

Muir Watt on Kate Provence Pictures

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Cachez ce sein... It seems to me that this case – which is perhaps less intrinsically interesting, even from a conflict of laws perspective, than other recent instances in which the cross-border exercise of the freedom of press is challenged in the name of competing values, such as *Charlie Hebdo* and the satirical caricatures of Mahomet, or *The Guardian* and the *Trasfigura* super-injunction – serves to illustrate the relative indifference of the content of the relevant choice of law rules when fundamental rights are in balance. As so much has already been written about possible additions to Rome II in privacy or defamation cases, I shall concentrate on what could be called the *Duchess of Cambridge hypothesis*: whatever the applicable rules, the only real constraint on adjudication in such an instance, and the only real arbiter of outcomes, is the duty of the court (assumed to be bound, whatever its constitutional duties, by the European Convention on Human Rights, or indeed the Charter if Rome II were in the end to cover censorship issues) to carry out a proportionality test in context.

One might start with a few thoughts about the balance of equities in this case. Back at the *café du commerce* (or the ranch, or the street, or indeed anywhere where conventional wisdom takes shape), the debate is usually framed in moral terms, but remains inconclusive, neither side inspiring unmitigated sympathy. On the one hand, invasion of privacy of public figures by the gutter press (however glossy) can on no account be condoned. If the royal couple were stalked in a private place by prying *paparazzi*, then the immediate judicial confiscation of the pictures by the *juge des référés* was more than justified. Of course, there is clearly a regrettable voyeur-ism among the general public that supports a market for pictures of intimate royal doings. The real responsibility may lie therefore with those governments which have failed adequately to regulate journalistic practices. On the other hand (so the debate goes), the main source of legitimacy of devoting large amounts of public resources to fund the essentially decorative or representational activities of national figures abroad (whether royals, ambassadors or others) lies in the reassuring, inspiring or otherwise positive image thus projected, which in turn serves to divert attention from domestic

difficulties, to smooth angles in foreign policy etc. Surely the Duchess of Cambridge, who appears to have been driven from the start by a compelling desire to enter into this role, should have taken particular care to refrain from endangering the public image of niceness of which the British royal family places its hope for survival? Moreover, she can hardly claim not to be accustomed to the prying of the gutter press at home – although of course, in England, the medias may be more easily gagged (see *Trasfigura*), and have apparently agreed in this instance to remain sober, in the wake of last year's hacking scandals and in the shadow of pending regulation. And so on...

The circularity of this imagined exchange is not unlinked to the well-known difficulties encountered in the thinner air of legal argument. The conflict involving the invasion of privacy of public figures (including those who otherwise capitalize on publicity), and claims to journalistic freedom of expression (albeit by paparazzi whose profits rise in direct proportion to the extent to which they expose the intimacy of the rich and famous), is both a *hard case* (in terms of adjudication of rights) and a *true conflict* (in terms of the conflict of laws). As to the former, of course, there is no more an easy answer in this particular case than an adequate way of formulating general legal principle. If these unfortunate photographs do not provide a convincing enough example, the (less trivial?) *Charlie Hebdo* case reveals a conflict of values and rights which is equally divisive and ultimately insoluble from “above”, that is, in terms of an overarching, impartial determination of rights and duties. Take Duncan Kennedy's *A Semiotics of Legal Argument* (Academy of European Law (ed.), *Collected Courses of the Academy of European Law*, Volume III. Book 2, 309-365): all the oppositional pairs of conventional argument-bites can be found here, within the common clusters of substantive or systemic legal arguments (morality, rights, utility or expectations, on the one hand; administrability and institutional competence, in the other), as well as all the various “operations” which they instantiate. Thus, when challenged with invasion of privacy, *Closer* responds, predictably, by denial (“no, we did not cross the bounds, the royals were visible through a telescopic lense”); counter-argument (“well, we merely made use of our fundamental freedom in the public interest”); the formulation of an exception to an otherwise accepted principle (“yes, we admit that the pictures were unauthorized, but these were public figures whose deeds are traditionally of public interest”); then finally by “shifting levels” from the fault/not fault to the terrain of the reality of injury. How could anyone possibly complain about pictures which were both esthetic and modern,

and which will undeniably contribute to bring glamour to the somewhat fuddy-duddy, or goody-goody, royal style?

