EBS Law Term Lecture on "Extraterritoriality in Transnational Regulation: The Special Problem of Private Enforcement" on 18 October 2016 at EBS Law School in Wiesbaden

The Research Center for Transnational Commercial Dispute Resolution at EBS Law School will host a lecture on extraterritoriality in transnational regulation. Professor Dr. Hannah L. Buxbaum, John E. Schiller Chair in Legal Ethics, Maurer School of Law, Indiana University Bloomington, USA, will talk about the special problem of private enforcement in this context.

Background: In 2000, the European Community filed a lawsuit against RJR Nabisco (RJR) in U.S. federal court, alleging violations of the U.S. Racketeer Influenced and Corrupt Organizations Act (RICO). In 2016, the litigation came to a close. The Supreme Court held that RICO does apply to certain forms of foreign conduct – however, it concluded that RICO's private cause of action does not extend to claims based on injuries suffered outside the United States, and therefore denied the European Community any recovery. The effect of this decision, which builds on other recent decisions of the Court, is to constrain quite significantly the application of U.S. regulatory law in cross-border cases.

The talk will explore the extraterritorial application of domestic regulatory law as a tool of transnational regulation. In particular, it will address the special challenges created when it is private plaintiffs, rather than state agencies, that seek to apply that law.

The Lecture will be held on 18 October 2016 at 6.30 p.m. in Lecture Room "Sydney" at EBS Law School in Wiesbaden. For further information see here.

We are looking forward to seeing you.

Conference on International Banking Transactions

The Interdisciplinary Association for Comparative and Private International Law (IACPIL) with support of the Faculty of Law at the University of Vienna is hosting a conference organized by Professor Dr Bea Verschraegen and Dr Florian Heindler on international banking transactions involving consumers.

The conference (in German language) will take place on 24 October 2016 in Vienna at the Vienna University, Faculty of Law.

Speakers are:

Professor Dr Peter Mankowski, University of Hamburg
Professor Dr Dietmar Czernich, Innsbruck
Professor Dr Georg Kodek, Vienna University of Economics and Business and Austrian Supreme Court
Private-Docent Dr Judith Schacherreiter, Vienna
Professor Dr Gerald Spindler, University of Göttingen
Dr Florian Heindler, Bregenz
Welcome address by Prof Dr Paul Oberhammer, University of Vienna
Moderation and conclusive remarks by Prof. Dr. Bea Verschraegen, University of Vienna, Prof Dr Verica Trstenjak, University of Vienna, Dr Konrad Koloseus, Vienna, Dr Heinz Löber, Vienna
The programme can be downloaded here.
For additional questions and registration, please contact Ms Sandra Muckenhuber.

And Then There Were … Seventeen!

Estonia has recently joined the Rome III Regulation (EU) No. 1259/2010 on enhanced cooperation in the area of the law applicable to divorce and legal separation, increasing the number of participating Member States to seventeen. The Decision of the Commission of 10 August 2016 has been published in (2016) OJ L 216/13. Before, Lithuania and Greece had already joined the original fourteen participating Member States. Contrary to some dire forecasts made at the time when the Rome III Regulation was adopted, this instrument has turned out to be rather successful, being now in force in a clear majority of Member States. Rome III shall apply to Estonia from 11 February 2018. Article 3 of the said Council's decision contains specific transitional provisions, in particular with regard to choice-of-law agreements.

ERA-Conference: The Impact of Brexit on Commercial Dispute Resolution in London

The Academy of European Law (ERA) will host a conference on the changes which will be brought about by Brexit with regard to the UK's status under the Brussels Ia, Rome I & Rome II Regulations and the impact of those changes on commercial dispute resolution in London during the transitional period and afterwards. The seminar is organized by Dr *Angelika Fuchs* (ERA) in cooperation with the Bar Council, the European Circuit and the Hamburgischer Anwaltverein. The event will take place on **10 November 2016** in **London** and will be followed by a reception.

Key topics will be:

- the fate of prorogation clauses in favour of English courts
- cross-border enforceability of judgments
- consequences for choice of law agreements
- the future of London as a legal hub

The full conference programme is available here.

