Dutch draft bill on collective action for compensation – a note on extraterritorial application

As many readers will know, the Dutch collective settlement scheme – laid down in the Dutch collective settlement act (*Wet collective afhandeling massaschade*, WCAM) – has attracted a lot of international attention in recent years as a result of several global settlements, including those in the *Shell* and *Converium* securities cases. Once the Amsterdam Court of Appeal (that has exclusive competence in these cases) declares the settlement binding, it binds all interested parties, except those beneficiaries that have exercised the right to opt-out. When the WCAM was enacted almost ten years ago, the Dutch legislature deliberately choose not to include a collective action for the compensation of damages to avoid some of the problematic issues associated with US class actions and settlements.

However, following a Parliamentary motion, this summer the Dutch legislature published a draft proposal for public consultation (meanwhile closed, public responses available here) to extend the existing collective action to obtain injunctive relief to compensation for damages. As the brief English version of the consultation paper states, the draft bill aims to:

> *"enhance the efficient and effective redress of mass damages claims and to strike a balance between a better access to justice in a mass damages claim and the protection of the justified interests of persons held liable. It contains a five-step procedure for a collective damages action before the Dutch district court. Legal entities which fulfill certain specific requirements (expertise regarding the claim, adequate representation, safeguarding of the interests of the persons on whose behalf the action is brought) can start a collective damages action on behalf of a group of persons. The group of persons on whose behalf the entity brings the action must be of a size justifying the use of the collective damages action. Those persons must not have other efficient and effective means to get redress. The entity must have tried to obtain redress from the person held liable amicably."*

A point of particular interest is a provision regarding the extraterritorial

application of the proposed act. The Amsterdam Court of Appeal has been criticized by both Dutch and other scholars for adopting a wide extraterritorial jurisdiction in the WCAM procedure, on the basis of the Brussels Regulation, the Lugano Convention and domestic international jurisdiction rules. The application of the European jurisdiction rules is challenging in view of the particular procedural design of the WCAM scheme (a request to declare a settlement binding between a responsible party and representative organisations/foundations on behalf of interested parties). This draft bill does not introduce separate international jurisdiction rules, but proposes a 'scope rule' to ensure that the case is sufficiently connected to the Netherlands. The draft explanatory memorandum (in Dutch) states that a choice of forum of two foreign parties in relation to an event occurring outside the Netherlands will not suffice to seize the Dutch court for a collective compensatory action, even if parties have made a choice of law for Dutch law (yes, we see similarities to the US Supreme Court case *Morrison v. National Australia Bank*). It is required that either the party addressed has its domicile or habitual residence in the Netherlands (a), or that the majority of the interested parties have their habitual residence in the Netherlands (b), or that the event(s) on which the claim is based occurred in the Netherlands. Needless to say that these rules leave the application of the jurisdiction rules of Brussels and Lugano unimpeded. It is clear that the proposed provision limits the possibility for foreign parties to seek collective compensatory relief in the Netherlands. The risk of the Netherlands becoming a 'magnet jurisdiction' for collective redress as put forward by some commentators seems therefor absent.

See for two recent English publications on the Dutch collective settlements act, published in the *Global Business & Development Law Journal* 2014 (volume 27, issue 2) devoted to Transnational Securities and Regulatory Litigation in the Aftermath of Morrison v. Australia National Bank: Bart Krans (University of Groningen), *The Dutch Act on Collective Settlement of Mass Damages,* and Xandra Kramer (Erasmus University Rotterdam), *Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries.*

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (1/2014)

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

- ***Heinz-Peter Mansel/Karsten Thorn/Rolf Wagner***: "European conflict of laws 2013: Respite from the status quo"

The article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from November 2012 until November 2013. It summarizes current projects and new instruments that are presently making their way through the EU legislative process. It also refers to the laws enacted at the national level in Germany as a result of new European instru-ments. Furthermore, the authors look at areas of law where the EU has made use of its external competence. They discuss both important decisions and pending cases before the ECJ as well as important decisions from German courts pertaining to the subject matter of the article. In addition, the article also looks at current projects and the latest developments at the Hague Conference of Private International Law.

- ***Christoph Schoppe***: "The intertemporal provisions regarding choice-of-law clauses under Europeanised inheritance law"

This article examines the practical implications of the intertemporal provisions of the new European Regulation No. 650/2012 on succession and wills in private international law. Its emphasis lies on those rules regarding choice-of-law clauses. Although hardly noticed yet, such provisions can have a significant impact on a testator's estate planning, especially during a transitional period until 15 th August 2015. Thus, firstly, the article analyses risks and opportunities for testators who seek to have the law of their nationality applied. Secondly, it addresses those testators who prefer to apply another law, which will be unavailable to them under the European Regulation after the transitional period has lapsed. As a common ground underlying all practical

issues, it is advocated that only a broad interpretation of any intertemporal provision under the Regulation protects the reasonable reliance-interest of testators regarding their estate planning. Thirdly, some practical points are addressed that might prove difficult when the testator did not choose the law applicable to his estate.

- ***Anatol Dutta***: "The liability of American credit rating agencies in Europe"

The question whether credit rating agencies are liable for flawed ratings is mainly discussed in substantive law. Yet, from a European perspective, the liability of credit rating agencies also raises issues of private international law as the rating market is dominated by the three American agencies Standard & Poor's, Moody's and Fitch Ratings. Hence, it is not necessarily the case that a European liability regime – be it at the Member State level or at the European Union level such as the recently introduced Art. 35a of the European Regulation on Credit Rating Agencies – will adequately encompass the American agencies and their ratings, a question which shall be addressed in the present paper.

- ***Giesela Rühl***: "Causal Link between Targeted Activity and Conclusion of the Contract: On the Scope of Application of Art. 15 et seq. Brussels I – Comment on the Judgment of the Court of Justice of the European Union of 17 October 2013 (Lokman Emrek ./. Vlado Sabranovic)"

On 17 October 2013 the Court of Justice of the European Union (CJEU) handed down its long-awaited decision in Lokman Emrek ./. Vlado Sabranovic. The court held that consumers may sue professionals before their home courts according to Art. 15 (1) lit. c), 16 (1) Brussels I even if there is no causal link between the means used to direct the commercial or professional activity to the consumers' member state and the conclusion of the contract. The case note comments on the judgment and criticizes the CJEU both in view of the reasoning applied and the results reached. It argues that the highest European court disregards the wording of Art. 15 (1) lit. c) Brussels I, the pertaining majority view in the literature as well as the requirement of uniform interpretation of European Union law. More specifically, it argues that the court ignores recital 25 Rome I that makes clear that Art. 6 (1) Rome I – and thus, Art. 15 (1) lit. c) Brussels I – requires a causal connection between targeted

activity and conclusion of the contract. The case comment goes on to show that the CJEU also disregards the rationale of Art. 15 (1) lit. c) Brussels I: it allows consumers to sue at home even if they actively – and without motivation by their contracting partner – go abroad to purchase goods and services. The CJEU, thus, pushes the boundaries of consumer protection beyond what the European legislator had in mind – and beyond what is needed.