What does all this tell us about the conflict of laws issue? Potentially, the choice of connecting factor entails significant distributional consequences in such a case. At present, outside the sway of Rome II, each forum makes its own policy choices in respect of conflict of law outcomes, and these probably balance each other out across the board in terms of winners and losers – at the price of transnational havoc on the way (through the risk of parallel proceedings and conflicting decisions, which Brussels I has encouraged with *Fiona Shevill*, although *Martinez* may be a significant improvement in this respect). If it were to be decided at some point that Rome II should cover privacy and personality issues, whatever consequences result from the choice of any given connecting factor would obviously be amplified through generalization; the risk of one-sidedness would then have to be dealt with. However, as illustrated by the continued failures of attempts to design an adequate regime in Rome II, any such scheme is highly complex. One might initially assume, say, that editors generally choose to set up in more permissive jurisdictions, whereas victims of alleged violations might more frequently issue from more protective cultures, which encourage higher expectations as to the protection of privacy or personality rights. Any clear-cut rule would therefore be likely to favor either the freedom of the press (country of origin principle, constantly lobbied by the medias from the outset), or conversely the right to privacy (place of harm or victim's habitual residence). However (and allowing for the switch from privacy to defamation), while the *Charlie Hebdo* case may conform to this pattern, the *Duchess of Cambridge* affair turns out to be (more or less) the reverse. To establish a better balance, therefore, exceptions must be carved out, whichever principle is chosen as a starting point. The place of injury might be said to be paramount, unless there are good reasons to derogate from it under, say, a foreseeability exception in the interest of the defendant newspaper. Alternatively, the country of origin principle may carry the day (as in the E-commerce directive and *Edate Advertising*), but then the public policy of the (more protective) forum may interfere to trump all. In terms of the semiotics of legal argument, this endless to-and-fro illustrates the phenomenon of “nesting” (Kennedy *op cit*, p357). Each argument carries with it its own oppositional twin. Chase a contrary principle out of the door in a hard case and inevitably, at some point in the course of implementation of its opposite, it will reappear through the window.

Of course, even if one settles for the inevitable impact of public policy as a matter of private international law, this is not the end of the story. Because the public policy exception itself will have to mirror the balance of fundamental rights to which the Member States are ultimately held (under the ECHR or, if Rome II is extended to cover such issues, under the Charter). Consider the case of unauthorized pictures of Caroline of Hannover, which had given rise to judicial division within Germany over the respective weight to be given to freedom of press and privacy of the royal couple. In 2004, the ECtHR observed (Grand Chamber, case of VON HANNOVER v. GERMANY (no. 2), Applications nos. 40660/08 and 60641/08):

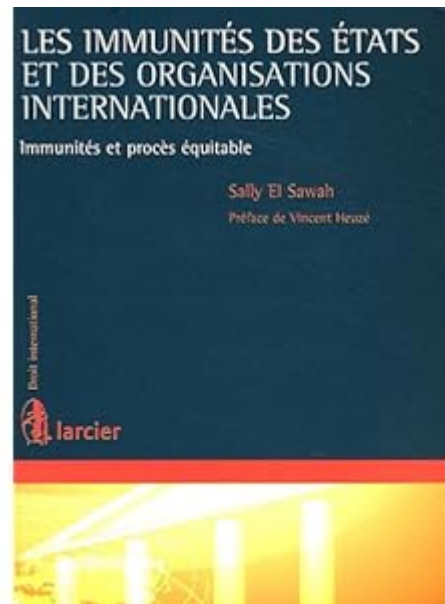
§124. ... the national courts carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life. In doing so, they attached fundamental importance to the question whether the photos, considered in the light of the accompanying articles, had contributed to a debate of general interest. They also examined the circumstances in which the photos had been taken...§126. In those circumstances, and having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the latter have not failed to comply with their positive obligations under Article 8 of the Convention. Accordingly, there has not been a violation of that provision.

