

Latest Issue of RabelsZ: Vol. 79 No 3 (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:

Dagmar Coester-Waltjen, *Himmel und Hölle: Einige Überlegungen zur internationalen Zuständigkeit* (Heaven and Hell: Some Reflections on International Jurisdiction)

Jurisdictional rules differ all over the world. Plaintiffs might consider jurisdictional practices in one legal system as “heaven”, whereas defendants will fear exactly these rules like “hell”. Due to increasing global interconnectedness that results from increasing cross-border trade, from the mobility of people, and the global reach of the internet, there is a need for international consensus on matters of jurisdiction on several levels. The first level concerns the question whether a complete set of acceptable grounds of jurisdiction (direct grounds of jurisdictions) can be developed for a binding instrument. On the second level the question arises as to tolerable heads of jurisdiction (only) for the purpose of recognition and enforcement of foreign judgments (indirect grounds of jurisdiction). And finally the jurisdiction of the courts that recognize and enforce the foreign judgment is at issue. The Hague Conference on Private International Law has resumed its work on the so-called judgment project and it is working on all three levels although direct grounds of jurisdiction will be tackled only after a certain agreement will have been reached on jurisdictional issues concerning recognition and enforcement of judgments. However, on all three levels the inclusion and the role of the doctrine of forum non conveniens will be an important and most decisive issue.

The doctrine of forum non conveniens has its origin in the common law world, but has spread around the globe in recent decades. Today it can be found also in jurisdictions which traditionally apply strict jurisdictional rules. The very essence of the doctrine is a margin of discretion the competent court may apply in staying or rejecting litigation. This applies if in the given situation the court addressed seems to be a “not convenient” forum and there is another more

appropriate forum. The particulars of the doctrine as well as the standards of the test (inconvenient, clearly inconvenient, more appropriate) and the determinative considerations vary.

By contrast, it has been said that the European rules on jurisdiction are and have to be strict rules in order to guarantee certainty and predictability. However, a close look at these jurisdictional systems in European regulations reveal some weakness of the strict rules on the one hand and also the fact that even in these systems a non-convenience substitute has been developed. There are rules which allow courts to deny jurisdiction by way of interpreting a jurisdictional rule restrictively in the light of specific circumstances of the case at hand. There are other rules which give judges a limited power to decline (or in case of a forum necessitatis even to attract) jurisdiction outside the normal rules. In this situation forum non conveniens-type considerations are at issue. In so far the acceptability of the doctrine of forum non conveniens in a global instrument concerning jurisdiction even for continental-European legal systems and the EU as such does not seem unthinkable any more.

This applies especially as far as direct jurisdiction is concerned. Globalization of the markets and of societies as well as the delocalisation of the connecting factors ask for wide jurisdictional rules which may have to be restricted with regard to the specific and limited circumstances of the precise facts of a case.

Concerns about “access to justice”, “the right to a lawful judge”, non-discriminatory decisions, predictability and certainty of the jurisdictional system can be rebutted if the terms and conditions of a rule on forum non conveniens are framed accordingly: A presumption that honours the plaintiff’s choice of court may only be rebutted, if the defendant proves that the interests of both parties and the end of justice justify a stay or denial of the proceedings. He will have to prove in addition that there is an alternative appropriate forum which guarantees a lawful procedure and a possibility for the plaintiff to enforce his right when granted by this alternative court. Much will depend on the phrasing of the rule, but there are models for orientation.

When it comes to indirect jurisdiction the doctrine of forum non conveniens for constitutional reasons plays an important role in the United States. It seems unlikely that an agreement on the international level will be reached without coping with this issue. However, forum non conveniens may have a very limited

role on this level only. Due to the fact that in so far practical difficulties for the original forum in adjudicating the case are not at issue any more, the essential issue will be whether the interests of the defendant have been treated in accordance with the rule of law. This could be argued under the head of “ordre public”, but it seems preferable to define the limits of such exception expressly.

Finally, the jurisdictional rules of the courts recognizing and enforcing foreign judgments are of pivotal importance. Without the possibility of enforcement a right may be theoretical and illusionary only. Therefore, in order to guarantee practical and effective rights, a legal system must not refrain from enforcing a judgment according to the doctrine of forum non conveniens if and so far as this judgment has to be recognized in this system. Thus, on the third stage of jurisdictional issue the doctrine of forum non conveniens should not play any role at all.