The speakers are:

- **Barbara Dohmann QC**, Barrister, Blackstone Chambers, London
- **Alexander Layton QC**, Barrister, 20 Essex Street, London
- **Matthias Lehmann**, Professor at the University of Bonn
- **Ravi Mehta**, Barrister, Blackstone Chambers, London
- **Hugh Mercer QC**, Barrister, Essex Court Chambers, London
- **Michael Patchett-Joyce**, Barrister, Outer Temple Chambers, London

For further information, please see the conference website. Registration forms are available here.

Changes and challenges in cross-border litigation – a post-referendum view from the UK

On Friday, 7 October 2016, the Institute of Advanced Legal Studies at the University of London will host a half-day conference on Changes and challenges in cross-border litigation after the Brexit referendum. Designed to give speakers and attendees the opportunity to reflect on topics that are or could be affected by 'Brexit' for better or worse, the focus of the conference will be on areas of law that are relevant to commercial law such as choice of law, dispute resolution, banking resolution and cross border securities. A comparative viewpoint will be taken to include perspectives from Scotland and England and other European legal systems. The objective is to invite fresh approaches to legal solutions as they

have been manifested in European Union legislation that may benefit from rethinking in the light of the June 2016 referendum on the UK's EU Membership. Registration is possible and requested via the conference website.

The Programme reads as follows:

Introductory Remarks: **Prof. Andrew Dickinson**, University of Oxford, tbc – *"The future direction of private international law in the UK"*

Keynote Speaker: **Prof. Giesela Ruehl**, University of Jena – *"Choice of law and choice court clauses after the EU Referendum"*

Prof. Sophia Tang, University of Newcastle – *"Future Private International Law and Judicial Cooperation: Different Models"*

Dr Maren Heidemann, Visiting Fellow, IALS – *"Identities in EU PIL – an outdated social model?"*

Dr Lorna Gillies, University of Strathclyde – *"Some observations on intra-UK rules post-Brexit"*

Prof. Gerard McCormack, University of Leeds – "Insolvency litigation after Brexit"

Dr Jonathan Fitchen, University of Aberdeen – *"Post-Brexit recognition and enforcement of UK civil and commercial judgments in the European Union: problems and challenges"*

Dr Mukarrum Ahmed, University of Aberdeen – *"BREXIT and English Jurisdiction Agreements: The Post-Referendum Legal Landscape*

Turkish Constitutional Court on international child abduction

By an individual application, the Turkish Constitutional Court for the first time examined an allegation of violation of rights secured under the Turkish Constitution in the proceedings before the Turkish courts in relation to the 1980 Hague International Child Abduction Convention. The Court decided by majority that the applicant's right to respect for family life, which is guaranteed under Art 20 of the Constitution, was violated.

Burcu Yüksel, post-doctoral researcher at the University of Aberdeen and manager of the EUPILLAR project has written an article on this topic. It is published in International Family Law Journal, issue 3 of 2016.

A short version of the article is available here.

Vitamin C and Comity

Following up on last week's post on the Second Circuit's comity decision in the Vitamin C Antitrust Litigation case, Professor Bill Dodge of UC Davis has the following thoughts (also cross-posted on Opinio Juris here)

American law has many doctrines based on international comity—doctrines that help mediate the relationship between the U.S. legal system and those of other nations. The Second Circuit's decision last week in the *Vitamin C Antitrust Litigation* case correctly identified an international comity issue. But did it choose the right comity tool to address that issue?

Plaintiffs alleged that defendants, two Chinese companies, participated in a cartel to fix the price of vitamin C exported to the United States in violation of U.S. antitrust law. Defendants did not deny the allegations, but argued that Chinese

law required them to coordinate export prices. The Chinese Ministry of Commerce backed the defendants in an amicus brief explaining Chinese law. The district court, however, declined to defer to the Ministry's interpretation of Chinese law, awarding the plaintiffs $147 million in damages and permanently enjoining the defendants from further violations of U.S. antitrust laws.