Outside the German domestic context, whatever the legal basis supporting the competing interests here, it would be difficult to imagine a very different outcome. My point, therefore, is merely that given the conflict of values involved, the choice of conflict rule – national or European, general principle or special rule, bright-line or flexible, with foreseeability clause or public policy – is for a significant part, indifferent in the end. The forum will be bound ultimately to a proportionality test, whatever the starting point. And in the end, no doubt, the way in which it implements such a test will depend on its own view of the equities in a specific case. Human rights law indubitably places constraints on adjudication, but it is of course largely context-sensitive and does not mandate one right answer. The economy of any choice of law rule, along with its exceptions, special refinements or escape clauses, is likely to reflect similar constraints – no more, no less.

It may be that the unfortunate saga of the Duchess of Cambridge's topless pictures will begin and end on a purely jurisdictional note, with the interim measures already obtained. These gave the claimants partial satisfaction, at least on French soil and for the existing digital versions of the pictures. At the time of writing, we do not know if further legal action is to be taken with a view to monetary compensation (nor where), and whether the issue of applicable law will arise. We know that the French provisional measures have not entirely prevented copies from circulating on the Internet, nor the medias in other countries (including of course some which would not be bound by Rome II in any event) from publishing or intending to publish them. This raises the additional and much discussed issue (or "can of worms" to borrow Andrew Dickinson's term) of the adequate treatment of cross-border cyber-torts (whether or not linked to the invasion of personality rights). As apparent already in the Duchess of Cambridge case, cyber-privacy conflicts will usually comprise a significant jurisdictional dimension, frequently debated in terms of the lack of effectiveness of traditional measures (such as seizure of the unauthorized pictures), which are usually territorial in scope (not cross-border), and merely geographical (no effect in virtual space). The first deficiency might be overcome through injunctive relief, but the second requires specifically regulatory technology (as opposed to merely legal or normative: see for example, on the regulatory tools available, Roger Brownsword's excellent *Rights, Regulation and the Technological Revolution*, Oxford, OUP, 2008). However, given the inevitable conflicts of values in all cases and the variable balance of equities as between any given instances, it is not necessarily desirable that any such measure should actually achieve universal water-tightness. Look at the *Trafigura* case, after all (a saga involving the silencing of journalists relating to a case involving the international dumping of toxic waste: see, on the extraordinary judicial journey of the *Probo Koala*, *Revue critique DIP* 2010.495). Was it not lucky that the super-injunction which purported to gag *The Guardian* newspaper to the extent allowed by the most sophisticated judicial technology, did not succeed in preventing an unauthorized twit (but that's also a sore point in French politics at the moment!)?

El Sawah on Immunities and the Right to a Fair Trial

Sally El Sawah, who practices at the French arbitration boutique Leboulanger, has published a monograph in French on Immunities of States and International Organizations (*Les immunités des Etats et des organisations internationales - Immunités et procès équitable*).



The book, which is more than 800 page long, is based on the doctoral dissertation of Ms El Sawah. The main project of the author is to confront the law of sovereign immunities with human rights, and more specifically the Right to a Fair Trial.

The most provocative idea of Ms El Sawah is that the existence of rules of customary international law on sovereign immunities is a myth, and that the wide divergences of the national laws on the topic clearly show that there is no superior rule binding on national states.

After arguing that customary international law is essentially silent on the matter, the author makes her central claim. States should be considered as being essentially constrained by fundamental rights when unilaterally adopting rules on sovereign immunities. As a consequence, and contrary to the case law of the European Court of Human Rights, the laws of sovereign immunities should not be considered immune from an assessment from a human rights perspective.