- ***Georgia Koutsoukou***: "Einspruch gegen den Europäischen Zahlungsbefehl als rügelose Einlassung?" – the English abstract reads as follows:

In the case Goldbet Sportwetten ./. Massimo Sperindeo, the CJEU had to decide on the applicability of Art. 24 of the Brussels I Regulation to Regulation (EC) No 1896/2006 creating a European order for payment procedure. In its decision, the CJEU ruled that a statement of opposition to a European order for payment does not amount to entering an appearance within the meaning of Article 24 of the Brussels I Regulation. In the Court's view, this rule applies to both a reasoned and an unreasoned statement of opposition. The Court's decision adheres to the main principles of the European order for payment procedure. In this paper, the author illustrates and evaluates the legal reasoning of the decision and concludes that the Court should have elaborated the relationship between the European order for payment procedure and the ordinary civil proceeding in a less abstruse manner.

- ***Herbert Roth***: "Mahnverfahren im System des Art. 34 Nr. 2 EuGVVO" – the English abstract reads as follows:

The judgement of the Oberlandesgericht (Higher Regional Court) Düsseldorf confers the requirements concerning the possibility of the defendent to lodge a legal remedy stated in Art. 34 No 2 of the European Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters to decisions in foreign order for payment procedures. Therefore the defendant's pure knowledge of the existence of the payment order in not sufficient. Essential is the knowledge of the content of the payment order as being officially served. However some exceptions are necessary, because the payment order gives no reasons and is issued on the base of a prima facie examination of the merits of

the claim. The defendant is not obliged to contest the claim, if it is not clearly identified in the payment order. The refusal of enforcement can be avoided by paying attention to the requirements of § 10 para 1 of the German AVAG (Gesetz zur Ausführung zwischenstaatlicher Verträge und zur Durchführung von Verordnungen und Abkommen der Europäischen Gemeinschaft auf dem Gebiet der Anerkennung und Vollstreckung in Zivil- und Handelssachen).

- ***Thomas Rauscher***: "Erbstatutswahl im deutsch-italienischen Rechtsverkehr"- the English abstract reads as follows:

From a German court's perspective a choice of the applicable succession law made by an Italian citizen under art. 46 (2) of the Italian Law on Conflicts may only be valid as a result of a renvoi issued by Italian conflict law. An additional choice of law under art. 25 (2) of the German Introductory Law, concerning only real property situated in Germany, makes sense, as the validity of an "Italian" choice of law clause depends on the "de cuius" residence at the time of death. The following article explains which law applies to formal and material problems concerning a choice of law under art. 25 (2). As a result such choice of law is valid, if it complies with German law; formal validity may in addition be governed by any other law applicable under art. 1 Hague Convention of October 5, 1961.

- ***Urs Peter Gruber***: "Die konkludente Rechtswahl im Familienrecht"- the English abstract reads as follows:

Art. 14 EGBGB (general effects of marriage) and Art. 15 EGBGB (matrimonial property regime) grant a limited freedom to choose the applicable law. As a basic rule, the choice of law must be notarially certified. However, if the agreement on the applicable law is not concluded in Germany, it is sufficient if the formal requirements of a marriage contract under the law chosen or of the place of the choice of law are observed.

In recent years, German courts had to deal with cases in which Muslim spouses, who were domiciled in Germany, had married abroad in their country of origin and concluded a marital contract based on Islamic laws. In these circumstances, it was doubtful whether there had been an implicit choice of law

leading to a derogation of the otherwise applicable German law and the application of the law of the state in which the marriage had been celebrated.

In most decisions, the courts denied the existence of an implicit choice of law, arguing that the spouses had not been aware of the possibility and/or need to derogate from the German law. They reasoned that merely acting under the "wrong" law did not amount to an agreement on the applicable law. In a recent decision, the Kammergericht Berlin followed this line of arguments. However, in the author's opinion, the court should have scrutinized the facts of the case much more closely – especially as in the matter at hand, as stipulated by § 26 FamFG, the court had to ascertain the relevant facts ex officio.

- ***Claudia Mayer***: "Inappropriate differentiations in international surrogacy cases"

Determining legal parentage is one of the most urgent questions arising in international surrogacy cases, especially in countries like Germany, where surrogacy is illegal. Infertile couples, who avail themselves of surrogacy abroad, face severe difficulties when trying to have their legal parenthood of the child recognized by German courts or by public authorities, especially when the surrogate mother is married. Recent German court decisions have made apparent the discrepancy in German case law as well as the inconsistency of the current filiation law with higher-ranking principles. In the opinion of the author, allowing for different results with regard to accepting the legal parentage of the intended parents depending on the marital status of the surrogate mother, or depending on whether the status of the intended father or the intended mother (resp. the registered parent) is concerned, is inappropriate and unjustifiable. When the German legal system accepts that the intended father may assume the legal position as father by acknowledgement where the surrogate mother is single despite the fact of an underlying surrogacy arrangement, approving the legal parental status of the intended parents cannot be contrary to the German ordre public, only because the surrogate mother is married or the legal status of the intended mother (or registered partner) is concerned. The author argues that the German prohibition of surrogacy may not be regarded as part of the ordre public. This applies irrespective of whether a procedural recognition of foreign decisions on legal parentage or the application of foreign substantive law, designated by the

German conflict of law rules, is at issue. The German ordre public rather demands the approval of the legal parentage of the intended parents, namely in the interest of the welfare of the child.

- ***Sabine Corneloup***: "Recognition of Russian decisions under French Law"

The judgment of the Cour de cassation deals with two Russian decisions which ordered a guarantor domiciled in France to pay to a Russian bank a debt of over six million euros after insolvency proceedings had been opened in Russia against the Russian principal debtor. Both decisions have been declared enforceable in France and the Cour de cassation confirms that all conditions for their recognition under French Law were fulfilled: international jurisdiction of the Russian court, no violation of substantial or procedural public policy and absence of fraud. The Cour de cassation thus reiterates the in 2007 newly defined conditions for the recognition of foreign decisions. Their application to the present case demonstrates the liberal orientation of French Law.