Rolf Wagner, *EU-Kompetenz in der justiziellen Zusammenarbeit in Zivilsachen – Resümée und Ausblick nach mehr als fünfzehn Jahren* (EU Legislative Powers Regarding Judicial Cooperation in Civil Matters)

Since the entry into force of the Amsterdam Treaty in 1999, the European Union has been empowered to cooperate in the area of civil matters. As this power has now existed for more than fifteen years, it seems appropriate to take stock of developments. In addition to asking whether initial legal uncertainties regarding the interpretation of the power of judicial cooperation in civil matters have been resolved over the course of time, the present article also considers what new problems may have emerged.

Chloé Lignier and **Anton Geier**, *Die Verstärkte Zusammenarbeit in der Europäischen Union – Politischer Hintergrund, Bestandsaufnahme und Zukunftsperspektiven* (Enhanced Cooperation in the European Union – Political Background, Current Status and Future Perspectives)

The legislative instrument of enhanced cooperation allows member states to create a common legal regime in a given field, which applies only to those member states that voluntarily subject themselves to it. While the concept of having different levels of integration (“differentiated integration”) as such is not new to EU law, the instrument of enhanced cooperation stands out through its

broad scope of application and its elaborate institutional entrenchment.

The history of differentiated integration in the EU illustrates the basic conflict between effective integration on the one hand and preserving the sovereignty of the member states on the other hand. In this context, the two principal competing political ideals aspiring to resolve this conflict are often labelled as “Europe à la carte” on the one hand and “multi-speed Europe” on the other hand. Both ideals – to a varying degree – manifest themselves in the rules on enhanced cooperation introduced with the treaties of Amsterdam and Nice.

After having been neglected by the European legislator for a long time, we can now witness the first practical implementations of enhanced cooperation in the fields of divorce law, patents and the financial transaction tax. The ideas of differentiated integration and the instrument of enhanced cooperation remain highly controversial. Some see it as the only means for overcoming the integrational standstill in an ever more complex and heterogenic Union. Others fear that enhanced cooperation will sow division among the member states and foster political and legal alienation between them.

Ultimately, an analysis of the rules on enhanced cooperation in the treaties and the latest examples of its implementation gives rise to optimism. It reveals a promising potential of the instrument of enhanced cooperation for achieving effective integration in the EU, while duly observing the legitimate interests of all member states, be they participating or not. At the same time, the European legislator should wield its new sword with caution if it wishes to preserve the solidarity among the member states and the coherence of EU law. It cannot be denied that specific projects of enhanced cooperation can come into conflict with other EU interests such as the coherence and effectiveness of the internal market. As regards the political coherence of the EU, the provisions on sincere cooperation do allow for political inclusion and wisely oblige the participating member states to confer with the non-participants at every stage. The extent to which the member states act in this spirit of constructiveness and cooperation will decide over the fate of enhanced cooperation as either a king’s road or a dead end of European legal integration.

Marieke Oderkerk, *The Need for a Methodological Framework for Comparative Legal Research – Sense and Nonsense of “Methodological Pluralism” in*

Comparative Law

The paper has presented a framework for comparative legal research indicating the various methodological issues that have to be considered in the various stages of a research project. Its significance is twofold. In the first place it brings order into the existing methodological knowledge in the field such that the various methods and techniques can be understood and assessed within the correct context, automatically unveiling existing lacunae. Secondly, and probably most importantly, the framework shows that there is indeed one framework which contains – at the moment at least, for certain parts of it – clear guidelines and principles that can guide comparatists conducting any type of comparative legal research in any field of the law.

Dieter Martiny, *Die Haager Principles on Choice of Law in International Commercial Contracts – Eine weitere Verankerung der Parteiautonomie* (The Hague Principles on Choice of Law in International Commercial Contracts: Buttressing Party Autonomy)

The Hague Conference on Private International Law has recently drawn up “Principles on Choice of Law in International Commercial Contracts”. An innovative feature of these Principles, which are accompanied by an explanatory Commentary, is that unlike an international convention they are non-binding. The Principles were drafted by a Working Group, which commenced in 2010, and by a Special Commission of November 2012. The instrument was approved by the Council on General Affairs and Policy in March 2015.