On appeal, defendants argued that the district court should have dismissed on grounds of foreign state compulsion, international comity, act of state, and political question. While the political question doctrine rests on separation of powers, the other three grounds are all doctrines of prescriptive comity. As I have explained in a recent article, American law is full of international comity doctrines, each with its own specific requirements.

To avoid confusion, it is worth noting at the outset that although the Second Circuit repeatedly framed the question as whether the district court should "abstain from exercising jurisdiction,"*Vitamin C* was clearly not an international comity abstention case. International comity abstention is a doctrine of adjudicative comity, or deference to foreign courts. The Second Circuit has held that it is available only if parallel proceedings are pending in a foreign court. See *Royal & Sun Alliance Ins. Co. of Canada v. Century Intern. Arms, Inc.*, 466 F.3d 88, 93-94 (2d Cir. 2006). The same is true in most other circuits that have adopted the doctrine (the cases are collected here at pp. 2112-14). The main exception is the Ninth Circuit, whose decision in *Mujica v. Airscan Inc.*, 771 F.3d 580 (9th Cir. 2014), applied a broad and uncertain comity abstention doctrine that conflicts with its own precedents, those of other circuits, and even the Supreme Court's. Because no parallel antitrust claims against these defendants were pending in Chinese courts, international comity abstention would not have been an appropriate ground on which to dismiss this case.

Instead, the Second Circuit properly viewed the *Vitamin C* case as raising questions of prescriptive comity—deference to foreign lawmakers—which U.S. law has developed a number of different doctrines to address (for discussion see here at pp. 2099-2105). The court relied particularly on an interest-balancing, comity doctrine commonly associated with *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979), and Section 403 of the Restatement (Third) of Foreign Relations Law. In the court's view, this doctrine authorized it to "balance the interests in adjudicating antitrust violations alleged to have harmed

those within our jurisdiction with the official acts and interests of a foreign sovereign in respect to economic regulation within its borders" (slip op. at 4). The idea that U.S. courts are institutionally capable of balancing the interests of foreign governments against our own has the subject of significant criticism over the past three decades.

Moreover, it is hard to see how this particular prescriptive comity doctrine survives the Supreme Court's later decisions in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), and *F. Hoffmann-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004), both of which declined to apply a multi-factor balancing approach in antitrust cases. The Second Circuit read *Hartford* "narrowly" (slip op. at 20) not to preclude such an approach, particularly when compliance with both U.S. and foreign law was impossible. But the Second Circuit did not even mention *Empagran*, which expressly rejected case-by-case balancing as "too complex to prove workable." *Empagran* recognized that ambiguous statutes should be construed "to avoid unreasonable interference with the sovereign authority of other nations," but it also said in no uncertain terms that "application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." Plaintiffs unquestionably alleged domestic antitrust injury in *Vitamin C*, making the application of U.S. law reasonable and consistent with prescriptive comity, at least has the Supreme Court has understood these concepts in the antitrust context.

The act of state doctrine is a separate and distinct manifestation of international comity, requiring that the acts of foreign sovereigns performed within their own territories be deemed valid. But the Supreme Court has made clear that the act of state doctrine applies only when a U.S. court must "declare invalid, and thus ineffective as 'a rule of decision for the courts of this country,' the official act of a foreign sovereign." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*, 493 U.S. 400, 405 (1990). To find that the defendants fixed the price of vitamin C, the district court did not have to find any part of Chinese law invalid or even to evaluate the conduct of the Chinese government. It only had to find that Chinese law did not immunize the defendants' own conduct from liability under U.S. law.

The best fitting tool to address the prescriptive comity issue in *Vitamin C* would

seem to be the doctrine of foreign state compulsion (also known as foreign sovereign compulsion), which sometimes allows a U.S. court to excuse violations of U.S. law on the ground that the violations were compelled by foreign law. That is precisely what defendants had argued in this case. Although the exact contours of this doctrine are uncertain, the U.S. government has recognized it as a defense in antitrust cases. See Antitrust Enforcement Guidelines for International Operations ¶ 3.32 (1995). China represented that its law compelled the defendants to coordinate export prices for vitamin C, and the Second Circuit considered itself bound by China's interpretation of its own laws (slip op. at 30), which seems reasonable at least in these circumstances.