Ms El Sawah concludes that the French law of sovereign immunities should be significantly amended, in particular insofar as it distinguishes between immunity to be sued in court and immunity from measures of constraint (enforcement).

More details can be found on the publisher's website.

The French abstract is available after the jump.

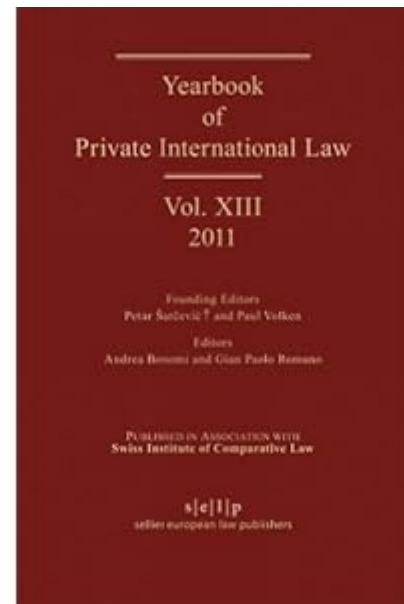
Le débat sur le conflit entre les immunités et le droit au procès équitable a pris toute son ampleur après les décisions décevantes de la CEDH, jugeant que les immunités constituent une limitation légitime et proportionnée au droit d'accès au juge. Or, il résulte de l'étude des fondements, sources et régimes des immunités et du droit au procès équitable que leur conflit dépasse leur antinomie étymologique : les immunités portent atteinte au droit d'accès au juge dans sa substance même.

L'imprécision et l'incohérence du régime des immunités étatiques aussi bien que l'absence de voie de recours alternative aux immunités des organisations internationales portent atteinte au droit d'accès concret et effectif au tribunal. Néanmoins, le conflit entre les immunités étatiques et le droit au procès équitable est moins problématique que le conflit entre ce dernier et les immunités des organisations internationales. Contrairement aux immunités étatiques qui n'ont qu'une source nationale, il existe un véritable conflit de normes de valeur égale entre le droit au procès équitable, droit fondamental en droit interne et international, et les immunités des organisations internationales, régies par des conventions internationales. La résolution du conflit entre le droit des immunités et le droit au procès équitable, qui ne mérite pas de se réaliser par le sacrifice de l'un au profit de l'autre et inversement, requiert l'intervention du législateur, compte tenu de la fonction politique des immunités et des principes de l'état de droit.

Une conciliation qui prend en compte les intérêts légitimes poursuivis par les droits en conflit est possible. Le droit au procès équitable ne doit plus constituer un motif d'exclusion des immunités. Il doit désormais servir à définir le régime des immunités des états et des organisations internationales. Si un déni de justice subsiste, le justiciable ne sera pas pour autant désarmé. Son droit de recours au juge sera préservé ; il pourra agir contre l'état du for pour rupture de l'égalité devant les charges publiques.

Yearbook of Private International Law, Vol. XIII (2011)

The latest issue of the Yearbook of Private International Law (Volume XIII - 2011) has recently been published. Edited by *Andrea Bonomi*, Professor at the University of Lausanne, and *Gian Paolo Romano*, Professor at the University of Geneva, the volume focuses, among others, on recent developments in European private international law.



The official announcement reads as follows:

The current volume of the “Yearbook of Private International Law” includes three special sections: The first one is devoted to the recent European developments in the area of family law like the proposal on the matrimonial property régimes in its relation with other EU instruments, such as Brussels IIbis or Rome III. Another special section deals with the very hotly debated question of the treatment of and access to foreign law. The third one presents some recent reforms of national Private International Law systems. National reports and court decisions complete the book.

