Publications on PIL issues in JIPLP Vol. 10, No. 6 (2015)

An article and a case note on international jurisdiction in intellectual property disputes are published in Journal of Intellectual Property Law & Practice, Volume 10, Issue 6, 2015.

Annette Kur is the author of article **Enforcement of unitary intellectual property rights: international jurisdiction and applicable law** (pp. 468-480), a translation from German of the previously reported publication. The abstract reads:

> *Proprietors of Community trade mark and design rights have several advantages over national right holders. In case of cross-border infringements, the claims are based on uniform law and decisions rendered by Community Trade Mark and Design Courts with central competence have immediate legal effect throughout the Community. Nevertheless several issues remain unclear, and where such issues arise, they were not always resolved satisfactorily by the CJEU. The pertinent case-law demonstrates that the CJEU fails to appreciate the particularities of intellectual property law that accrue from the principle of territoriality. Another problem is that the CJEU uses the terms "place of infringement" and "place where the event causing damage occurred" synonymously, yet the meaningful use of these terms in industrial and intellectual property law requires a clear-cut conceptual distinction.*

Kevin Bercimuelle-Chamot wrote a case note **Accessibility is the relevant criterion to determine jurisdiction in online copyright infringement cases** (pp. 406-407). The abstract reads:

> *The Court of Justice of the European Union (CJEU) held that in online copyright infringement cases the special rule of jurisdiction in Article 5(3) of Regulation 44/2001 (the 'Brussels I Regulation') must be interpreted as giving jurisdiction to the courts located in the member state where the allegedly infringing content is accessible and that, in compliance with the principle of territoriality of copyright, those courts have competence only to determine the damages that have occurred therein.*

Conference: Provisional Measures in European Civil Litigation

The renowned German legal periodical „Recht der Internationalen Wirtschaft“ (RIW; International Business Law Review) will host a conference on „Provisional Measures in European Civil Litigation“ in Frankfurt/Main on Wednesday, 17 June 2015. This event is the second in a series of workshops that was successfully launched in 2014 and that aims at bringing together high-level academics and practitioners. The conference language is German. Registration is still possible. Further information is available here. The programme will be as follows:

10.30–10.35 Welcoming the participants

Dr. Roland Abele

10.35–10.45 Introduction

Prof. Dr. Jan von Hein, University of Freiburg (Germany)

10.45–11.30 Provisional Measures under Article 35 Brussels I*bis*

Prof. Dr. Jan von Hein, University of Freiburg (Germany)

11.30–11.45 Coffee Break

11.45–12.30 The European Account Preservation Order

Prof. Dr. Tanja Domej, University of Zurich

12.30–13.15 Discussion

13.15–14.15 Lunch

14.15–15.00 Provisional Measures concerning Intellectual Property Rights

Prof. Dr. Christian Heinze, LL.M. (Cambridge), University of Hanover

15.00–15.20 Discussion

15.20–15.45 Coffee Break

15.45–16.30 Provisional Measures and Arbitration

Prof. Dr. Jens Adolphsen, University of Gießen

16.30–16.50 Discussion

16.50–17.00 Conclusion

Prof. Dr. Jan von Hein, University of Freiburg (Germany)

17.00 End of Conference

Latest Issue of RabelsZ: Vol. 79 No 2 (2015)

The latest issue of "Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabel Journal of Comparative and International Private Law" (RabelsZ) has recently been released. It contains the following articles:

Jürgen Basedow: *Das Zeitelement in der richterlichen Rechtsfortbildung – Einleitung zum Symposium* (The Time Dimension in Judicial Law-Making – Introduction to the Symposium)

> *Wherever the law changes it must be determined which fact situations and disputes are still governed by the old law and which are covered by the new. Legislation often deals with this question in transitional provisions of a new statute which may be very detailed. Where the change in the law is due to new orientations of judicial practice, the answer must be given by the courts. National traditions and the procedural framework may have an impact on the respective answers. The overall question splits into several sub-questions: Will a court confine the effect of its new case law to future cases, excepting the*

pending case from its judgment? Has the new orientation of the court a retroactive effect on analogous cases? To what extent will courts explain the change in jurisprudence by reference to statutes which have been adopted but not yet taken effect? This and the following papers dealing with these questions were presented and discussed at a comparative law conference held at the Institute on 14 June 2014.

