Andrea Koutras' blog).*

This is a clear reference to Article 9 of the Rome I Regulation and an attempt to strengthen the Greek legislation by elevating it to the status of 'overriding mandatory provisions'. It remains to be seen whether this will be sufficient to ensure that the law will be applied whenever investors (private or institutional) institute legal proceedings against what some of them have deemed to be a 'forced expropriation'. It is indeed almost inevitable that the whole operation will lead to much litigation, which will raise interesting features of investment law and even human rights. Another issue which will be discussed is whether the Greek Mopping Up Law will be applied at all by courts and possibly arbitral tribunals called to decide on claims filed by investors. Given the limitations imposed by Article 9.3 of the Rome I Regulation on the application of foreign mandatory rules, the Regulation may offer a very limited protection to Greece if investors who have not accepted the bond swap but were nonetheless forced to take part on the basis of the CAC's, succeed in bringing proceedings outside Greece.

Editors' note: Patrick Wautelet is a professor of law at Liege University.

First Issue of 2012's Journal of Private International Law

The last issue of the *Journal of Private International Law* was just released. It includes the following articles:

Review of the Brussels I Regulation: A Comment from the Perspectives of Non-Member States (Third States), by Koji Takahashi

> *The review of the Brussels I Regulation is in progress. Quite naturally, the discussions have been centred on the viewpoints of the Member States. Yet, both the current Regulation and the Commission's proposal have significant implications for non-Member States. In fact, stakes for non-Member States are higher in Brussels I than in Rome I or II. This analysis evaluates the current regime and the proposed reform from an angle of non-Member States, focusing on three issues of particular relevance to the interests or positions of such*

States. They are (1) recognition and enforcement of judgments founded on exorbitant bases of jurisdiction (2) denial of "effet réflexe" and (3) lis pendens between the courts of a Member State and a non-Member State. The analysis reveals that views from inside and outside the Union do not necessarily diverge on the desirable contents of reform but may differ on the priorities of reform. While the EU is entitled to construct its internal legal regime in whatever manner it sees fit, to the extent there are implications for the outside world, it is hoped that due consideration will be given to views from outside.

Recognition and Enforcement of Judgments in Carriage of Goods by Road Matters in the European Union, by Paolo Mariani

This article discusses the relationship between Brussels I Regulation and The Convention on the Contract for the International Carriage of goods by road (CMR). The Court of Justice in TNT Express Nederland decision (case C-533/08) confirms the international specialised conventions' primacy on the Regulation, provided the respect of the principles underlying judicial cooperation in civil and commercial matters in the European Union. The Court also acknowledges its lack of jurisdiction to interpret the CMR.

TNT Express Nederland contributes in the elaboration of the EU principles underlying judicial cooperation. Unfortunately, this contribution risks being useless for national courts since the decision fails to answer the question as to how CMR provisions should be applied lacking the compliance with the European standard.

The article concludes by supporting the Court of Justice power to provide the interpretation of the Brussels I Regulation in the context of the application of Article 31 CMR in order to enable the national court to assess whether the CMR can be applied in the European Union.

Avoid the Statutist Trap: The International Scope of the Consumer Credit Act 1974, by Christopher Bisping

This article takes a fresh look at the role statutes play within the conflict of laws. The author argues that statutes can only ever apply within the framework of conflict-of-laws rules. Parliament's intention must be taken to subject

legislation to the conflict-of-laws system. The opposing view would commit the mistake of falling into the 'statutist trap' and overload statutes with meaning, which they do not have. The author uses the Consumer Credit Act 1974 and the House of Lord's decision in OFT v Lloyds to illustrate the argument.

Preliminary Questions in EU Private International Law, by Susanne Goessl

Whenever a rule contains a legal concept, such as "matrimony", rarely are the legal requirements for the concept clarified in the same rule. Determining the meaning of such a concept (preliminary question) is often necessary to resolve the principal question. In an international context, one can apply the lex fori's or the lex causae's PIL to determine the law applicable to the preliminary question. This article analyses which of those two approaches is preferable in the PIL of the EU.

Traditional advantages of the lex causae approach loose its cogency in the European context, esp. the deterrence of forum shopping, the presumption of the closer connection and the international harmony. On the other hand, many traditional and new reasons support the lex fori approach, eg national harmony, foreseeability, practicability and further integration.

The article comes to the conclusion that, no matter whether the concept occurs in a PIL or a substantive rule the lex fori approach is the better solution. Only in limited cases with an urgent need of international harmony the lex causae approach should prevail.