Recent highlights include:

- *multiple nationalities in EU Private International Law*
- *the European Court of Human Rights and Private International Law*
- *parallel litigation in Europe and the US*
- *arbitration and the powers of English courts*
- *conflict of laws in emission trading*
- *res judicata effects of arbitral awards*

The *Yearbook* includes the following contributions:

Doctrine

- Stefania Bariatti, Multiple Nationalities and EU Private International Law – Many Questions and Some Tentative Answers
- George A. Bermann, Parallel Litigation: Is Convergence Possible?
- Patrick Kinsch, Private International Law Topics Before the European Court of Human Rights – Selected Judgments and Decisions (2010-2011)
- Jonathan Hill, The Powers of the English Court to Support an Arbitration in “Foreign Seat” and “No Seat” Cases
- Christa Roodt, Border Skirmishes between Courts and Arbitral Tribunals in the EU: Finality in Conflicts of Competence
- Koji Takahashi, Conflict of Laws in Emissions Trading
- Thomas Kadner Graziano, The CISG Before the Courts of Non-Contracting States? Take Foreign Sales Law as You Find It

European Family Private International Law

- Cristina González Beilfuss, The Proposal for a Council Regulation on the Property Consequences of Registered Partnerships
- Ilaria Viarengo, The EU Proposal on Matrimonial Property Regimes – Some General Remarks
- Andrea Bonomi, The Interaction among the Future EU Instruments on Matrimonial Property, Registered Partnerships and Successions
- Beatriz Campuzano Díaz, The Coordination of the EU Regulations on Divorce and Legal Separation with the Proposal on Matrimonial Property Regimes
- Simone Marinai, Matrimonial Matters and the Harmonization of Conflict of Laws: A Way to Reduce the Role of Public Policy as a Ground for Non-Recognition of Judgments

Application of Foreign Law

- Carlos Esplugues Mota, Harmonization of Private International Law in Europe and Application of Foreign Law: The “Madrid Principles” of 2010
- Shaheez Lalani, A Proposed Model to Facilitate Access to Foreign Law

News from Brussels

- Mel Kenny / Lorna Gillies / James Devenney, The EU Optional Instrument: Absorbing the Private International Law Implications of a Common European Sales Law

News from Rome

- Alessandra Zanobetti, UNIDROIT's Recent Work: An Appraisal

National Reports

- Yasuhiro Okuda, New Provisions on International Jurisdiction of Japanese Courts
- Tomasz Pajor†, Introduction to the New Polish Act on Private International Law of 4 February 2011
- Mathijs H. ten Wolde, Codification and Consolidation of Dutch Private International Law: The Book 10 Civil Code of the Netherlands
- Seyed N. Ebrahimi, An Overview of the Private International Law of Iran: Theory and Practice (Part Two)
- Nikolay Natov / Boriana Musseva / Teodora Tsenova / Dafina Sarbinova / Zahari Yanakiev / Vasil Pandov, Application of the EU Private International Law Instruments in Bulgaria
- William Easun / Géraldine Gazo, Trusts and the Principality of Monaco

Court Decisions

- Michael Bogdan, Defamation on the Internet, *forum delicti* and the E-Commerce Directive:
Some Comments on the ECJ Judgment in the *eDate* Case
- Michel Reymond, The ECJ *eDate* Decision: A Case Comment
- Matthias Lehmann, Exclusive Jurisdiction under Art. 22(2) of the Brussels I Regulation:
The ECJ Decision *Berliner Verkehrsbetriebe v JPMorgan Chase Bank* (C-144/10)
- Jan von Hein, Medical Malpractice and Conflict of Laws: Two Recent Judgments by the German Federal Court of Justice
- Kun Fan, The Risks of Apparent Bias when an Arbitrator Acts as a

Forum

- Jeremy Heymann, The Relationship between EU Law and Private International Law Revisited: Of Diagonal Conflicts and the Means to Resolve Them
 - Ilaria Pretelli, Cross-Border Credit Protection against Fraudulent Transfers of Assets – *Actio pauliana* in the Conflict of Laws
-

ICC and Civil Reparations

Many thanks to Assistant Professor Nicolás Zambrana (University of Navarra, Spain), author of this comment on the ICC decisions against Lubanga.

