New publication on Kiobel and human rights litigation

Maria Chiara Marullo and Francisco Javier Zamora Cabot have published a paper on "TRANSNATIONAL HUMAN RIGHTS LITIGATIONS. KIOBEL'S TOUCH AND CONCERN: A TEST UNDER CONSTRUCTION."

The abstract reads:

In recent years the international debate on Transnational Human Rights Litigation has mainly focused, although not exclusively, on the role of the Alien Tort Claims Act as a way of redress for serious Human Rights violations. This Act has given the possibility of granting a restorative response to victims, in a Country, such as the United States of America, that assumes the defense of an interest of the International Community as a whole: to guarantee the access to justice to the aforesaid victims. The purpose of this article is to analyze the recent and restrictive position on this Act of the Supreme Court of the United States, in the Kiobel case, and especially when, as a means of modulating the limitative doctrine affirmed there, the Touch and Concern test was introduced. It has generated from its very inception a strong discussion amongst international legal scholars and also great repercussions concerning the practice of the U.S. District and Circuit Courts.

The publication can be downloaded here or through SSRN.

Conference on the Hague Principles on Choice of Law,

Lucerne 8-9 September 2016

The Permanent Bureau of the Hague Conference on Private International Law and the University of Lucerne are organising a conference "*Towards a Global Framework for International Commercial Transactions: Implementing the Hague Principles on Choice of Law in International Commercial Contracts*" in Lucerne on 8-9 September 2016.

The purpose of this conference is to present the impact and prospects of the Hague Principles of 2015 in the context of other instruments applicable to international commercial transactions.

For the programme and registration information see the conference's website.

Van Den Eeckhout on the Proposed Revision of the Posting Directive

by Veerle Van den Eeckhout

On the blog section of the Dutch journal Nederlands Juristenblad, a blog of Veerle Van Den Eeckhout on the Proposal for a revision of the Posting Directive has been published, see here.

The blog is entitled "Modellering van internationaal privaatrecht – Een enkele ipr-technische aantekening bij het voorstel tot wijziging van de Detacheringsrichtlijn" (in English: "Modelling Private International Law. A single PIL-technical note on the proposed revision of the Posting Directive"). It is written in Dutch.

The blog focuses on a single technical PIL-aspect of the proposed revision of the Posting Directive; at the end, however, the issue is placed in a broader context of ongoing dynamics and debates in private international law – see also already on

this the blog “The impact and potential of a curious and unique discipline. About PIL, Shell Nigeria, European and global competition and social justice”, published also on the blog section of the NJB-site, see here , available in English on https://conflictoflaws.de/2015/on-pil-international-labour-law-and-corporate-social-responsibility/.

Cross-border Bank Resolution and Private International Law

The following information have kindly been provided by Prof. Dr. Matthias Lehmann, University of Bonn.

Bank resolution is key to avoiding a repetition of the global financial crisis in which failing financial institutions had to be bailed out with taxpayers’ money. It permits recapitalizing banks or alternatively winding them down in an orderly fashion without creating systemic risk. Resolution measures, however, suffer from a structural weakness. They are taken by nation-states with territorially limited powers, yet they target entities or groups with global activities and assets in many countries. Under traditional rules of private international law, these activities and assets are governed by the law of other states which is beyond the remit of the state undertaking the resolution.

Matthias Lehmann (University of Bonn) addresses this problem in a recent paper titled “Bail-in and Private International Law: How to Make Bank Resolution Measures Effective Across Borders”. He illustrates the conflict between resolution and private international law by using the example of the European Union, where the limitations of cross-border issues are most acutely felt. He explains the techniques and mechanisms provided in the Bank Recovery and Resolution Directive (BRRD) and the Single Resolution Mechanism (SRM) Regulation to make resolution measures effective in intra-Eurozone cases, in intra-EU conflicts with non-Euro Member States and in relation to conflicts with third countries. Besides this, he also throws light on the divergences and flaws in the BRRD’s

transposition into national law. In this context, he discusses two recent cases, *Goldman Sachs International v Novo Banco SA* [2015] EWHC 2371 (Comm), and *BayernLB v Hypo Alpe Adria (HETA case)* Regional Court, Munich I, judgment of 8 May 2015, that have dealt with the recognition of foreign resolution acts. A brief overview of third-country regimes furthermore highlights the problems in obtaining recognition of EU resolution measures abroad.

Munich's Institute of Comparative Law celebrates its 100th Anniversary: Conference on 'Sales Law and Conflict of Laws from Ernst Rabel until Today', 16-17 June 2016, LMU Munich

The following announcement has been kindly provided by Professor Dr. Stephan Lorenz, LMU Munich.

It was in 1916 that Ernst Rabel founded the 'Institute of Comparative Law' at Munich University – the first of its kind in Germany. The 100th Anniversary of the Institute, which still persists as a department of the Institute of International Law at Ludwig-Maximilians-University Munich, gives reason to review the influence of Ernst Rabel on both, sales law and conflict of laws and to take a current view on

recent developments in these fields. As is well-known, Rabel's work on sales law was highly influential for the development of the Hague Uniform Sales Law of 1964, the precursor of the CISG of 1980. The latter had a formative impact on EU consumer sales law and subsequently on the proposal for a Common European Sales Law (CESL). But also the current contractual conflict of laws of the EU as the Rome I-Regulation would not exist in its current form without the fundamental contributions of Ernst Rabel. The presentations of the conference cover the entire range of these topics from the beginnings of comparative law and its early years until its most recent developments:

- Dean's Greeting, *Prof. Dr. Martin Franzen*
- Introductory Speech, *Prof. Dr. Peter Kindler*
- The History of the Institute of Comparative Law, *Prof. Dr. Dagmar Coester-Waltjen, München/Göttingen*
- Welcome and Introduction, *Prof. Dr. Dr. h.c. mult. Hans Jürgen Sonnenberger, München*
- Ernst Rabel – The Munich Years, *Archivdirektor a.D. Hans-Joachim Hecker, Stadtarchiv München*
- Karl Neumeyer as a Pioneer of Comparative Law in the field of Public Law, *Prof. Dr. Peter Huber, Judge at the Federal Constitutional Court (Bundesverfassungsgericht), München*
- Rabel's Influence on the CISG and the Development of European Sales Law, *Prof. Dr. Ulrich Magnus, Hamburg*
- The Distinction between Digital and Analogous Goods – How fit for the Future are the Commission's Proposals for a Law of Contracts in the Digital Interior Market?, *Univ.-Prof. Dr. Christiane Wendehorst, LL.M. (Cambridge), Wien*
- International Contract Law and CISG, *Prof. Dr. Andreas Spickhoff, München*
- Transaction-like Party Autonomy, *Prof. Dr. Marc-Philippe Weller, Heidelberg*
- Conclusions, *Prof. Dr. Stephan Lorenz, München*

Participation in the Conference requires prior registration here.

Call for Papers–International Law Weekend in NY

The American Branch of the International Law Association has issued a call for papers. See here for more details.

Private International Law Newsletter

From the Private International Law Interest Group of the American Society of International Law:

We are pleased to present the second issue of “Commentaries on Private International Law,” the newsletter of the American Society of International Law Private International Law Interest Group.

You may find it here and here.

Recent Scholarship

Professor Anthony Colangelo of the SMU Dedman School of Law has just posted a new article entitled *A Systems Theory of Fragmentation and Harmonization*. It blends public and private international law and has a strong dose of conflict of laws. It is well worth the read!

Also, as a friendly reminder, there is a wonderful SSRN eJournal on Transnational Litigation/Arbitration, Private International Law, and Conflict of Laws that is available here.

Thomale on Surrogate Motherhood

Chris Thomale from the University of Heidelberg has written a private international critique of surrogate motherhood (Mietmutterschaft, Mohr Siebeck, 2015, X+ 154 pages). Provocatively entitled "mothers for rent" the book offers a detailed and thorough (German language) analysis of the ethical and legal problems associated with gestational surrogacy.

The author has kindly provided us with the following abstract:

> *Surrogacy constitutes an intricate ethical controversy, which has been heavily debated for decades now. What is more, there are drastic differences between national surrogacy rules, ranging from a complete ban including criminal sanctions to outright legalisation. Hence, on the one hand, surrogacy constitutes a prime example of system shopping. On the other hand, however, we are not simply dealing with faits accomplis but rather enfants accomplis, i.e. we find it hard to simply undo the gains of system shopping at law as the "gain" levied by the parties is in fact a party herself, the child.*
>
> *In his new book, "Mietmutterschaft – Eine international-privatrechtliche Kritik" (Mohr Siebeck Publishers, 2015), Chris Thomale from the University of Heidelberg, Germany, provides a fully-fledged analysis of surrogacy as a social and legal phenomenon. Starting from an ethical assessment of all parties' interests (p. 5-18), the treatment of foreign surrogacy arrangements before the courts of a state banning surrogacy is discussed both on a conflict of laws level (p. 19-40) and at the recognition stage with respect to foreign parental orders based on surrogacy contracts (p. 41-52). The essay follows up with investigating the implications of EU citizenship (p. 53-58) and human rights (p. 59-72) for the*

international legal framework of surrogacy, ensued by a brief sketch of the boundaries of judicial activism in this regard (p. 73-80). Finally, proposals for legislative reform on an international, European and national level are being developed (p. 81-99).

Thomale looks at both the empirical medical background of surrogacy and the economic, political and ethical arguments involved. It is from this interdisciplinary basis that he engages the legal questions of international surrogacy in a comparative fashion. His main conclusion is that surrogacy in accordance notably with human rights and recent jurisprudence by the European Court of Human Rights as well as the principle of the superior interest of the child can and should be banned at a national level. At the same time, according to Thomale, national legislators should reform their adoption procedures, building on the well-developed private internatioal law in that field, in order e.g. to offer an adoption perspective also to couples who cannot procreate biologically, such as notably gay couples. In the essay, recent international case-law on surrogacy, including notably Mennesson et Labassée and Paradiso et Campanelli (both ECHR), is discussed in great detail.

German Constitutional Court on a Judge‘s Duty to Take the European Evidence Regulation and the Hague Evidence Convention into Account

In a recent order of 14 September 2015 – 1 BvR 1321/13, the German Federal Constitutional Court (*Bundesverfassungsgericht*) has held that the right to effective judicial protection (Article 2(1) in conjunction with Article 20(3) of the German constitution) is violated if, in a cross-border case, a court fails to

investigate the facts of the case by using possibilities that have good prospects of success, in particular if it does not take into account specific institutionalised facilities and measures of judicial assistance, such as those offered by the European Evidence Regulation, the Hague Evidence Convention and the European Judicial Network in Civil and Commercial Matters. In the case before the Court, a Romanian national had sued a widow of Romanian nationality for a share of the inheritance of her deceased husband based on the assertion that the couple had adopted him. Although it remained controversial whether such an adoption had actually taken place in Romania, the Municipal Court (*Amtsgericht*) did not request the Romanian adoption files for consultation by way of judicial cooperation. According to the Constitutional Court, the Amtsgericht ought to have considered whether the EU Evidence Regulation or the Hague Evidence Convention permit a German court to request the original case files from another Member State. An English abstract of the decision is available here.