Hannes Rösler, *Die Rechtsprechungsänderung im US-amerikanischen Privatrecht – Aufgezeigt anhand des prospective overruling* (Case Law Changes in U.S. Private Law – Prospective Overruling)

The article deals with the practice of prospective overruling, an innovative method of U.S. law whereby a judgment does not have retrospective effect, but – like statutory law – only applies to future events. This doctrine was declared constitutionally unobjectionable in the Sunburst Oil decision of the U.S. Supreme Court in 1923, which explains why state courts continued with the practice of prospective overruling. On the federal level, prospective overruling was used for the first time in the 1954 Brown v. Board of Education case ending school desegregation. The next step was the U.S. Supreme Court's test developed in Chevron Oil in 1971. According to the test, courts have to consider three factors: First, whether the decision to be applied non-retroactively establishes a genuinely new rule, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; second, whether retrospective application would further or retard the operation of that rule; and third, whether retroactivity could produce substantially inequitable results. Many state courts still apply the Chevron Oil test regarding their own state laws. However, the U.S. Supreme Court abandoned the Chevron Oil test in Harper in 1987. The ambiguities and uncertainties that exist with prospective overruling can be explained by the not entirely clear Leitbild of the judge, who when deciding in favour of a solely future application of law acts like a legislator. The article evaluates these developments in the context of the jurisprudential views on the role of a judge in the U.S. legal system and compares them with German law.

Helge Dedek, *Rumblings from Olympus: Das Zeitelement in der (Fort-)Bildung*

des englischen common law
(Rumblings from Olympus: Adjudication and Time in the English Common Law)

In this article, I endeavour to render an account of various temporal aspects of judicial decision making: the judicial anticipation of future statutory reform, the retrospective effects of judicial decisions, and the possibility of rulings that have exclusively prospective effects (so-called "prospective overruling"). All three aspects are interconnected through their respective links to the same theoretical and constitutional themes – most importantly, the problem of reconciling the function of adjudication first with the constitutional principle of parliamentary sovereignty in a common law system, and second with the theoretical explanation of the decision-making process as the creation of law within the boundaries of precedent and legal principle. Since the days of Bentham's polemics, the specifically temporal implications of these classic problems of common law theory have been discussed. However, unlike some Continental jurisdictions, as Lord Rodger of Earlsferry pointed out, England and Wales never developed a comprehensive discourse on matters concerning the relationship between law and time; instead, temporal aspects have, in a more pointillist and haphazard fashion, been treated in the context of the various discussions surrounding the abovementioned fundamental problems. Different aspects have received different degrees of attention: whereas the anticipation of statutes through judge-made law has been discussed only rarely, a much larger number of judicial and scholarly comments exist with regard to the questions of adjudicatory retrospectivity and the possibility of prospective overruling. While traditionally the retrospective effects of judgements have been accepted and explained as being inherent in the nature of the adjudicative process, only recently, in 2005, did the House of Lords make clear that it lays claim to the constitutional power to issue non-retrospective rulings, and that neither the nature of judicial decision making nor the principle of parliamentary sovereignty would stand in the way of thus employing the technique of prospective overruling.

Felix Maultzsch, *Das Zeitelement in der richterlichen Fortbildung des deutschen Rechts* (The Time Dimension in Judicial Law-Making in Germany)

The anticipated application of legal norms which are not yet in force and the

retroactive effect of changes in case law receive increasing attention in recent German legal discourse. Both phenomena pose the question of whether a solution that is considered to be normatively appropriate for the future can be applied to past facts already. This concern has to be balanced with aspects of legal certainty and the protection of legitimate expectations. Furthermore, the rule of law principle may militate against the anticipated application of legal norms and, reciprocally, in favor of a retroactive effect of changes in case law. Against this background, anticipated application and retroactive effect seem to be defensible, if the respective legal norm or the new line of case law do not, by themselves, change the pertinent normative assessment, but merely trace a factual or normative change that has already taken place in society. In addition, both the problem of anticipated application and of retroactive effect may be approached by identical doctrinal means. A so called substantive law approach (sachrechtliche Lösung) addresses the anticipated application and the protection against retroactive effect within the framework of substantive private law. This approach accords well with the role of the judiciary in the German legal system and is therefore applied rather frequently. In contrast, the so called conflict of laws approach (intertemporalrechtliche Lösung) comprises a self-contained anticipated application of legal norms which are not yet in force or a self-contained protection against retroactive effects of changes in case law. This approach is at odds with the orthodox view of the judiciary in Germany and, therefore, is practiced only cautiously.

Notwithstanding these common principles, the current doctrine of retroactive effect of changes in case law does not seem to be fully convincing. It rests on the assumption that a retroactive effect is typically necessary because the courts do merely articulate the best picture of the law based on arguments and principles. However, private law is deployed to an increasing extent to shape society and the courts assume an active part in this transformative process. In that course, the idea of a mere improved legal judgment is threatened to become a fiction. Therefore, the German Federal Supreme Court should be more attentive to the risks that are inherent to far-reaching changes in case law. This could be achieved, primarily, by a strengthened judicial self-restraint, especially with regard to changes in case law. If this solution is discarded as unrealistic, one should, alternatively, consider a better protection against retroactive effects which could be achieved, inter alia, by the means of prospective overruling.