The Principles’ relatively few black-letter rules (12 articles and a preamble) seek to encourage choice of law in international commercial transactions. They contain clarifications and innovations on choice of law, particularly for jurisdictions where party autonomy is not accepted or is accepted only in a restrictive manner. The Principles try to achieve universal application and also to influence existing regional instruments such as the Rome I Regulation of the European Union and the OAS Mexico Convention.

Developing the Principles was a demanding task since they apply not only to courts but also to arbitral tribunals. Since party autonomy is the centrepiece of the Hague Principles, freedom of choice is granted basically without restriction.

The Principles clarify important issues for agreements on choice of law. A reference to “law” also includes generally accepted “rules of law”. The latter refers to principles developed by international organisations or international conventions. This approach is also applicable to courts. Under the Hague Principles the parties’ choice of law is severable from the main contract. Express and tacit choices are accepted. There is no requirement as to the formal validity of a choice of law. An innovative solution also tries to find an agreement on choice of law in the case of a battle of the forms. Not only are international mandatory rules of the forum respected but under certain circumstances mandatory provisions from other sources are also taken into account. The extent to which overriding mandatory rules and public policy are applied or taken into account, however, is ultimately a matter not for the non-binding Principles themselves but for other rules.

The Hague Principles declare themselves to be an international code of current best practice with respect to the recognition of party autonomy in choice of law in international commercial contracts. Their acceptance in international practice will show how far the expectations of The Hague will be met.

Call for Papers

Call for Papers on Private International Law, Economics, and Development

The Federalist Society’s Faculty Division is pleased to announce a **Call for Papers** on **Private International Law, Economics, and Development**. Up to four submissions will be selected for inclusion in an upcoming Faculty Division colloquium on this topic. Authors of the selected pieces will each receive a prize of approximately \$2,500 (any co-authors must share a single prize). The topic is intentionally broad in scope, though we have a particular interest in papers that offer fresh perspectives or insights on the relationship between private international law, economics, and development.

The **Private International Law, Economics, and Development** colloquium is

intended to engage private international law from a legal, economics, and public policy perspective—particularly the seeming lack of international agreement on how trade should be encouraged and regulated. Some contend legal regimes that promote free trade will benefit all of society, while others argue that such an approach benefits the relatively wealthy at the expense of the relatively poor. Fitted within this larger debate of politics and economics is the important question of what role, if any, private international law should play in promoting and regulating transnational activity. Winning submissions will be incorporated into a special colloquium session, during which we hope to engage some of the latest thinking on these issues.

The winning authors will be expected to attend the colloquium (Oct. 9-10, 2015), which we plan to hold in the Los Angeles area, but not to present their papers in the formal sense; rather, all participants will have read the papers beforehand and will come prepared to engage in a freewheeling discussion on the issues the papers raise. Submissions will be accepted from current law faculty or those pursuing full-time employment in the legal academy.

There is a limit of one submission per person.

Submissions must be substantially complete and formatted in accord with the Bluebook. Submissions should be of a quality publishable in a mainstream law journal, but must **not** have been published as of the date of the submission deadline below. This must be the case even if the paper has been accepted for publication in a journal or law review.

Submissions must be sent via Microsoft Word or pdf attachment to anthony.deardurff@fed-soc.org **no later than 5:00pm Eastern Time on Friday July 31, 2015.**

Patents and the Internet

Guest Post by Professor Marketa Trimble (UNLV) (also posted at this blog).

Imagine that someone had a patent on the internet and only those who had a license from the patent holder could, for example, do business on the internet. This internet patent would not need to concern the internet protocol, the domain name system, or any other technical features of the network; the patent could, in fact, cover something else – a technology that everyone, or almost everyone, who wants to do business on the internet needs, a technology that is not, however, a technical standard. There might be one such patent application – the patent application discussed below – that could be approaching this scenario.

We must accept, however reluctantly, that activities on the internet will not be governed by a single internet-specific legal regime or by the legal regime of a single country. Although countries might agree on an internet-specific regime for the technical features of the internet, and might even adopt some uniform laws, countries want to maintain some of their country-specific national laws. People and nations around the world are different, and they will always have diverse views on a variety of matters – for example, online gambling. Online gambling might be completely acceptable in some countries, completely unacceptable in others, or somewhere in between; likewise, countries have different understandings of privacy and requirements for the protection of personal data. Therefore, countries now have and likely always will have different national laws on online gambling and different national laws on privacy and personal data protection. Compliance with multiple countries' laws regarding the internet is nonnegotiable, certainly for those private parties who wish to conduct their activities on the internet transnationally and legally. Nevertheless, in practice and for some matters, the number of countries whose laws are likely to be raised against an actor on the internet may be limited, as I discussed recently.