Unfortunately for the defendants, there are at least two potential problems with foreign state compulsion in this case. First, it appears that defendants may have asked the Chinese government to mandate their price fixing. See slip op. at 36-37. At least some authority suggests that a defendant wishing to claim foreign state compulsion as a defense must try in good faith to obtain relief from the compulsion from the foreign state. See, e.g., *Societe Internationale v. Rogers*, 357 U.S. 197, 208-09, 213 (1958). Second, it appears that defendants may have fixed prices at levels higher than those mandated by the Chinese government. See slip op. 38. The Second Circuit found this irrelevant to its "comity" analysis but seemed to acknowledge that such facts would preclude a foreign compulsion defense. See id.

U.S. courts have many tools at their disposal to address international comity issues. But sometimes no tool fits. "International comity" is not a universal wrench offering unlimited judicial discretion to dismiss cases that seem problematic. It is a principle underlying specific doctrines, with specific requirements, developed over many years to keep judicial discretion within bounds.

Conference on the new European Matrimonial Property Regulations in Würzburg

The German Notary Institute and the Chair of Civil Law, Private International Law and Comparative Law at the University of Regensburg are hosting a joint conference on the new Matrimonial Property Regulations for spouses and registered partners. The conference (in German language) will take place on 10 February 2017 in Würzburg. Speakers include:

- Professor Andrea Bonomi, Université de Lausanne
- Professor Michael Coester, Ludwig Maximilians University Munich
- Dr Christoph Döbereiner, Notary Public in Munich
- Professor Anatol Dutta, University of Regensburg
- Dr Andreas Köhler, University of Passau
- Professor Christian Kohler, Europa-Institut at the Saarland University
- Professor Stephan Lorenz, Ludwig Maximilians University Munich
- Professor Peter Mankowski, University of Hamburg
- Joanna Serdynska, European Commission, Brussels
- Dr Rembert Süß, German Notary Institute, Würzburg
- Dr Johannes Weber, German Notary Institute, Würzburg

The **programme** can be downloaded here.

Doctoral Seminars on EU Private International Law at the University

of Padova

During the months of **October-December 2016**, Professor *Christian Kohler* (Europa-Institut, University of Saarbrücken) will give a series of doctoral seminars on European Private International Law at the University of Padova, where he will be a *Visiting Scientist* during this period.

The programme can be found here.

Professor *Bernardo Cortese*, who has organized the series, warmly invites applications from PhD students with a focus on International and EU Law.

Conference: Cross Border Family Litigation in Europe. The Brussels IIbis Recast (Milan, 14 october 2016)

The University of Milan (Department of International, Legal, Historical and Political Studies) will host on **Friday 14 October 2016** (14h00) a conference on "**Cross border family litigation in Europe. The Brussels IIbis recast**".

Here is the programme (the sessions will be held in English and Italian):

Welcoming addresses

- *Chiara Tonelli* (Vice-Rector for Research, Univ. of Milan)
- *Laura Ammannati* (Director of the Department of International, Legal, Historical and Political Studies)

Chair: *Stefania Bariatti* (Univ. of Milan)

The Brussels IIbis recast

- *Joanna Serdynska* (Civil Justice Policy, DG Justice, European Commission): The Commission's proposal
- *Anatol Dutta* (Universität Regensburg – MPI Hamburg): A comment on the Commission's Proposal from a member of the Commission's Expert Group

Round Table – The Commission's Proposal: exchange of views among judges, practitioners and academics

- *Giuseppe Buffone* (Milan Court, Family Division)
- *Monica Velletti* (Rome Court, Family Division)
- *Suzanne Todd* (Whiters LPP, London)
- *Cinzia Calabrese* (President of AIAF Lombardia)
- *Carlo Rimini* (Univ. of Milan)
- *Ilaria Viarengo* (Univ. of Milan)

Closing remarks: *Stefania Bariatti* (Univ. of Milan)

Venue: Sala Lauree, Facoltà di Scienze Politiche, Economiche e Sociali, University of Milan.

(Many thanks to Prof. Ilaria Viarengo for the tip-off)