Susan Emmenegger, *Das Zeitelement in der richterlichen Fortbildung des schweizerischen Rechts* (The Time Dimension in Judicial Law-Making in Switzerland)

"Law must be stable and yet it cannot stand still."106 In both the common law and the civil law systems courts are faced with the challenge to reconcile the principle of legal certainty, including the reasonable reliance on the existing state of the law, and the principle of legal rightness which requires a correct application of the law in an ever changing world. This article explores two areas of judicial decision-making in which this challenge arises:
(1) The role of new statutes which have not entered into force at the time of the judicial decision, and (2) the effect of a decision to overrule a precedent on pending cases.

The first question regards judicial rulings in cases where a new (statutory) law is in the making but has not yet been formally enacted. Should the judges take these developments into account and if so, under what conditions? The answer of the Swiss Supreme Court and the Swiss scholarly writing is that future law is to be considered in the judicial interpretation and gap-filling if the future law does not contain a fundamental change but rather stays in line with the legislative perspective of the existing law. It is also unanimously held that the principle of legality bars the courts from a direct and formal application of the future law before its formal entry into force.

There is less unanimity between the Swiss Supreme Court and the Swiss doctrine with regard to the second question, namely, the effects of an overruling of judicial precedents. When the Supreme Court overturns a precedent, it will generally apply its new reasoning to the case at hand, thus accepting the retroactive nature of its ruling. The balancing of the principle of legal certainty against the principle of legal rightness is a process which precedes the court's decision regarding the alteration of its current case law. If the principle of legal certainty is considered to be of prevailing weight, the Supreme Court will abstain from an overruling. Instead, it will announce its doubts with regard to the existing case law, thereby proceeding to a sort of informal prospective overruling. A considerable part of the Swiss scholarly writing is critical of the Supreme Court's stance. It proposes a set of intertemporal rules which turn on the reliance of the parties in the stability of the existing case law. Whenever a court reaches a "better understanding" of

the law, it should proceed to an overruling. However, the retroactive effect would be mitigated if the reasonable reliance of the parties warrants protection – which is almost always true for the party in the pending case. As a result, the intertemporal rules lead to a formal prospective overruling, at least concerning the party which is taking part in the proceeding.

Both the judicial and the scholarly model require the balancing of contradictory interests, and in both cases this balancing allows the court to take the intertemporal dimension of judicial decision-making into account. Therefore, the principal challenge is not so much to determine which model should be applied, but rather to ensure that the two interests in question are balanced in an adequate manner. Having said this, one should keep in mind that – just as in the case of a judicial overruling – the model of judicial intertemporal rules proposed by the doctrine would have to be substantially more adequate than the model favoured by the Swiss Supreme Court to address the issue of contradictory interests arising in connection with a judicial overruling.

Bertrand Fages, *Das Zeitelement in der richterlichen Fortbildung des französischen Rechts*
(The Time Dimension in Judicial Law-Making in France)

Under French law, the principle of legal certainty operates both against the anticipated application of legal norms and in favor of the retroactive effect of changes in case law. Although exceptions to these two positions are occurring more frequently, they still remain largely unpredictable.

Imen Gallala-Arndt, *Die Einwirkung der Europäischen Konvention für Menschenrechte auf das Internationale Privatrecht am Beispiel der Rezeption der Kafala in Europa – Besprechung der EGMR-Entscheidung Nr. 43631/09 vom 4.10.2012, Harroudj ./. Frankreich* (The Impact of the European Convention on Human Rights on Private International Law as Illustrated by the Reception of Kafala in Europe – Reflections on ECHR, Harroudj v. France (No. 43631/09, 4 October 2012))

On 4 October 2012, the European Court of Human Rights (ECHR) rendered a decision dealing with Kafala. This Islamic law-based institution is an undertaking of an adult person to support and educate a minor without creating

a formal parent-child relationship. Since adoption, as understood in western legal systems, is prohibited in most Muslim jurisdictions, Kafala is employed as a substitute. The Court considered the French conflicts-of-law rule (Art. 370-3 para. 2 of the Civil Code) prohibiting adoption of foreign children whose national laws prohibit the institution as compatible with Article 8 of the European Convention on Human Rights.

This essay considers the decision of the Court as a positive contribution to the issue of the impact of Human Rights on private international law. After recalling briefly the general terms of the relationship between human rights and private international law, the essay examines the status of Kafala outside and inside the European context. It also deals with the reception of Kafala in France.

The Court considered that a relationship founded on the Kafala may be protected under Article 8 of the Convention if requirements of continuity and stability are met. Nevertheless it recalled that Article 8 contains no right to adoption. This position of the Court is in line with its case-law on similar issues: given relationships should be protected as part of the respect of family life. The court however did not recognize any right of the applicant to convert the relationship in question into a determined legal relationship such as a parent-child-relationship. Two arguments were decisive for the decision of the court: lack of consensus among state-parties concerning the reception or the status of Kafala and recognition of Kafala by the relevant international instruments as a suitable alternative to adoption. As far as the first point is concerned the essay contends that the Court was mistaken in its appraisal of other state-parties regulations on Kafala as only France specifically prohibits the conversion of Kafala to adoption.