For some time the major excuse for noncompliance with the laws of multiple countries on the internet was the ubiquitousness of the network. The network's technical characteristics seemed to make it impossible for actors to both limit their activity on the internet territorially, and also to identify with a sufficient degree of reliability the location of parties and events on the internet, such as customers and their place of consumption. However, as geolocation and

geoblocking tools developed, location identification and territorial limitation of access became feasible. Of course the increase in the use of geolocation tools generated more interest in the evasion of geolocation, and increased evasion has prompted even further improvements of the tools. The argument that we cannot limit or target our activity territorially because we don't know where our content is accessed or consumed no longer seems valid. (Also – at least in some countries – courts and agencies have permitted internet actors to employ low-tech solutions as sufficient territorial barriers, for example, disclaimers and specific language versions.)

The multiplicity of applicable laws that originate in different countries and apply to activities on the internet is more troubling in some areas of law than in others. One area of law that permeates most internet activity is data privacy and personal data protection. Any internet actor who has customers and users (and therefore probably has user and traffic analytics) will likely encounter national data protection laws, which vary country-by-country (even in the EU countries, which have harmonized their personal data protection laws, national implementing regulations may impose country-specific obligations). Therefore, compliance with the varying national data protection laws will become one of the essential components of conducting business and other activities transnationally. If someone could patent a method for complying simultaneously with multiple countries' data privacy laws on the internet and claim the method broadly enough to cover all possible methods of achieving compliance with the national privacy laws, that patent owner might just as well own a patent on the internet, or at least on a very large percentage of internet activity.

A U.S. patent application that seeks a patent on simultaneous compliance with multiple countries' data privacy laws on the internet through broad method claims is application No. 14/266,525, which concerns "Systems and Methods of Automated Compliance with Data Privacy Laws," meaning "laws of varying jurisdictions" (the title and the "Abstract"). The invention is designed to facilitate an automatic method of complying with the data privacy laws of various jurisdictions, which are, as the "Introduction" notes, "complicated, diverse, and jurisdiction specific." The method envisions that once "person-related data" are requested from a data provider, a "filter is the [sic] automatically applied to the person-related data to restrict transfer of person-related data [that] does [sic] not meet the data privacy regulations applicable to the jurisdiction" (the

“Introduction”); the filter also checks for any consents by the data subject if the particular regulations require them. The method also foresees, for example, the possibility of “identif[ying] different origins of the person-related data sources” in terms of their geographical location (“Trust Object and Trust Data”).

The patent application still must be prosecuted, and the – undeniably useful – invention will be subject to scrutiny as to its compliance with the requirements of statutory subject matter, novelty, and non-obviousness. A patent on the application may not issue at all, or the language of the application may be amended and the claims narrowed. Whatever the future might bring for the claimed invention, this patent application serves as a useful prompt for thinking about the components that have been or are becoming essential to conducting business and other activities on the internet.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2015: Abstracts

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

Holger Jacobs, The necessity of choosing the law applicable to non-contractual claims in international commercial contracts

International commercial contracts usually include choice-of-law clauses. These clauses are often drafted narrowly, such that they do not cover non-contractual obligations. This article illustrates that, as a result, contractual and non-contractual claims closely linked to the contract risk being governed by different laws. This fragmentation might lead to lengthy and expensive disputes and considerable legal uncertainty. It is therefore advisable to expressly include non-contractual claims within the scope of choice-of-law clauses in international commercial contracts.

Leonard Hübner, **Section 64 sentence 1 German Law on Limited Liability Companies in Conflict of Laws and European Union Law**

The article treats the application of the liability pursuant to § 64 sentence 1 GmbHG to European foreign companies having its centre of main interest in Germany. At the outset, it demonstrates that the rule belongs to the *lex concursus* in terms of Art. 4 EuInsVO. For the purposes of this examination, the article considers the case law of the ECJ as well as the legal consequences of the qualification. At the second stage, it illustrates that the application of the rule to foreign companies does not infringe the freedom of establishment according to Art. 49, 54 TFEU.