- ***Baiba Rudevska***: "Recognition and Enforcement of an English Default Judgment in Latvia"

This article deals with the question of recognition and enforcement of an English default judgment in Latvia. On 6 September 2012 the European Court of Justice gave a preliminary ruling in the case of Trade Agency, replying to questions asked by the Senate (Cassation Division) of the Supreme Court of Latvia concerning the interpretation of Article 34, paras. 1 and 2 of the Brussels I Regulation. According to the Latvian civil procedure rules, all the judgments in civil matters must give a reasoning. In this precise case the default judgment of the High Court of Justice of England contained no reasoning at all. Therefore the Senate doubted whether such a judgment could be enforced in Latvia in the first place. Finally, on 13 February 2013 the Senate recognised the English default judgment. However, the order of the Senate contains legal lacunae as to the recognition and enforcement proceedings in this case. Specifically, the Senate had not checked all the relevant circumstances before recognising and enforcing the aforementioned default judgment in Latvia. These relevant circumstances have been analysed at length in this article. The abovementioned error of the Senate might in principle lead to a complaint and a further

litigation before the European Court of Human Rights.

- ***Heinz-Peter Mansel***: "Vereinheitlichung des Kollisionsrechts als Hauptaufgabe"
- ***Erik Jayme***: "Mehrstaater im Europäischen Kollisionsrecht"

Another Alien Tort Statute Case Dismissed and a Preliminary Scorecard

As readers of this blog are aware, the United States Supreme Court in the recent case of *Kiobel v. Royal Dutch Petroleum* applied the presumption against extraterritoriality to limit the reach of the Alien Tort Statute. In short, the Court held that the ATS did not apply to violations of the law of nations occurring within the territory of a foreign sovereign.

Today, the United States Court of Appeals for the Second Circuit issued an opinion in the case of *Balintulo v. Daimler AG* holding that the *Kiobel* decision barred a class action against Daimler AG, Ford Motor Company, and IBM Corporation for alleged violations of the law of nations in selling cars and computers to the South African government during the Apartheid era. Rather than dismiss the case itself, the Second Circuit remanded the case to the district court to entertain a motion for judgment on the pleadings. This case is important because it rejected the plaintiffs' theory that "the ATS still reaches extraterritorial conduct when the defendant is an American national." Slip op. at 20. It is also important because it explains that "[b]ecause the defendants' putative agents did not commit any relevant conduct within the United States giving rise to a violation of customary international law . . . the defendants cannot be *vicariously liable* for that conduct under the ATS." Slip op. at 24.

This case as well as the Ninth Circuit's recent decision in *Sarei v. Rio Tinto*

(similarly dismissing an ATS suit) would seem to point to substantial contraction in ATS litigation. But, not so fast.

A federal disctrict court in Massachussettes recently let an ATS case go forward notwithstanding *Kiobel* where it was alleged that a U.S. citizen in concert with other defendants took actions in the United States and Uganda to foment "an atmosphere of harsh frighenting repression against LGBTI people in Uganda." *Sexual Minorities Uganda v. Lively*, 2013 WL 4130756 (D. Mass. Aug. 14, 2013). According to the district court, "*Kiobel* makes clear that its restrictions on extraterritorial application of American law do not apply where a defendant and his or her conduct are based in this country." This statement is plainly at odds with the Second Circuit decision.

Similarly, a federal district court in D.C. recently held that an ATS case could go forward that involved an attack on the United States Embassy in Nairobi.. *Mwani v. Bin Laden*, 2013 WL 2325166 (D.D.C. May 29, 2013). This was so because, according to the district court, "[i]t is obvious that a case involving an attack on the United States Embassy in Nairobi is tied much more closely to our national interests than a case whose only tie to our nation is a corporate presence here. . . . Surely, if any circumstances were to fit the Court's framework of "touching and concerning the United States with sufficient force," it would be a terrorist attack that 1) was plotted in part within the United States, and 2) was directed at a United States Embassy and its employees." This case is now on appeal.

To be clear, these cases are in the minority of the post-*Kiobel* decisions. By my count, it appears that 12 courts have dismissed ATS cases on extraterritoriality grounds and that the two cases higlighted above are the only courts to push the boundaries of the "touch and concern" language in *Kiobel*.

As always with ATS litigation, it will be interesting to see how the case law develops.

The Stream-of-Commerce Doctrine under McIntyre and the First Reactions of U.S. Courts to the U.S. Supreme Court's Ruling

Cristina M. Mariottini is a Senior researcher at the Max Planck Institute Luxembourg on International, European and Regulatory Procedural Law

How the U.S. Supreme Court Has Relinquished Reciprocity in Jurisdiction in Cross-Border Products Liability Cases and Possible Future U.S. Federal Legislation on the Matter

Products liability is the area of law in which manufacturers, distributors, suppliers, retailers, and others who make products available to the public are held accountable for the injuries caused by those products. As Justice Kennedy points out at the outset of his opinion in *J. McIntyre Machinery, Ltd. v. Nicastro et. al.*, 131 S. Ct. 2780 (2011), whether a natural or legal person is subject to jurisdiction in a State is a question that frequently arises in products liability litigation. This question arises even with an out-of-forum defendant, i.e. despite the fact that the defendant was not present in the State, either at the time of suit or at the time of the alleged injury, and did not consent to the exercise of jurisdiction. Before the U.S. Supreme Court's ruling in *McIntyre*, the issue of specific *in personam* jurisdiction of U.S. courts over out-of-forum defendants in products liability cases was addressed several times by the U.S. Supreme Court, and particularly in *International Shoe Company v. Washington*, 326 U.S. 310 (1945), *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) and *Asahi Metal Industry Co. v. Superior Court of California, Solano Cty*, 480 U.S. 102 (1987). With its decisions, the Court framed the scope of the Fourteenth Amendment's Due Process Clause and introduced the stream-of-commerce doctrine. As the Court held, in products liability cases over an out-of-forum defendant it is the defendant's purposeful availment that makes jurisdiction constitutionally proper and notably consistent with traditional notions of fair play and substantial justice; moreover, the Court held that the transmission of goods permits the exercise of jurisdiction only where the defendant targeted the forum. It is not enough that the defendant might have