Conference Report: UNIDROIT

Convention on Stolen or Illegally Exported Cultural Objects – 20 Years Later

On 8 May 2015, UNIDROIT hosted an international conference on the occasion of the 20th „birthday“ of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. The illicit trade with cultural property is a huge market, and legislators on all levels of law-making seek to provide for a regulatory scheme that confines this trade as far as possible. This is a truly difficult task, however, given that the art and cultural property market is fully globalized. A first step on the level of international treaties was taken by the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 (Luxembourg ratified this Treaty on 3 February 2015 as the 128th Contracting State). Soon it became clear that this Treaty should be amended by a more effective instrument providing, inter alia, for self-executing claims for the return of stolen property even against good faith-acquirers who would, if they can prove their good faith, (merely) get a fair compensation. This instrument was to become the UNIDROIT Convention that was adopted on the Diplomatic Conference in Rome in June 1995. Whereas the Convention certainly was a progress conceptually, the sucess amongst the states was moderate: only 38 States have ratified or acceeded the Treaty so far. Therefore, it was one of the key objectives of the Conference to further promote the Convention, but also to evaluate the practical experiences of Contracting States to which belongs, inter alia, the hosting State Italy.

After notes of welcome by Prof. Alberto Mazzoni, President of UNIDROIT, Ms Giovanni Marinelli, Deputy for Cultural Affairs at the Municipality of Rome, H.E. Ambassador Nassif Hitti, Head of Mission of the Arab League to Italy, Ms Maria Vittoria Marini Clarelli, speaking on behalf of H.E. Mr Dario Franceschini, Minister of Italy for Heritage and Cultural Activities, and Mr Alfredo Pérez de Armiñán, Assistant Director-General for Culture, UNESCO, Prof. Kurt Siehr, Professor emeritus of the University of Zurich, Max-Planck-Institute of Comarative and International Private Law in Hamburg opened the floor by presenting on „Difficulties in private international law relating to the restitution of cultural objects“. Siehr recalled the landmark cases of *Attorney-General of New*

Zealand v Ortiz, [1984] AC 1, *Winkworth v. Christie Manson and Woods Ltd. and Another*, [1980] 1 ER (Ch) 496, and *Islamic Republic of Iran v The Barakat Galleries Ltd* [2007] EWCA Civ 1374 as well as of course the seminal decision by the German Federal Court of Justice on the illicit export of nigerian masks. Siehr made clear that typical problems arise from the territorial limitations of jurisdictions and the principle of non-enforcement of foreign public law in local courts, a principle that sometimes is confused with the well-accepted doctrine of the application of foreign public law by local courts in connection with a preliminary question such as who is the owner of the object in question (see on this doctrine the Resolution of the Institute of International Law of Wiesbaden 1975 on „The Application of Foreign Public Law"). Thus, the obstacle of non-enforcement of foreign public law does indeed require to be taken care of by international instruments such as the Treaties mentioned above, but any source state may contribute on its own by enacting export laws that result in automatic forfeiture once an attempt of illegal exportation of a cultural object is made. Then such a state may claim return of the object under private law as being the owner. It becomes apparent that the protection of cultural property is a challenge that requires both public and private enforcement mechanisms. This was further substantiated and illustrated by the presentations by Edouard Planche, Programme Specialist, Section for Cultural Heritage Protection Treaties, Division of Heritage, UNESCO, Mr Francesco Rutelli, President of Priorità Cultura, and Ms Maria P. Kouroupas, Cultural Heritage Center, U.S. Department of State.

Prof. Jean-Sylvestre Bergé, Université Jean Moulin (Lyon 3) reflected on the dynamics of sources in international law on the basis of the Treaties mentioned above. Dr. Maamoun Abdulkarmin, Director General, Antiquities and Museusm, Syria (IDGAM) demonstrated via skype the immense looting taking currently place in Syria. Prof. Spyridon Vrellis, Professor emeritus, University of Athens and Director of the Hellenic Institute of International and Foreign Law, Athens, commented on the legal status and factual situation of archaeological objects. Mr Sandro Barbagallo, Curator of the Department of Historical Collections, Vatican Museums, and Mr José Angelo Estrella Faria, Secretary-General of UNIDROIT, analysed the special status of ecclesiastical objects, and Mr Marc-André Haldimann, Associated Researcher at the University of Bern as well as Mr Jorge Sánchez Cordero, Director of the Mexican Center of Uniform Law, Vice President of the International Academy of Comparative Law, discussed the status of private collections. Prof. Manlio Frigo, University of Milan, Member of the ILA Heritage

Committee presented the international development of case law and practice on the restitution of cultural objects, and Prof Marie Cornu, Director of Research, CNRS, France, Member of the ILA Heritage Law Committee, discussed the adoption of the recast of the European Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 in respect to interactions between European Union law and international law.