Felix Koechel, **Submission by appearance under the Brussels I Regulation and representation in absentia**

In response to two questions referred by the Austrian Supreme Court, the ECJ ruled that a court-appointed representative for the absent defendant (*Abwesenheitskurator*) cannot enter an appearance on behalf of the defendant for the purposes of Article 24 of the Brussels I Regulation. This solution seems convincing because the entering of an appearance by the representative would circumvent the court's obligation to examine its jurisdiction on its own motion under Article 26 para 1 of the Brussels I Regulation. Considering also the ECJ's decisions in cases C-78/95 (*Hendrikman*) and C-327/10 (*Hypoteční banka*) it seems that the entering of an appearance within the meaning of the Brussels I Regulation is generally excluded in case of a representation in absentia. It is, however, doubtful whether the very specific solution adopted by the ECJ in the present case should be applied in other cases of representation in proceedings.

Peter Mankowski, **Tacit choice of law, more preferential law principle, and protection against unfair dismissal in the conflict of laws of employment agreements**

Labour contracts with a cross border element are a particular challenge. They call for a particularly sound administration of justice. Especially, the discharge of employees gives rise to manifold questions. The final decision of the Bundesarbeitsgericht in the case *Mahamdia* provides a fine example. It tempts to spend further and deepening thoughts on tacit choice of law (with a special focus on jurisdiction agreements rendered invalid by virtue of Art. 23 Brussels Ibis Regulation, Art. 21 Brussels I Regulation/revised Lugano Convention), the most favourable law principle under Art. 8 (2) Rome I Regulation, and whether the

general rules on discharge of employee might possibly fall under Art. 9 Rome I Regulation.

*Christoph A. Kern, **Judicial protection against torpedo actions***

In the recent case *Weber v. Weber*, the ECJ had ruled that, contrary to the principle of priority provided for in the Brussels I Regulation, the court second seized must not stay the proceedings if it has exclusive jurisdiction. The German Federal Supreme Court (BGH) applies this ratio decidendi in a similar case. In its reasons, the BGH criticizes – and rightly so – the court of appeal which, in the face of a manifestly abusive action in Italy, had denied an identity of the claims and the parties by applying an “evaluative approach”. Nevertheless, the repeated opposition of lower courts to apply the principle of priority is remarkable. The Brussels I recast, which corrects the ECJ’s jurisprudence in the case *Gasser v. Misat*, would, however, allow for an approach based on forum selection: Whenever the parties have had no chance to protect themselves against torpedo actions by agreeing on the exclusive jurisdiction of a court or the courts of a Member State, the court second seized should be allowed to deviate from a strict application of the principle of priority.

*Jörn Griebel, **The Need for Legal Relief Regarding Decisions of Jurisdiction Subject to Setting Aside Proceedings according to § 1040 of the German Code of Civil Procedure***

§ 1040 section 3 of the German Code of Civil Procedure prescribes that a so called “Zwischenentscheid”, an arbitration tribunal’s interim decision on its jurisdiction, can be challenged in national court proceedings. The decision of the German Federal Court of Justice (BGH) concerned the procedural question whether a need for legal relief exists in such setting aside proceedings concerning an investment award on jurisdiction, especially in situations where an award on the merits has in the meantime been rendered by the arbitration tribunal.

*Bettina Heiderhoff, **No retroactive effect of Article 16 sec. 3 Hague Convention on child protection***

Under Article 21 German EGBGB it was possible that a father who had parental responsibility for his child under the law of its former habitual residence lost this right when the child moved to Germany. This was caused by the fact that Article 21 EGBGB connected the law governing parental custody to the place of habitual residence of the child.

Article 16 sec. 1 Hague Convention on child protection (1996) also connects the

parental custody to the habitual residence. However, in Article 16 sec. 3 it has a different rule for the above described cases, stating that parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.

The author is critical towards the common understanding of Article 21 EGBGB. The courts should always have interpreted this rule in the manner that is now explicitly fixed in Article 16 sec. 3 Hague Convention. As the rule has been virtually out of force for many years due to the overriding applicability of the Hague Convention, a retroactive change in its interpretation would cause great insecurity.