predicted that its goods would reach the forum State. However, in *Asahi*'s plurality opinion,the Court developed two separate branches in the stream-of-commerce analysis. Holding that in a products liability case, constitutionally proper jurisdiction may only be established over an out-of-forum defendant where the defendant purposefully availed himself of the market in the forum State; merely placing the product or its components into the stream of commerce that swept the products into the forum State was insufficient to meet the minimum contacts requirement. Justice O'Connor, joined by Chief Justice Rehnquist, and Justices Powell and Scalia, drafted what is commonly known as the "foreseeability plus" or "stream-of-commerce plus" theory of minimum contacts. In a concurring opinion Justice Brennan, joined by Justices White, Marshall, and Blackmun, appeared to accept the principle that sales of large quantities of the defendant's product in a U.S. State, even indirectly through the stream of commerce, would support jurisdiction in that State, depending on the nature and the quantity of those sales. However, in Justice Brennan's opinion, even simply placing a product into the stream of commerce with knowledge that the product will eventually be used in the forum State constitutes purposeful availment for jurisdictional purposes. Regardless of the fact that eventually the Justices agreed that a constitutionally proper specific *in personam* jurisdiction could not be established in *Asahi* over the out-of-forum defendant, inconsistency has developed among the lower courts in regards to how the foreseeability test should be applied.

By granting certiorari on the petition from the New Jersey Supreme Court in *J. McIntyre Machinery, Ltd. v. Nicastro et al.* (in which the N.J. Supreme Court found personal jurisdiction over the manufacturer), the U.S. Supreme Court acknowledged the need to tackle the question of the stream-of-commerce doctrine, and particularly the issues left open by the lack of a majority opinion in *Asahi*. Nonetheless, on June 27, 2011, a – once again – deeply divided U.S. Supreme Court handed down its opinion in *McIntyre*, holding that, because a machinery manufacturer never engaged in activities in New Jersey with the intent to invoke or benefit from the protection of the State's laws, New Jersey lacked personal jurisdiction over the company under the Due Process Clause. As the plurality opinion held, a foreign company that markets a product only to the United States generally, but does not purposefully direct its product to an individual State, is not subject to specific jurisdiction in the State where its product causes an injury.

Unfortunately, the *McIntyre* decision failed to provide a comprehensible framework for practitioners and lower courts faced with specific *in personam* jurisdiction questions. In a sharply fragmented plurality opinion – where six Justices voted to overrule the lower court's decision, but only four joined the lead opinion, and a dissenting opinion was filed by Justice Ginsburg, joined by Justices Sotomayor and Kagan – *McIntyre* marks a strong narrowing down of the stream-of-commerce doctrine. Justice Kennedy's plurality made clear that the stream of commerce, per se, does not support personal jurisdiction, and that something more is required. While the concurrence did not fully support Justice Kennedy's opinion, they too apparently rejected Justice Brennan's view in *Asahi* that a product is subject to jurisdiction for a products liability action, so long as the manufacturer can reasonably foresee that the distribution of its products through a nationwide system might lead to those products being sold in any of the fifty States. The U.S. Supreme Court's opinion in *McIntyre* undoubtedly results in a positive development for foreign companies and a truly unfavorable outcome for U.S. plaintiffs in products liability cases.

At the outset of her dissenting opinion in *McIntyre*, Justice Ginsburg provocatively asks:

> *A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive substantial revenue from sales it makes to United States purchasers. Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user? Under this Court's pathmarking precedent in International Shoe Co. v. Washington, and subsequent decisions, one would expect the answer to be unequivocally, 'No.' But instead, six Justices of this Court, in divergent opinions, tell us that the manufacturer has avoided the jurisdiction of our State courts, except perhaps in States where its products are sold in sizeable quantities.*

In her dissent, Justice Ginsburg seems to suggest that under Article 5(3) of the

Brussels I Regulation the courts of the United Kingdom would have had no hesitation in asserting their jurisdiction over the case, if J. McIntyre had been a U.S. manufacturer and Nicastro a UK resident and had the accident occurred in the United Kingdom. Based upon the fact that, pursuant to Article 2, the Brussels I Regulation applies to defendants domiciled in the EU and that pursuant to Article 4(1) when "the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State", the argument could be raised that the hypothetical suggested by Justice Ginsburg (where the defendant is a U.S. manufacturer, *i.e*. a non-EU domiciliary), would not fall in the scope of application of the Brussels I Regulation. As for England and Wales, the Civil Procedure Rules of England and Wales would apply, instead, and notably CPR 6.20(8), whereby the courts of England and Wales may assume jurisdiction in tort claims where the damage was sustained in England, or the damage sustained resulted from an act committed within England. Accordingly, the difference in the applicable statute does not weaken the final point made by Justice Ginsburg in her dissent. In the hypothetical put forward by Justice Ginsburg, the courts of England and Wales would indeed have had no hesitation in asserting their jurisdiction over the U.S. manufacturer.

Moreover, the European solution in this area of law goes even further. Article 3(1) and (2) of the EEC Directive 85/374/EEC on Product Liability provides:

> *Article 3*
>
> *1. 'Producer' means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.*
>
> *2. Without prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer.*

As a result of, respectively, Articles 2, 5 and 60 of the Brussels I Regulation, there will always be a defendant domiciled in the Internal Market: the importer deemed to be the producer.

Hence, the conclusion may be drawn that with *McIntyre* the U.S. Supreme Court has relinquished reciprocity in jurisdictional issues in cross-border torts and notably in products liability cases, to the disadvantage of United States plaintiffs who seek to acquire jurisdiction over foreign defendants who caused them an injury in the plaintiffs' home State.

The need for legislation in this area was recognized in 2009 by the U.S. Senate Committee on the Judiciary "Leveling the Playing Field and Protecting Americans," which subsequently introduced the Foreign Manufacturers Legal Accountability Act of 2009 (see here Trey Childress' post on this blog). This bill required foreign manufacturers of products imported into the United States to establish registered agents in the United States who are authorized to accept service of process against such manufacturers, and for other purposes. The Foreign Manufacturers Legal Accountability Act of 2010 was a re-introduction of the 2009 bill; but, again, it was not enacted. In 2011, the bill was re-introduced a third time as the Foreign Manufacturers Legal Accountability Act of 2011. The bill is assigned to a Congressional committee, which will now consider it before possibly sending it on to the House of Representatives and then to the Senate. Hopefully, the uncertainties that stem from the U.S. Supreme Court's ruling in *McIntyre* will be taken into due consideration by the U.S. legislators when addressing the possible enactment of this bill.