It may be noteworthy that this recast also triggered activity within the legal orders of the EU Member States. Germany, for example, is currently consolidating and even perhaps codifying its entire cultural property law, a legislative process to which the author of these lines was invited by the German Federal Government to contribute as an expert (see written expert opinion for the hearing by the German Government on 22 April 2015).

Finally a roundtable on the understanding of the core term of „due diligence" closed the Rome conference at the prestigious Museo Capitolini in its Sala Pietro da Cortona. Many times the spirit of Rome for adopting all kinds of treaties was evoked, and indeed, being at a location of such a significance for culture and history of mankind should help to improve the regulatory framework in particular for the protection of cultural property. It cannot be a surprise that a large number of experts worldwide attended UNIDROIT's „birthday party" for its Convention in this field.

Addendum

Further to these notes on the UNIDROIT Conference it may be of interest to be informed about the following two recent, noteworthy publications (amongst many others in the vast and rapidly growing field of cultural property law):

- Alessandro Chechi, The Settlement of International Cultural Heritage Disputes, Oxford University Press2014 (review of this book in the next issue of the GermanYearbook of International Law)

- Klaus Schurig, Nazibeflecktes Kunsteigentum und die USA, in Christian Fahl et al. (eds.), Ein menschengerechtes Strafrecht als Lebensaufgabe,

Festschrift für Werner Beulke, pp. 1329 et seq., C.F. Mueller-Verlag 2015, discussing choice-of-law issues in respect to Nazi-looted art

---

Fentiman, International Commercial Litigation (2nd edn) – 20% Discount

International Commercial Litigation (Second Edition) by Richard Fentiman

Special Offer: 20% discount available to conflictoflaws.net readers

- The definitive account of the principles of international commercial litigation, regularly cited with approval by the courts
- Takes a strategic approach to litigation risk and examines the tactical choices facing litigants
- Structured to address issues as they arise in practice
- Embeds practical issues in the underlying principles of private international law

New to this edition

- In-depth coverage of recent legislation and case law
- Enhanced treatment of anti-suit injunctions, freezing injunctions, and jurisdiction agreements
- Extended treatment of the provisions of Regulation 1215/2012 (the recast Brussels Regulation on jurisdiction and judgments)
- In-depth analysis of issues of current concern, including the effectiveness of hybrid jurisdiction agreements, the role of anti-suit injunctions in arbitration (especially within the EU), the scope of injunctions ancillary to

foreign proceedings, the treatment of claims involving third parties, and the effect on high-value commercial disputes of new approaches to case-management and costs

Invaluable for: Litigators and commercial law practitioners, academics and scholars of private international law; postgraduate/advanced students of the subject; legal reference libraries.

816 pages | 978-0-19-871291-6 | Hardback | 08 January 2015

Price: ~~£225.00~~ £180.00.

Order your copy here by quoting the code ALAUTH17 when ordering.

Limit 3 copies per transaction. Offer valid until 31st December 2015. This offer is only available to individual (non-trade) customers when ordering direct from the Oxford University Press website. This offer is exclusive and cannot be redeemed in conjunction with any other promotional discounts.

Prof. Lortie on Child Abduction

Interdisciplinary Association of Comparative and Private International Law in co-operation with the University of Vienna is organising a lecture on **Direct judicial communications under the 1980 Hague Child Abduction Convention and the International Hague Network of Judges**. The lecture will be given by the First Secretary of the Hague Conference on Private International Law Prof. Philippe Lortie, on 20 May 2015 at 6.30 p.m. in Juridicum, Vienna.
Additional information is available in the leaflet.

The New European Insolvency Regulation- Seminar

A seminar on the new European Insolvency Regulation, organized by professors Francisco Garcimartín and Juana Pulgar, and sponsored by the Revista de Derecho Concursal y Paraconcursal, will be held on June, 3, at the Real Academia de Legislación y Jurisprudencia (Madrid). The event will bring together leading and renowned experts in the field, among which Katja Lenzing and Prof. Miguel Virgós Soriano. The spoken language of the first panel will be English; the second one will be held in Spanish.

For more information and to access the detailed program click here.

Book: The Brussels I Regulation Recast (OUP) – Dickinson & Lein (eds)

Brussels I Regulation Recast (OUP)

A new, major commentary on the Brussels I Regulation Recast has been published by Oxford University Press. Here's the summary:

- The only text describing the provisions of the Regulation and their inter-relationship with one another, with focus on the changes introduced in the recast process
- Summarises the structure of the Regulation and the role played by the case law of the European Court of Justice

- A bibliography for each article enables readers to access other sources of commentary (including leading texts in key jurisdictions, monographs and articles)
- Critical analysis of the text of the relevant Articles and recitals are combined, with a short reference to the legislative history
- Written by leading experts in the field
- Helpfully written in an accessible and concise way

The Brussels I Regulation has undergone a lengthy review process, resulting in Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). The provisions of the new Regulation apply from 10 January 2015.