Statutory Restrictions on Party Autonomy in China's Private International Law of Contract: How Far Does the 2010 Codification Go?, by Liang Jieying

The "Law on the Application of Laws to Foreign-Related Civil Relationships of the People's Republic of China" became effective on 1 April 2011. This is the first statute in China that specifically addresses private international law issues. The party autonomy principle is positioned in the first chapter as one of the "General Provisions". This article provides a critical commentary on the relevant rules in the new law concerning the restrictions on party autonomy in contractual choice of law. The author investigates how the new Codification responds to the problems existing in the previous legal rules and judicial

practice, and argues that, although the Codification has provided several rules to resolve some previously unclear questions, it fails to address comprehensively the more critical issues relating to the operation of the party autonomy principle.

The Law Applicable to Intra-Family Torts, by Elena Pineau

Courts increasingly face at the domestic level cases of intra-family torts. Two kinds of answers are provided to the question whether there is a right to reparation and, if so, to what extent: either the answer is given by the same family law rules which are infringed; or resort is had to the general system of tort law as a default solution. At the conflict rules' level, European judges dealing with intra-family torts are confronted with an interesting problem since the Rome II Regulation expressly excludes damages arising out of family relationships out of its scope of application. This being so, the case is posed which are the possible solutions. Two options have been considered: either applying the same law which governs the 'family duty' allegedly infringed, ie, the underlying lex causae; or considering whether it would be reasonable to extend the application of the Rome II Regulation to these cases. It is contended that the first option is to be preferred.

Unmarried Fathers and Child Abduction in European Union Law, by Pilar Blanco

The treatment that the laws of some Member States of the European Union give to the custody rights of unmarried fathers should be regarded as contrary to the European Convention of Human Rights and the Charter of Fundamental Rights, insofar as the unmarried father who is responsible for the child cannot prevent the removal of said child to another State because of the absence of automatic acquisition of rights of custody under national law. Although the Charter only applies to Member States expressly when they are implementing European Union law, this paper has argued for a broad construction of a uniform EU law meaning of "custody rights" under Brussels IIa, including the inchoate custody rights of unmarried fathers, influenced by a desire to avoid unnecessary and disproportionate restrictions on the right to non-discrimination on the grounds of sex in the application of the right to object to a child abduction by fathers compared to mothers.

Fourth Issue of 2011's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains two articles addressing private international law issues and several casenotes. The table of contents can be found here.

In the first article, Dr. Markus Buschbaum et Dr. Ulrich Simon discuss the European Commission's Proposals regarding jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and the property consequences of registered partnerships.

In the second article, Patrick Kinsch (Luxembourg Bar and University of Luxembourg) explores the impact of the *Negrepontis* case of the European Court of Human Rights on the public policy exception in the law of foreign judgments.

Sciences Po PILAGG Workshop Series, Final Conference

The Law School of the Paris Institute of Political Science (*Sciences Po*) will hold the final meeting of its workshop series for this academic year on Private International Law as Global Governance on May 11th, 2012.

This day long conference will include three round tables and two lectures.

9:00 – 10:00: TABLE I: THEORY: Function, Foundations and Ambit of PIL

1. How would you describe the function of PIL today?
2. What are the global issues for which you feel that its tools could be developed? (What are their limits?)
3. Is the distinction between public and private international law still valid?

- Sabine CORNELOUP, Université de Bourgogne
- Gilles CUNIBERTI, Université de Luxembourg
- Alex MILLS, University College London (to be confirmed)
  Chair: Horatia MUIR WATT, Sciences Po Law School

10:15 – 11:15: Conference: Access of individuals to international justice
Antônio Augusto CANÇADO TRINDADE, International Court of Justice

11:30 – 12:30: TABLE II: METHODS: Impotence, Decline or Renewal?
1. Is there room for proportionality in conflicts methodology?
2. Is there room for Human Rights?
3. How should non-state actors and norms be dealt with?

- Jeremy HEYMANN, Université Paris I (Panthéon-Sorbonne)
- Yannick RADI, Leiden University
- Geneviève SAUMIER, McGill University
  Chair: Mathias AUDIT, Université Paris-Ouest (Nanterre-La Défense)

12h45 -14h15 LUNCH with David KENNEDY, Harvard Law School

14:30 – 15:30: TABLE III: INSTITUTIONS: Method, Policy and Governance?
1. What are the most significant methodological changes induced by policy choices?
2. How are the topics selected and developed? (Who, how, why?)
3. Is there a role for non-state actors in international law-making?

- Hans VAN LOON, Hague Conference on Private International Law
- Frédérique MESTRE, UNIDROIT
- Corinne MONTINERI, UNCITRAL
  Chair: Diego P. FERNÁNDEZ ARROYO, Sciences Po Law School

15:30 – 16:00: Final Comments

More information is available on the PILAGG website.