TDM’s Latin America Special

Prepared by guest editors Dr. Ignacio Torterola and Quinn Smith, this special addresses the various challenges and changes at work in dispute resolution in Latin America. A second volume that continues many of the themes from different angles and perspectives is also nearing completion. Download a free Excerpt here

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Conference for Young PIL Scholars: “Politics and Private International Law (?)” – Call for Papers

The following announcement has been kindly provided by Dr. Susanne Lilian Gössl, LL.M., University of Bonn:

Call for Papers

On 6th and 7th April 2017, for the first time a young scholars’ conference in the field of Private International Law (PIL) will be held at the University of Bonn.

The general topic will be

Politics and Private International Law (?)

We hereby invite interested junior researchers to send us their proposals for conference papers. We envisage presentations of half an hour each in German language with subsequent discussion on the respective subject. The presented papers will be published in a conference transcript by Mohr Siebeck.

Procedure

If we have stimulated your interest we are looking forward to your application to

nachwuchs-ipr(at)institut-familienrecht.de

until **30 June 2016, 12 a.m. CET** (deadline!).

The application shall include an exposé of maximum 1,000 words in German language and shall be composed anonymously that is without any reference to the authorship. The author including his/her position or other affiliation shall be identifiable from a separate file.

Selection decisions will be communicated in October 2016.

For organisational reasons, a preliminary version of the paper (to measure 35,000 to 50,000 characters including footnotes) and the core statements must be received by not later than 31 March 2017.

Topic:

For our purposes, we explicitly understand PIL in a broader sense: international jurisdiction and procedure, the law of the international settlement of disputes (including ADR) as well as uniform law and comparative law and the comparison of legal cultures are included insofar as they allude to cross-border questions.

Ever since Savigny, conflict of laws rules have traditionally been perceived as "unbiased" or "value-neutral" in Central Europe as they are solely supposed to coordinate the applicable substantive law. However, during the second half of the past century the opinion that conflict of law rules may also strengthen or prevent certain results of substantive law has become prevalent. In the U.S., such discussion led to a partial abolition of the "classical" PIL in favour of balancing the individual governmental interests as to the application of their respective substantive law provisions (so called *governmental interest analysis*). But other legal systems have also explicitly or indirectly restricted classical PIL in some areas in favour of governmental interests. Our conference is dedicated to the various possibilities and aspects of this interaction between PIL and politics as well as to the advantages and disadvantages of this interplay.

Possible topics or topic areas are:

<u>General questions:</u>

- "Politicisation" of PIL on the national, European and international level, or the political target of "value-free" PIL rules (?)
- "Politicisation" of comparative law (?)
- Convergence of PIL and Public International Law, especially the protection of fundamental rights and human rights by means of PIL
- Uniform applicable law or harmonisation of PIL
- PIL in day-to-day application of law – theory and reality (?)
- General instruments of PIL to enforce political targets: overriding mandatory rules, public policy, *forum non conveniens*, extensive/narrow

jurisdiction …

- Allocative functions of PIL and International Civil Procedure Law
- Users, stakeholders and their interests in cross-border questions: parties, attorneys, judges, notaries, experts etc.
- Protection by formal requirements or third parties' obligations to cooperate (e.g. notarial recording of the choice of law agreement)
- Parties' or courts' expenses due to the application of foreign law
- Regulatory competition, e.g. in order to establish a national venue of arbitration
- Forum shopping and locational advantages through low standards of protection (e.g. regarding data protection law, copyright law, family law or consumer protection law)
- Issues of competences as regards European PIL rules
- Extraterritorial application of national (private) law (*Kiobel, Bodo Community*)

Business Law:

- Financial crisis, e.g. resolution of globally operating banks
- Gender Quotas of in Corporate Law, e.g. application of German law on foreign companies or comparison between international regulatory models
- Protection of competition in case of worldwide groups operating, e.g. Google antitrust proceedings by FTC and EU Commission
- Law on co-determination within the European context, e.g. questions referred for a preliminary ruling by KG (Court of Appeal in Berlin) and LG Frankfurt
- Worker protection

Family and Inheritance Law:

- Protection of minors, i.e. regarding repatriation of children or international adoptions: successful legal unification (?)
- Cross-border protection of adults
- Application of religious law and judgements of religious courts

Consumer protection:

- Consumer protection and market freedom (i.a. in the Internet)

- Special jurisdiction, party autonomy and the enforcement of minimum standards in substantive law

Internet and new media:

- Territoriality of rights to ubiquitous goods (e.g. copyright law and data protection rules) and cross-border trade
- Copyright Law and “Fair Use”
- Data protection/privacy and freedom of information

Other recent focal points:

- Migration and refugee crisis, e.g. the determination of the law of the person between integration or preservation of cultural identity
- Environmental protection, e.g. enforcement of titles from class actions or international litigation regarding mass damages
- Protection of cultural property – issues regarding ownership and repatriation

For more information, please visit https://www.jura.uni-bonn.de/en/institut-fuer-deutsches-europaeisches-und-internationales-familienrecht/pil-conference/.

If you have any further questions, please contact Dr. Susanne Gössl, LL.M. (sgoessl(at)uni-bonn.de).

We are looking forward to thought-provoking and stimulating discussions!

Yours faithfully,

Susanne Gössl
Rafael Harnos
Leonhard Hübner
Malte Kramme
Tobias Lutzi
Michael Müller
Caroline Rupp
Johannes Ungerer

OGEL and TDM Special Issue: Focus on Renewable Energy Disputes

With renewable energy disputes seemingly everywhere these days, OGEL and TDM have published a special joint issue focusing on these disputes at the level of international, European and national law. Below is the table of contents:

Renewable Energy Claims under the Energy Charter Treaty: An Overview, by J.M. Tirado, Winston & Strawn LLP

Non-Pecuniary Remedies Under the Energy Charter Treaty, by A. De Luca, Università Commerciale Luigi Bocconi

Joined Cases C-204/12 to C-208/12, Essent Belgium, by H. Bjørnebye, University of Oslo, Faculty of Law

Ålands Vindkraft AB v Energimyndigheten – The Free Movement Law Perspective, by S.L. Penttinen, UEF Law School, University of Eastern Finland

Recent Renewables Litigation in the UK: Some Interesting Cases, by A. Johnston, Faculty of Law, University College (Oxford)

The Rise and Fall of the Italian Scheme of Support for Renewable Energy From Photovoltaic Plants, by Z. Brocka Balbi

The Italian Photovoltaic sector in two practical cases: how to create an unfavorable investment climate in Renewables, by S.F. Massari, Università degli Studi di Bologna

Renewable Energy and Arbitration in Brazil: Some Topics, by E. Silva da Silva, CCRD-CAM / Brazil-Canada Chamber of Commerce, and N. Sosa Rebelo, Norte Rebelo Law Firm

Renewable Energy in the EU, the Energy Charter Treaty, and Italy's Withdrawal Therefrom, by A. De Luca, Università Commerciale Luigi Bocconi

Excerpts of these articles are available here and here

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.

My appreciation also goes to Adrienne Lester-Fitje for kindly editing this text.

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.