This work, written by a number of leading experts on the subject, provides a commentary on the Recast Regulation. It contains a concise article-by-article commentary on all provisions of the recast Regulation with reference to the existing case law of the European Court of Justice and leading national decisions, and provides additional focus on the newly introduced changes, in particular to the provisions on lis pendens and the recognition and enforcement of judgments.

And the Table of Contents:

1: Andrew Dickinson: Background and Introduction to the Regulation
2: Martin Illmer, Arnaud Nuyts, Jonathan Fitchen: Scope and Definitions (Art. 1 – 3)
3: Helene van Lith: Jurisdiction – General Provisions (Art. 4-6)
4: Matthias Lehmann, Eva Lein, Pippa Rogerson, Marie Elodie Ancel: Special Jurisdiction (Art. 7-9)
5: Stefania Bariatti: Jurisdiction in Matters Relating to Insurance (Arts. 10-16)
6: Andrea Bonomi: Jurisdiction over Consumer Contracts (Arts. 17-19)
7: Louise Merrett: Jurisdiction over Individual Contracts of Employment (Arts. 20-23)
8: Matthias Lehmann: Exclusive Jurisdiction (Art. 24)
9: Paco Garcimartin: Prorogation of Jurisdiction – Choice of Court Agreements and Submission (Arts. 25-26)
10: Xandra Kramer: Examination as to Jurisdiction and Admissibility (Arts. 27-28)

11: Pippa Rogerson, Paco Garcimartin, Matthias Lehmann: *Lis Pendens* and Related Actions (Arts. 29-34)
12: Arnaud Nuyts: Provisional, Including Protective Measures (Art. 35)
13: Pietro Franzina, Xandra Kramer, Jonathan Fitchen: The Recognition and Enforcement of Member State Jud gements (Arts. 36-57)
14: Jonathan Fitchen, Xandra Kramer: Authentic Instruments and Court Settlements (Arts. 58-60)
15: Martin George, Jonathan Fitchen, Marie-Elodie Ancel: General Provisions (Arts. 61-65)
16: Andrew Dickinson: Transitional Provisions (Art. 66)
17: Pippa Rogerson, Andrea Bonomi, Martin Illmer: Relationship with other Instruments (Arts. 67-73)
18: Andrew Dickinson: Final Provisions (Arts. 74-81)
Appendix 1. The Regulation: English, French and German language versions.
Appendix 2. Comparison of 2001 Regulation and Recast Regulation
Appendix 3. Commission Proposal (Annexes omitted)
Appendix 4. Explanatory Statement within the Final Report of the EP Legal Affairs (JURI) Committee
Appendix 5. Information Published by the Commission Pursuant to Art 76

Needless to say, this is highly recommended to all. It's available to order for £165 from the OUP website.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2015: Abstracts

The latest issue of the *"Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)"* features the following articles:

Jochen Hoffmann, **"Button-click" Confirmation and Cross Border Contract**

Conclusion

Section 312j paragraph 3 and 4 of the German Civil Code (BGB) addresses and secures effective consumer protection with regard to the issue of internet-related "cost traps". Cost traps are websites that are designed to lead to the conclusion of contracts without the consumer's awareness of an obligation to pay. At the same time this regulation transposes Art. 8 par. 3 of the Consumer Rights Directive into German law. In effect, this provision ensures that an e-commerce contract between a trader and a consumer cannot be concluded if the trader does not ensure that the consumer is made aware, prior to placing his order, that he is assuming an obligation to pay, in connection with internet contracts specifically by using an unambiguously labelled button. Since this regulation is applicable to all e-commerce contracts it not only applies to "cost traps", but also to legitimate internet trading. This article addresses the problems arising from the new provision for cross border contracts in the light of the applicable conflict of laws rules.

Jan von Hein, **Authorization Requirements for a Guardian's Transaction Concerning a Vulnerable Adult's Immovable Property – Jurisdiction and Conflict of Laws**

The Court of Justice excluded, in Case C-386/12 – Siegfried Janós Schneider, the applicability of the Brussels I-Regulation to a court's authorization that an adult's guardian required for a transaction concerning immovable property belonging to the adult (Article 1(2)(a) of the Regulation). In his case note, von Hein agrees with the Court's ruling because the authorization requirement was the main object of the proceedings. If the necessity to obtain an authorization arises merely as an incidental question in litigation related to property, however, the Regulation, including the forum rei sitae, remains applicable. Moreover, the author analyses which court is competent to rule on granting an authorization to an adult's guardian for the sale of immovable property and which law is applicable to this question. He looks at this problem both from the point of view of autonomous German PIL and of the Hague Convention on the International Protection of Adults. The article shows that autonomous PIL and the Hague conflicts rules differ considerably and that in the Hague Convention's framework, authorization requirements are treated in a very differentiated manner.