The First Reactions of U.S. Courts to McIntyre

As expected, objections and critiques are now being raised by U.S. courts against the U.S. Supreme Court's ruling. In *Weinberg et al. v. Grand Circle Travel LLC*, 2012 WL 4096611 (D.Mass.), the estate of a Florida resident, who died in a hot air balloon crash in the Serengeti, and the deceased's fiancée, who was also a Florida resident and who sustained severe bodily injuries in the crash, brought a negligence action against the travel agent (a Massachusetts company) and the Tanzanian company that operated the hot air balloon. The balloon company moved to dismiss for want of personal jurisdiction. In drawing its conclusions, and regretfully granting the motion to dismiss, the District Court of Massachusetts stated:

> *It seems unfair that the Serengeti defendants can reap the benefits of obtaining American business and not be subject to suit in our country. It is perhaps unfortunate that recent jurisprudence appears to "turn the clock back to the*

> *days before modern long-arm statutes when a [business], to avoid being hailed into court where a user is injured, need only Pilate-like wash its hands of a product by having [agents] market it.," Russell J. Weintraub, A Map Out of the Personal Jurisdiction Labyrinth, 28 U.C. Davis L.Rev. 531, 555 (1995), and that, in many circumstances, American consumers "may now have to litigate in distant fora – or abandon their claims altogether," Arthur R. Miller, Inaugural University Professorship Lecture: Are They Closing the Courthouse Doors? 13 (March 19, 2012) (criticizing the plurality opinion in J. McIntyre Mach. v. Nicastro), but this Court must follow the law as authoritatively declared.*

The fact that in *Weinberg* the accident occurred in the defendant's State (unlike in *McIntyre*, where the accident occurred in New Jersey, where the plaintiff was also resident), inevitably weakens the constitutional soundness of the District Court's jurisdictional power over the foreign defendant. Nonetheless, regardless of such a weakened power, it appears that the District Court – siding with Justice Ginsburg's dissent – felt the urge to emphasize the fact that foreign defendants can benefit from American business without the risk of being brought to court in the U.S., and suggested that this issue should be reviewed in order to ensure access to justice to U.S. plaintiffs in cross-border tort claims.

Finally, in *Surefire LLC v. Casual Home Wolrdwide, Inc.*, 2012 WL 2417313 (S.D.Cal.), the U.S. District Court for the Southern District of California refused to apply the U.S. Supreme Court's ruling in *McIntyre* in a patent infringement claim against an out-of-forum defendant, stating that a Supreme Court plurality opinion is not binding law.

One can only hope that it will not take a further quarter of a century for the U.S. Supreme Court to sort out – possibly with a stronger awareness of the ramifications of the assessment of jurisdiction in cross-border matters and especially with a view to international private relations – the confusing picture that the lack of a majority in *McIntyre* has left behind and with which courts and legal practitioners must cope.

My most sincere gratitude goes to Prof. Dr. Burkhard Hess for his very insightful inputs.

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Any errors are, of course, mine.

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.*

Conference Announcement: Collective Redress in Cross-Border Context

Conference on Collective Redress in the Cross-Border Context
In the framework of the Henry G. Schermers Fellowship Programme<http://www.hiil.org/henry-g-schermers-fellowship>, held this year by Professor S.I. Strong, the Hague Institute for the Internationalisation of Law (HiiL) and the Netherlands Institute of Advanced Studies (NIAS)<http://www.nias.nl/Pages/NIA/2/764.bGFuZz1FTkc.html> announce a workshop on the theme 'Collective Redress in the Cross-Border Context: Arbitration, Litigation and Beyond.'
The workshop aims to explore the various means that can be used to resolve

collective legal injuries that arise across national borders. The types of dispute resolution mechanisms to be discussed range from class and collective arbitration, mass arbitration and mass claims processes, class and collective litigation, and large-scale settlement and mediation. The workshop will bring together practitioners, academics, and representatives of non-governmental organisations, all of whom have an interest and expertise in public and private resolution of collective redress in the international realm.

For the first time, NIAS and HiiL are offering a works-in-progress conference in association with the Henry G. Schermers workshop. This conference is designed to allow practitioners and scholars who are interested in this area of law to discuss their work and ideas in the company of other experts in the field.

Confirmed speakers for the Schermers workshop include:
* Jan Willem Bitter, Simmons & Simmons LLP/Netherlands Arbitration Institute (The Netherlands) * Christian Borris, Freshfields/German Arbitration Institute (Germany) * Laura Carballo Piñeiro, University of Santiago de Compostela (Spain) * Christopher R. Drahozal, University of Kansas (USA) * Gregory A. Litt, Skadden, Arps, Slate, Meagher & Flom LLP (USA) * Daan Lunsingh Scheurleer, NautaDutihl (The Netherlands) * Gerard Meijer, Nauta Dutihl/Erasmus University Rotterdam/PRIME Finance (The Netherlands) * Rachel Mulheron, University of London, Queen Mary (UK) * Victoria Orlowski, ICC International Court of Arbitration (France) * Geneviève Saumier, McGill University (Canada) * Garth Schofield, Permanent Court of Arbitration (The Netherlands) * S.I. Strong, Henry G. Schermers Fellow, HIIL/NIAS, University of Missouri (USA)
The three-day event will be held June 20-22, 2012, at the NIAS site in Wassenaar, twenty minutes outside of the Hague. The events are free to the public, but registration is required. For more information on the event, including the full programme for both the Schermers workshop and works in progress event, see the HiiL website at: http://www.hiil.org/events/hiil-nias-workshop-collective-redress. Questions may also be directed to Professor S.I. Strong at strongsi@missouri.edu<mailto:strongsi@missouri.edu>.

Tang on Consumer Collective Redress in European PIL

Zheng Sophia Tang (Leeds University) has posted Consumer Collective Redress in European Private International Law on SSRN.

> *Collective redress is a cost-sharing and procedure-consolidating mechanism. In the area of consumer litigation, it is introduced primarily to compensate the weakness of expensive and time-consuming court proceedings in small claims in order to increase consumers' access to justice. Consumer contractual claims are characterised as of small value, which largely discourages individual consumers from resorting to judicial action to protect their legal rights. Collective redress combines separate consumer claims against the same defendant based on the similar circumstances into one single action. It is helpful to resolve the litigation difficulty, to promote consumers' access to redress and to improve good commercial performance. A recent survey shows 76% of European consumers would be more willing to defend their rights in court if they could join other consumers. It is also believed that collective redress could offer businesses an opportunity to resolve an issue once rather than having repeated proceedings.*
>
> *The concept of collective redress is not new. Some common law countries, such as US, Canada and Australia have already established mature and widely used 'class action' mechanism, which enables one or more individuals to bring an action on behalf of putative claimants against the same defendant. Each putative claimant is presumed to consent being presented in the action and being bound by the judicial decision, unless he actively gives notice to opt out. The US-style class action does not exist in Europe, though the revised versions with similar elements exist in the Netherland and Sweden. Currently, thirteen Member States have adopted collective redress mechanisms for consumer claims. Although practices in these countries vary largely, they could be generally categorised into three groups: (1) group action, where exactly defined claimants bring actions in one procedure to enforce their similar claims*

together. Each group litigant is a party in the litigation; (2) representative action, where an organisation, an authority or an individual brings actions on behalf of a group of individuals, who are not the real party of the litigation; (3) test case procedure, under which mass individual claims are filed, and a leading decision is given to one case, which decides the common factual and legal issues of similar legal actions, and serves as an example for other similar cases.