The essay also deals with various transitional problems. It supports the view of the OLG Karlsruhe, that the Hague Convention cannot be applied retroactively when a child moved to Germany before January 2011.

Herbert Roth, Rechtskafterstreckung auf Vorfragen im internationalen Zuständigkeitsrecht

The European procedure law (Brussels I Regulation) does not make any statement concerning the scope of substantive res judicata of national judgments. However, the European Court of Justice extends the effects of res judicata to prejudicial questions of the validity of a choice-of-forum clause, in this respect it approves a European conception of substantive res judicata (ECJ, 15.11.2012 – Case C 456/11 – Gothaer Allgemeine Versicherung AG ./ Samskip GmbH, IPRax 2014, p. 163 Nr. 10, with annotation H. Roth, p. 136). The verdict of the higher regional court of Bremen as appellate court had to consider the precedent of the ECJ. It is the final decision after the case was referred back from the ECJ. The international jurisdiction of German courts was rejected in favour of the Icelandic courts, in spite of the defendant's domicile in Bremen.

Martin Gebauer, Partial subrogation of the insurer to the insured's rights and the incidental question of a non-contractual claim

The decision, rendered by the local court of Cologne, illustrates some of the problems that arise when the injured party of a car accident brings an action as a creditor of a non-contractual claim against the debtor's insurer, despite the injured party having already been partially satisfied by his insurer as a consequence of a comprehensive insurance policy. The partial subrogation leads to separate claims of the injured party, on the one hand, and its insurer on the other. According to Article 19 of the Rome II Regulation, the subrogation, and its

scope, is governed by the same law that governs the insurance contract between the injured party and its insurer. The non-contractual claim, however, which is the object of the subrogation, is governed by a different law and presents an incidental question within the subrogation. The injured party, as claimant, can sue the debtor's insurer in the courts of the place where the injured party is domiciled. The injured party's insurer, however, may not sue the debtor's insurer in the courts of the place where the injured party is domiciled, but is rather forced to bring the action at the defendant's domicile. This may lead to parallel proceedings in different states and runs the risk of uncoordinated decisions being made by the different courts regarding the extent of the subrogation.

Apostolos Anthimos, **On the remaining value of the 1961 German-Greek Convention on recognition and enforcement**

Since the late 1950s, Greece has established strong commercial ties with Germany. At the same time, many Greek citizens from the North of the country immigrated to Germany in pursuit of a better future. The need to regulate the recognition and enforcement of judgments led to the 1961 bilateral convention, which predominated for nearly 30 years in the field. Following the 1968 Brussels Convention, and the ensuing pertinent EC Regulations, its importance has been reduced gradually. That being the case though, the bilateral convention is still applied in regards to cases not covered by EC law and/or multilateral conventions. What is more interesting, is that the convention still applies for the majority of German judgments seeking recognition in Greece, namely cases concerning divorce decrees rendered before 2001, as well as adoption, affiliation, guardianship, and other family and personal status matters. The purpose of this paper is to highlight the significance of the bilateral convention from the Greek point of view, and to report briefly on its field of application and its interpretation by Greek courts.

David B. Adler, **Step towards the accommodation of the German-American judicial dispute? - The planned restriction of Germany's blocking statute regarding US discovery requests.**

Until today, US and German jurisprudence argue whether US courts are allowed to base discovery orders on the Federal Rules of Civil Procedure instead of the Hague Evidence Convention, despite the fact that evidence (e.g. documents) is located outside the US but in one of the signatory states. While the one side argues that the Hague Convention trumps the Federal Rules and has to be

primarily, if not exclusively, utilized in those circumstances, the other side, especially many US courts, constantly resisted interpreting the Hague Evidence Convention as providing an exclusive mechanism for obtaining evidence. Instead, they have viewed the Convention as offering discretionary procedures that a US court may disregard in favor of the information gathering mechanisms laid out in the federal discovery rules. The Hague Evidence Convention has therefore, at least for requests from US courts, become less important over time.

The German Federal Ministry of Justice and Consumer Protection intends to put this debate to an end and to reconcile the differing legal philosophies of Civil Law and Common Law with regard to the collecting of evidence. It plans to alter the wording of the German blocking statute which, up to this date, does not allow US litigants to obtain pretrial discovery in the form of documents which are located in Germany at all. Instead of the overall prohibition of such requests, the altered statute is intended to allow the gathering of information located in Germany if the strict requirements of the statute, especially the substantiation requirements towards the description of the documents, are fulfilled. By changing the statute, Germany plans to revive the mechanisms of the Hague Evidence Convention with the goal of convincing the US courts to place future extraterritorial evidence requests on those mechanisms rather than on the Federal Rules.