Astrid Stadler, **A uniform concept of consumer contracts in European civil law and civil procedure law? – About the limits of a comprehensive**

approach

In “Vapenik”, the ECJ had to decide whether Article 6 para 1 lit. d of Regulation 805/2004 prevents the confirmation of a judgment by default as a European enforcement order if the judgment was based on a c2c-relation and the plaintiff had not sued the defendant in the Member State where he was domiciled but in the courts where the contractual obligation had to be fulfilled. The question raised was whether Article 6 para 1 lit. d applied only to b2c situations or also to cases in which both parties were consumers. The ECJ denied the application of the provision based on the reasoning that the defendant was not a “weaker party”. This interpretation of the EEO Regulation was deduced from the rationale of “consumer contracts” in the Brussels I Regulation, the Rom I Regulation and Directive 93/13. The ECJ, however, provided only a very cursory comparison of the underlying policies of consumer protection. Particularly the idea of granting consumers a preferential treatment with respect to international jurisdiction differs from the purpose of consumer protection in substantive law and conflict of laws. With respect to Regulation 805/2004 the ECJ’s decision does not adequately balance the interests of the two consumers involved and unnecessarily privileges the plaintiff. It increases the defendant’s risk to suffer from a deficient cross-border service of documents without the chance of objecting to the enforcement of the judgment by raising grounds for non-recognition.

Jörg Pirrung, **Brussels IIbis Regulation and Child Abduction: Stones Instead of Bread ? – Urgent preliminary ruling procedure regarding the habitual residence of a child aged between four and six years**

After twelve mostly satisfactory decisions on the interpretation of the Brussels IIbis Regulation with respect to parental responsibility cases, the ECJ has given only conditional answers to the questions referred to it by the Irish Supreme Court. In this case it was not adequate to use the urgent preliminary ruling procedure instead of an expedited procedure. In substance, the Court interprets Articles 2 (11), 11 of the Regulation as meaning that, where a child was removed in accordance with a judgment later overturned by an appeal judgment fixing the child’s residence with the parent living in the Member State of origin, the failure to return the child to that State following the latter judgment is wrongful, if it is held that the child was still habitually resident in that State immediately before the retention, taking into account the (subsequent) appeal and that the judgment authorising the removal was (only) provisionally enforceable. If it is held, conversely, that the child was at that time no longer habitually resident in the

Member State of origin, a decision dismissing the application for return based on Article 11 is without prejudice to the application of the rules established in Chapter III of the Regulation relating to the recognition and enforcement of judgments given in a Member State. On the whole, the opinion of Advocate General Szpunar stating expressly that the fact that proceedings relating to the child's custody were still pending in the State of origin is not decisive as habitual residence is a factual concept and not depending on whether or not there are legal proceedings, seems more convincing than the judgment itself.

Marianne Andrae, **First decisions of the ECJ to the Interpretation of Article 12(3) Regulation (EC) No 2201/2003, Comment to Cases C 436/13 and C 656/13**

Article 12 (3) of Council Regulation (EC) No 2201/2003 of 27 November 2003 applies to separated matters of parental responsibility. The ECJ classifies this rule as a prorogation of jurisdiction for the holders of parental responsibility. This paper submits several arguments against this judgment. The jurisdiction of the courts is always justified for the particular application and it does not continue after pending proceedings have been brought to a close. This acceptance must be obtained at the time the matter is seized to the courts including the specific issues of the proceeding. An agreement, after the matter was brought to court, does not justify jurisdiction. The tight time requirements must be transferred to the jurisdiction under Article 8 (1) of that regulation. An interpretation whereupon the requirements of the jurisdiction can be fulfilled after pendancy and which orientates to the best interests of the child remains for an amendment of the regulation.

Tobias Helms, **The independent contestability of interlocutory judgments on international jurisdiction in family law cases**

The Stuttgart Higher Regional Court correctly held in its judgment of May 6, 2014 that, contrary to the wording of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG), German courts can pass interlocutory judgments on questions of their international jurisdiction in all family law cases. This conclusion can rightly be reached – in light of the statutory history of the FamFG – by way of an analogous application of Sec. 280 of the Code of Civil Procedure (ZPO).

Rainer Hüßtege, **Grenzüberschreitende Wohngeldzahlungen**

Wulf-Henning Roth, **Applicable contract law in German-Danish trade**
Given the opt-out of Denmark from the Area of Freedom, Security and Justice, Danish courts do not apply the conflict rules of the Rome I-Regulation, but still the EC Convention on the Law Applicable to Contractual Obligations of 1980 (Rome Convention). As Germany has not yet given notice of a termination of the Rome Convention, it appears to be not beyond doubt whether in settings relating to Denmark German courts have to apply the conflict rules of the Rome I-Regulation, given its call for universal application (Article 2) and in the light of Article 24 (1), whereby the Rome Convention shall ("in the Member States") be deemed replaced by the Rome I-Regulation. In contrast, the OLG Koblenz, pointing to Article 1 (4), holds Article 24 (1) to be inapplicable in the specific case as Denmark may not be regarded as a "Member State". The Appellate Court applies the Rome Convention despite the fact that the German legislator has explicitly excluded the direct applicability of the Rome Convention.