Collective redress in Europe is at an experimental stage and the existing collective redress mechanisms in most Member States are largely domestic tools, the effect of which is primarily limited to domestic claims. There is no common standard in the EU as to the functioning and regulation of collective actions. With the consumer-oriented culture, increasing consumers' access to justice has attracted much attention. In its Consumer Policy Strategy for 2007-2013, the European Commission announced that it would consider the feasibility of an EU initiative on collective action in protecting consumers' access to justice. In November 2008, the European Commission has published a Green Paper on Consumer Collective Redress, which provides four proposals for the possible development of consumer collective redress in Europe, two of which might be of particular interest to conflicts lawyers: (1) to require Member States having a collective redress mechanism to open up the mechanism to consumers from other Member States (option 2 of the Green Paper), and (2) to initiate a non-binding or binding EU measure to ensure that a collective redress judicial mechanism exists in all Member States (option 4). The European Commission specifically points out that these two options with clear cross-border features could generate conflict of laws difficulties.

This research focuses on the jurisdiction problems in cross-border collective redress in Europe. The European jurisdiction rules have two characteristics: firstly, protective jurisdiction is available for consumer contractual claims. Section 4 of the Brussels I Regulation provides that if a contract falls within the protective scope, a consumer is always entitled to sue a business defendant in the consumer's domicile. This approach is incompatible with the nature of cross-border collective redress, where consumers may come from different Member States. Secondly, special jurisdiction rules are designed according to the 'classification' of the claim. There is no special jurisdiction rule designated for the 'collective redress' (Art 6 concerns multiple defendants instead of multiple claimants) and it is necessary to see whether any of the existing

jurisdiction provisions can be properly applicable to a collective action.

These characteristics determine the difficulties to apply the Brussels rules in cross-border collective redress. In a representative action, the representative individual(s) or association brings the lawsuit on behalf of all represented consumers, where the real litigating party is the representative instead of the represented consumers. If the protective jurisdiction does not apply, one needs to study whether the action is a matter relating to contract under Art 5(1). There is no doubt that each putative claimant that has been represented has a contractual claim, but should Article 5(1) require the existence of a contractual claim between the 'litigating parties?' Even if the group action is classified as a matter relating to contract, applying the jurisdiction rules of Article 5(1) can be difficult in a representative action where the goods are delivered to, or services are provided for, consumers domiciled in different Member States.

In group action or test case procedure, each consumer is the real litigant and could individually enforce the decision. Since the Brussels I Regulation does not provide specific jurisdiction rules for these mechanisms, it is necessary for a court to consider jurisdiction over the claim of each consumer in the collective action. A consumer in a contract that falls within the scope of protective jurisdiction is entitled to sue a business defendant either in the court of the defendant's domicile or in the court of the consumer's domicile. According to this rule, where the consumers are domiciled in more than on Member State, only the courts of the defendant's domicile could have jurisdiction. The courts of any one of the consumers' domicile can only hear the action brought by the claimant consumer who has his domicile within this country.

It is concluded that under the current Brussels I Regulation, cross-border consumer collective redress can only be brought in the court of a defendant's domicile, unless all the consumers are domiciled in one Member State. However, it does not mean that the current approach is definitely a barrier to cross-border collective redress. On one hand, it brings disadvantages to those consumers domiciled in a country where very few consumers have transactions with the business and it prevents collective action from being brought where a business's commercial activities are spreading over many Member States and the number of consumers in each State is not high. On the other hand, it brings certainty to business defendants, especially small and medium sized companies, and reduces litigation costs. The research will continue to analyse the socio-

economic impact of the current jurisdiction rule, and to consider whether it is necessary to reform the Brussels I Regulation by introducing an innovative provision specifically for collective redress.

The paper was published in the *Journal of Private International Law* in 2011.

Call for Proposals

Please see below for a call for proposals for a conference to be held 20-22 June 2012

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Call for Proposals – Collective Redress in the Cross-Border Context

Large-scale international legal injuries are becoming increasingly prevalent in today's globalized economy, whether they arise in the context of consumer, commercial, contract, tort or securities law, and countries are struggling to find appropriate means of providing collective redress, particularly in the cross-border context. The Hague Institute for the Internationalisation of Law (HiiL), along with the Netherlands Institute for Advanced Study in the Humanities and Social Sciences (NIAS), will be responding to this new and developing challenge by convening a two-day event on the theme "Collective Redress in the Cross-Border Context: Arbitration, Litigation, Settlement and Beyond." The event includes two different elements – a workshop on 21-22 June 2012 comprised of invited speakers from all over the world as well as a works-in-progress conference on 20-21 June 2012 designed to allow practitioners and scholars who are interested in the area of collective redress to discuss their work and ideas in the company of other experts in the field. Both events are organized by the Henry G. Schermers Fellow for 2012, Professor S.I. Strong of the University of Missouri School of Law.

Persons interested in being considered as presenters for the works-in-progress conference should submit an abstract of no more than 500 words to Professor S.I. Strong at strongsi@missouri.edu on or before 1 May 2012. Decisions regarding

accepted proposals will be made in early May, and those whose proposals are accepted for the works-in-progress conference will need to submit a draft paper by 4 June 2012 for discussion at the conference. All works-in-progress submissions should explore one or more of the various means of resolving collective injuries, including class and collective arbitration, mass arbitration and mass claims processes, class and collective litigation, and large-scale settlement and mediation, preferably in a cross-border context. Junior scholars in particular are encouraged to submit proposals for consideration.

Persons presenting at the works-in-progress conference will have to bear their own costs, since there is no funding available to assist with travel and other expenses. The works-in-progress conference will be held on 20 and 21 June 2012 at NIAS, Meijboomlaan 1, 2242 PR Wassenaar, The Netherlands. Wassenaar is approximately 20 minutes from The Hague by car. The workshop of invited speakers will be held on 21 and 22 June, also at NIAS.