First Decision on Civil Reparations by the International Criminal Court

Last 14 of March, the International Criminal Court (ICC) issued its first judicial decision ever, declaring Thomas Lubanga guilty of the crime of conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities in the Democratic Republic of Congo. The following 10 of July, another decision, sentencing Lubanga to 14 years in prison, was issued by the same tribunal. Finally, last 7 of August a decision on reparations for the victims has been issued by the ICC. The first thing to be observed is that there does not seem to be a declaration by the tribunal concerning the **civil liability** of Lubanga in any of the three decisions, even if art 75 of the Rome Statute foresees that the ICC may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Furthermore, Lubanga is believed by the court to have no known assets, so no monetary fines have been imposed and no monetary reparations will be exacted from him, although the tribunal foresees that he should provide an apology to the victims as part of the reparations. If the person condemned by the ICC has assets with which to satisfy the fines imposed or the amounts of the reparations decided by the court, the Rome Statute

foresees, in article 109.1, that **State Parties** (i.e. parties to the Rome Statute) **shall give effect to those fines or forfeitures** ordered by the Court without prejudice to the rights of *bona fide* third parties, and in accordance with the procedure of their national law. This article can be complemented by article 93 of the Statute, which declares the obligation by countries to abide by orders of the ICC requesting seizures of property under the law of the country. This procedure seems, at least as regards its goals, rather similar to a common **exequatur system of recognition and enforcement of foreign judgements**, only this time there is no foreign country where the judicial decision originates but an international tribunal. Nevertheless, it could be anticipated that, as it happens with the **enforcement of decisions issued by human rights courts** such as the European Court of Human Rights, even if the international obligation to abide by the decision of the international tribunal is clear, nothing is foreseen in case the enforcing State delays or altogether refuses to comply with the decision. This may be easily done since the compliance with the ICC's decision on fines and seizures of property of the person condemned has to be carried out in accordance with the law of the country and few countries may have already adapted their legislation on enforcement of foreign judgments to the Rome Statute. It is also peculiar that, even if the person condemned has no assets with which to satisfy his or her civil liability, the Rome Statute foresees (art. 75.2) that the reparations can still be made "through" a **Trust Fund** funded by the States. This Trust Fund operates in such a way that the ICC only needs to find somebody guilty of one of the crimes established by its Statute in order to set in motion an elaborated machinery that will try to repair all kind of damages, individual or communitarian, physical or psychological, caused by the crimes (art. 97 of the Rules of Procedure and Evidence of the ICC). However, the most interesting part of the 7 August decision is the set of principles elaborated by the ICC in order to "calculate", design and distribute the reparations. It is worth noting that these principles are only valid for the Lubanga case, as the Rome Statute foresees that in every case the ICC will establish the principles needed to establish the reparations. Even if this almost one hundred pages decision sets out those principles, **it does not quantify the reparations** or even determine their exact nature, leaving that for the Trust Fund, which will have great discretion for this task, being only monitored by a Chamber of the ICC. One interesting feature of these principles is that they do not limit the reparations to victims present at the trial but to any person, community or entity that is found to have suffered from the crimes adjudicated. Therefore, the principles choose to make the victims a

“class”, as in the **US class action system**. Another interesting feature is that the ICC Lubanga principles state that victims may obtain reparations also under other mechanisms, according to national or international law. Another one of the principles will sound familiar to civil and common lawyers because it says that Restitution should, as far as possible, restore the victim to his or her circumstances before the crime was committed. This is certainly a landmark decision because it opens the way to non punitive redress for the victims of egregious international crimes.

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 Gijssels 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 Netherlands 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 country, 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 occurred for many decades. [Download here](#).