Malte Kramme, **Conflict law aspects of the successor's responsibility for debts of the acquired business, before and after the Rome-Regulations**
The German Federal Court of Justice deals, in its decision of 23 October 2013, with several current questions in the field of private international law. Firstly, the court adopts a position on the question of which conflict rule applies to the liability claim against the successor to a mercantile business carrying on the business under an identical trade-name (section 25 para. 1 sentence 1 German Commercial Code). Furthermore, the court decided which law applies to forfeit and limitation of claims underlying the United Nations Convention on Contracts for the International Sale of Goods. As the court applied the old legal regime prior to the entry into force of the Rome-Regulations, the article focuses on the question of how the case has to be solved under the new legal regime. This analysis shows that the Regulations "Rome I" and "Rome II" do not cover the law of obligations in an exhaustive manner. Remaining gaps need to be filled applying nonunified German private international law.

Dieter Henrich, **Children of Surrogate Mothers: Whose Children?**
The legal parentage of children, born by surrogate mothers and handed over to the intended parents, is a highly debated question. Strictly forbidden in Germany, surrogacy is allowed in other countries. In a case of children born by a surrogate mother in California the German intended fathers (a same sex couple) applied for recognition of the decision of the California court, which established a parent-

child relationship between the child and the couple. While the lower courts in Germany denied the application because of incompatibility with German public policy (cf KG IPRax 2014, 72) the Bundesgerichtshof (the Federal Court of Justice) decided in favour of the applicants, but restrained explicitly the recognition on cases of foreign court decisions and to cases, where at least one of the intended parents is the biological parent of the child. So the recognition of foreign birth certificates (e.g. from the Ukraine) is still an open question as well as the recognition of parentage decisions, if neither of the intended parents is a biological parent.

Susanne Lilian Gössl, **Constitutional Protection of ‚Limping' Marriages and the ‚Principle of Approximation'**
The Court decides how to treat a "limping" marriage which is not valid under German law but nevertheless falls in the scope of and is therefore protected by the concept of "marriage" of the German Constitution (Art. 6 para. 1 Basic Law). The article examines how the German status registration law over the last four decades has subsequently been adapted to the needs of cross-border status questions.

Susanne Lilian Gössl, **Adaptation of Status Registration Rules in Cases of ‚Limping' Status**
The subject of this article is how to handle the birth registration of a child born by a surrogate mother according to German and Swiss law. Both legal systems are absolutely opposed to surrogacy but also under the obligation to protect the child's right to know his/her decent. The Swiss Court found a possibility to resolve the resulting legal tension. The author shows that the court's resolution, an adaptation of the national civil status registry law, is a mechanism which has already been frequently used by German courts in other situations of "limping" status. She proposes to extend that existing jurisprudence to cases of cross-border surrogacy.

Alexander R. Markus, **Jurisdiction in Matters Relating to a Contract Under the Brussels/Lugano Regime: Agreements on the Place of Performance of the Obligation in Question and the Principle of Centralisation of Jurisdiction**
According to the Swiss Federal Supreme Court, parties can by agreement only specify the place of performance of the characteristic obligation under article 5(1)(b) of the 2007 Lugano Convention; contractual specifications of the place of

performance of non-characteristic obligations are irrelevant in terms of jurisdiction.

Jörn Griebel, **Investment Arbitration Awards in Setting Aside Proceedings in the US – Questions Regarding the Review of Local Remedies Clauses Within Investment Treaties**
National setting aside proceedings are more and more often concerned with investment arbitration awards. This is due to a constant rise of investment arbitration proceedings. Although two thirds of all investment disputes are adjudicated according to the ICSID rules, which provide for a special review mechanism, the remaining awards may be subject to review before national courts. The US Supreme Court decision had to decide on the degree of review in a dispute concerning local remedies clauses within an investment treaty and the possible impact of such clauses on the consent to arbitrate. The Court held that it had no competence to review the award in respect of such clauses.

Conference on Jurisdiction & Dispute Resolution in the Internet Era

The conference titled Jurisdiction & Dispute Resolution in the Internet Era: Governance and Good Practices, organised by the University of Geneva, the Faculty of Law, and two other institutions, is scheduled for 17 and 18 June 2015 in Geneva. Each conference day is divided into two sessions:

> *Session 1: Conflict of laws/private international law in the Internet era: which courts shall decide Internet-related disputes?*
> *Session 2: What alternative resolution systems for Internet-related disputes today and tomorrow?*
> *Session 3: What mechanisms for solving disputes in the ICT industries? The case of the licensing of Standard Essential Patents (SEP) under Fair,*

Reasonable and Non-Discriminatory (FRAND) terms
Session 4: How shall jurisdictional immunity and inviolability apply in the Internet Era?

More information is available at the conference website.