Both the Schermers workshop and the works-in-progress conference are open to the public, although advance registration is required. More information on both events is available at the HiiL website (www.hiil.org) or from Professor Strong at strongsi@missouri.edu.

Contact: Prof. S.I. Strong at strongsi@missouri.edu

Deadline for proposals: 1 May 2012

For more on the Henry G. Schermers Fellowship at HiiL/NIAS, see: http://www.hiil.org/organ-bios/prof-s-i-strong

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Jurisdiction of the Amsterdam Court of Appeal in the Converium

Settlement Case

[Guest post written by Thijs Bosters LL.M., a PhD Researcher (Private International Law and Collective redress) at Tilburg University.]

After the *Morrison v. NAB* decision of last June, the question was raised how and where an f-cubed case should be filed in the future. It has been proposed that, for example, the Canadian class action or the Dutch collective settlement procedure could serve as alternatives in cross-border securities mass disputes. What makes the Dutch collective settlement procedure such an interesting alternative is that a settlement can be declared binding by the Amsterdam Court of Appeal on all persons to which it applies according to its terms. In this way, all plaintiffs can be covered and a mass dispute can be resolved through a single action (for more information on the Collective Settlement Act (*Wet collectieve afwikkeling massaschade*), see the The Global Class Actions Exchange report of Stanford Law School). With the 2009 Shell collective settlement, the Dutch Act proved that it can be instrumental in the resolution of cross-border securities mass disputes. The *Shell* case, however, was only a partially f-cubed case, as quite many of the investors involved were Dutch.

Converium

On 12 November 2010, the Amsterdam Court of Appeal assumed preliminary jurisdiction in the "full f-cubed" *Converium* case (the Dutch text can be found here). This case revolves around the Swiss reinsurance company Converium Holding AG (currently known as SCOR Holding AG). In late 2001, Zürich Financial Services Ltd, of which Converium was a full subsidiary, sold its shares through an initial public offering. The shares were listed on the SWX Swiss Exchange in Switzerland and as American Depositary Shares (ADSs) on the New York Stock Exchange. Between 7 January 2002 and 2 September 2004, Converium made several announcements which led people to believe that Converium had deliberately underestimated the insurance risks when floating its reinsurance unit. The existing reserve deficiency forced Converium to announce that it would take a charge of between $ 400 and $ 500 million to increase its reserve. This, combined with the downgrade of the company's credit rating by Standard & Poor's in response to the reserve increase, caused a massive drop of the share

value.

In October 2004, the first of several securities class action complaints was filed against Converium, ZFS, and certain of Converium's officers and directors. Eventually, the filed class actions were consolidated before the United States District Court for the Southern District of New York. This court, however, excluded from the class action all non-U.S. persons who had purchased Converium shares on any non-U.S. exchange, leaving them empty-handed. Because of the positive way the Shell case was being resolved in the Netherlands, Converium and ZFS agreed that a settlement would be sought for these non-U.S. purchasers through the Dutch collective settlement system.

Converium, ZFS, the special Converium Securities Compensation Foundation (which represents the group of individual purchasers that were excluded from the U.S. class), and the Dutch Investors Association agreed on a settlement on 8 July 2010. These parties subsequently filed an application with the Amsterdam Court of Appeal to declare the settlement binding. Because there were only approximately 200 known Dutch individual purchasers (out of a total of 12,000), who formed the most important link to use the Dutch system, the Court first wanted to decide whether this link was enough to assume jurisdiction over the case.

Jurisdiction Amsterdam Court of Appeal

The Court first examined whether it could assume jurisdiction to effectuate the settlement and subsequently whether it was also competent to bind all the purchasers named in the settlement. This would prevent plaintiffs from filing a claim for damages in the future.

As the settlement only takes effect if it is made binding, it is not possible to directly use Article 5(1) Brussels I/Lugano to determine which court has jurisdiction because the place of performance, the main requirement of this provision, is unknown. However, in *Effer v. Kantner*, the court also based its jurisdiction on Article 5(1) Brussels I/Lugano in a dispute concerning a contract which had not been concluded yet, so the place of performance was unknown as well. Because the Converium settlement is aimed at a certain performance that will take place in the Netherlands, namely, payment of damages by the Dutch

special compensation foundation, the Dutch Court of Appeal can assume jurisdiction.

To prevent parallel and irreconcilable litigation, the Amsterdam Court of Appeal based its jurisdiction to declare the settlement binding on Article 6(1) Brussels I/Lugano. The Court stated that the claims of the various purchasers are so closely connected that it is expedient to hear and decide on them together. As the Court already had jurisdiction over the Dutch purchasers, Article 6(1) Brussels I/Lugano makes it possible to assume jurisdiction in the combined case.

Although the majority of the purchasers are domiciled in one of the Brussels I Regulation/Lugano Convention member states, there are also purchasers that are not. In these cases, the Dutch Code of Civil Procedure decides whether a Dutch court has jurisdiction. According to this Code, a court can assume jurisdiction over cases in which one or more purchasers are domiciled in the Netherlands. In the *Converium* case, the Compensation Foundation and the Investors Association are domiciled in the Netherlands. Moreover, because the settlement will be executed in the Netherlands, there is a sufficient connection with the Dutch jurisdiction for the Amsterdam Court of Appeal to also assume jurisdiction for those cases which involve non-Brussels I/Lugano purchasers.

Based on the above-mentioned provisions, the Amsterdam Court of Appeal may assume jurisdiction in the *Converium* case. Article 6 ECHR and the principle of *audi alteram partem*, however, prevent the Court from making a final decision on its competence. As not all the purchasers have been summoned yet, the Court will be forced to stay the proceedings (Article 26(2) Brussels I/Lugano) till they have been given proper notice. Until then, the ruling will be provisional. During the fairness hearing, which still has to be scheduled but will probably take place in the second half of 2011, the purchasers may still advance a different view on the jurisdiction issue.

A “View from Across” (in the Other Direction)

Horatia Muir Watt is a Professor at the School of Law of Sciences Po, Paris.

From the standpoint of an outside observer with « a view from across », the practical result reached in the Morrison case seems reasonable. It is highly probable that in a similar situation – that is, supposing jurisdiction could be secured under the relevant rules applicable before, say the courts of Member States as against foreign-third-State-domiciled defendants AND imagining private attorney general actions for violations of trans-European securities regulations – courts over this side of the Atlantic (and for realistic symmetry, we’d need to think in terms of the rulings by the Court of Justice of the European Union as relayed by the courts of the Member States) would not (whatever the reasoning involved) have extended the scope of domestic economic regulation to an “F-cubed” action. However, the concrete result reached in this particular case is clearly not the point in issue. Nor indeed is there any reason not to adhere to the important policy objective of discouraging global forum-shoppers (or their lawyers) attracted by the well-known magnetic properties of US civil procedure in purely financial matters when private punitive-damage-actions are available. The real question is the *approach* adopted by the Supreme Court in its first decision relating to the ambit of the Securities and Exchange Act in an international setting.

I’ll simply emphasise a few points that might be of specific interest to European observers on the Supreme Court’s new “transactional test”. (I’ll refrain from speculating here as to the impact of the potential new “anti-Morrison” legislation to which Gilles has just posted the links), or to the difference it might have made on the overall result had Justice Kagan, who authored the US amicus brief favoring the “substantial conduct” test, been sitting on the Court). In order to define the reach of § 10(b) of the Securities Exchange Act 1934 (and thereby of SEC 10b-5), the Court decided that these various stringent informational/transparency requirements apply only to *transactions in securities listed on US exchanges* or otherwise sold within the US:

1. It comes as a surprise (and disappointment) to see the Supreme Court

turning its back on several decades of (what looked from over here like) a widely shared and carefully tailored functional approach (initiated by the Court of Appeals of the Second Circuit whose case-law is discussed extensively) to the determination of the scope of federal economic regulation, in favor of a bright-line rule based on a regression to the presumption against extra-territoriality. As the concurrence suggests, haven't we been there before? Well over here, we certainly have. Obviously, the EU is only just beginning to grapple with similar issues (first in respect of the extraterritorial scope of European competition law, then in diverse areas involving the international reach of directives, such as the Agency Directive in the controversial *Ingmar* case) but if intra-European (as opposed to the international reach of "federal" or trans-European legislation) conflicts are anything to go by (and indeed much has been written on this point within the US on the striking parallelism between methodological approaches in international arena and in intra-federal situations) then the quest for a "simple" or "certain" conflicts rule designed to provide legal security to economics actors has proved at best elusive, at worst unfair. Whether or not one decides to adhere to a dogmatic principle of territoriality or its contrary, surely the only real issue is whether it is reasonable in functional or policy terms, given the connections between the conduct, its effects and the market the statute was designed to regulate, to extend such a statute in a given case. It is doubtful indeed that the concept of "territoriality" is of much help.

2. Of course, framed in these terms, a functional approach provides little predictability. Over here, this has been a well-known war-cry since the mid-sixties against the importation of any form of American legal realism in the sphere of the conflict of laws (let alone any weird law-and or, worse, critical legal thinking in any other sphere, domestic or global…). However, it also seems clear (from over here) that in the particular case of the reach of US Securities regulation, the courts (and the Second Circuit in particular) have, over time, attempted to refine this test – albeit, as inevitable with any judicial-interpretation-in-progress, with results that may sometimes lack coherence – so that it seems a shame that these painstaking efforts be set aside in one fell swoop. It appears then that the real debate concerns canons of statutory construction which involve far more than the sole issue of the international reach of the Exchange Act and extends to the whole sensitive question of judicial law-making when

statutes are either silent or fuzzy in novel contexts. (Paradoxically, over here, the opposition between conservative originalists/fundamentalists and more policy or society-attuned liberals is considerably less violent than in the US on issues of statutory interpretation and the role of the courts, although one still comes across (in France) people who claim to believe that case-law interpreting the Code civil of 1804 is not a source of law, etc.; there are also signs of renewed debate on the role of the courts in the context of the new Constitutional review procedure in the French courts (the "QPC" 2010), over whether new Constitutional review should extend or not to judicial constructions of statutes). One is however struck by the fact that although the previous policy-based, conducts-and-effects approach practiced by the courts is stigmatized as having no textual foundation, one may also wonder, in turn, where exactly the dogma of territoriality comes from.

3. So we've been there before (I think). But even if we accept that bright-line rules and dogmatic presumptions have their virtues, and may indeed work adequately if the courts are allowed sufficient margin to set them aside, these issues on statutory interpretation do not address the crucial question of building an appropriate response to the various dysfunctions of global markets. Of course, as the Court very rightly points out, financial markets are the object of very different national conceptions of regulation: there is no shared/uniform answer to the question of what a securities fraud actually is (I'd personally go further, of course, to say that there is no uniform answer to anything, but that is no doubt quite beside the point). But the existence of "true" conflicts of economic relation is not new. In the area of antitrust, the Court's appeal to positive comity in such a context, in *Empagram*, seems more attractive from this side of the Ocean. More importantly, in a world that is complex and messy (as Hannah has excellently pointed out), would it not be more judicious to devote energy to defining the requirements of reasonableness in the scope given to domestic regulation rather than asserting the primacy of a "principle of territoriality" which is not only culturally conditioned in the common law tradition (as I have often explained elsewhere), undefinable as a general matter, and totally maladjusted to contemporary interconnected markets. Indeed, the concurring opinion of Justices Stevens and Ginsburg provides an excellent hypothetical to illustrate the way in which the court's territorial, transaction-based test is likely to

create a loophole for many types of securities fraud.

4. My last point will be a hotch-potch of observations which may only interest the European private international lawyer-observer. First, as I have often tried to make clear in a tradition of legal thinking in which the public/private distinction is still deeply ingrained, it is very hard here to contend that this is a conflict of "private" interests or private laws, notwithstanding the private actions/actors involved. Second, contrary to much that has been written, often misguidedly, over here on the *Vivendi* class litigation, this decision is not necessarily going to "protect foreign (French) interests" (whatever one may suppose them to be) nor prevent trans-Atlantic class actions including European investors as claimants or European firms as defendants, as long as the new transactional criteria are satisfied. Third, it seems a little strange that at a time when the US Supreme Court is prudently retreating from extraterritoriality (whatever its reasons), the EU is doing exactly the reverse. Its policy appears to be to extend the effects of EU legislation to situations which are largely connected to third countries (after *Owusu*, see the new Alimentary Obligations Regulation or the Succession draft proposal). Finally, as I have already had the opportunity to point out elsewhere, considerable energy is currently being put into the reform of the Brussels I Regulation, following hard on the heels of Rome I and II. That is of course all very well. But the Morrison litigation shows that our models are no doubt already out of date (methodologically, epistemologically). Instead of doing things like promoting party autonomy in contract throughout the world (the latest initiative of the Hague Conference on PIL!?) ought we not to be thinking ahead to the massive new types of difficulties that (for instance) cross-border/global securities fraud is now raising?