The article critically analyses the planned statutory changes, especially with regard to the strict specification and substantiation requirements concerning the documents requested. The author finally discusses whether the planned statutory changes will in all likelihood encourage US courts to make increased usage of the information gathering mechanisms under the Hague Evidence Convention with regards to documents located in Germany, notwithstanding the effective information gathering tools under the Federal Rules of Civil Procedure.

*Steffen Leithold/Stuyvesant Wainwright, **Joint Tenancy in the U.S.***

Joint tenancy is a special form of ownership with widespread usage in the USA, which involves the ownership by two or more persons of the same property. These individuals, known as joint tenants, share an equal, undivided ownership interest in the property. A chief characteristic of joint tenancy is the creation of a "Right of Survivorship". This right provides that upon the death of a joint tenant, his or her ownership interest in the property transfers automatically to the surviving joint tenant(s) by operation of law, regardless of any testamentary intent to the contrary; and joint tenants are prohibited from excluding this right by will. Joint tenancies can be created either through inter vivos transactions or testamentary

bequests, and for the most part any asset can be owned in joint tenancy. A frequent reason for owning property in joint tenancy is to facilitate the transfer of a decedent's ownership interest in an asset by minimizing the expense and time-constraints involved with the administration of a probate proceeding. Additional advantages of owning property in joint tenancy include potential protections against a creditor's claims or against assertions by a spouse or minor children of homestead rights. Lastly, owning property in joint tenancy can result in inheritance, gift, property and income tax consequences.

Tobias Lutzi, France's New Conflict-of-Laws Rule Regarding Same-Sex Marriage and the French ordre public international

On 28 January, the French Cour de cassation confirmed a highly debated decision of the Cour d'appel de Chambéry, according to which the equal access to marriage for homosexual couples is part of France's ordre public international, allowing the court to disregard the Moroccan prohibition of same-sex marriage in spite of the Franco-Moroccan Agreement of 10 August 1981 and to apply Art. 202-1(2) of the French Code civil to the wedding of a homosexual Franco-Moroccan couple. The court expressly upheld the decision but indicated some possible limitations of its judgment in a concurrent press release.

Study on the Service of Documents

I have been asked by Giacomo Pailli, Università degli Studi, Florence, to spread the word about this study on the service of documents. Good luck with it!

The EU Commission has recently launched a European-wide study on the service of documents in EU Member States, which is being carried out by a consortium composed by the University of Florence, the University of Uppsala and DMI, a French consulting firm.

The Commission is particularly interested in understanding the existing disparities between the national regimes on service of documents that might constitute an obstacle to the proper functioning of Regulation 1393/2007 on the service of documents. The focus of the study is on domestic service of documents.

Anyone who works in the field of civil procedure, private international law and international litigation in general—either as private practitioners, in-house counsel, legal academics or neutrals— and has knowledge of how service of documents works in a EU Member State is invited to participate to the study by answering to an online questionnaire. On the website of the project you may also find the questionnaire translated in almost all languages of EU Member States.

The questionnaire is complex and articulated, but participants are free to answer only some of the sections, especially those that relate more closely to their direct experience or knowledge. The answers are all collected anonymously, unless the participant wish to be included in the public list of contributors to the study and answers question no. 1.5.

The survey will remain open until July 7th, 2015.

We warmly thank anyone who will take the time to ensure the success of this study.

Reminder: 2015 JPIL Conference at Cambridge: Booking Deadlines

The 10th Anniversary of the Journal of Private International Law Conference is being held at the Faculty of Law, Cambridge University on 3-5 September 2015. Booking for accommodation closes soon – on 15th July. Booking for the conference and dinner will close on 13th August.

The conference offers an excellent opportunity to hear and discuss many issues currently facing private international law.

More information and registration is [here](#). A draft programme is available on the same web site.

Rauscher (ed.) on European Private International Law: 4th edition (2015) in progress



At the beginning of 2015, the publication of the 4th edition of *Thomas Rauscher's* commentary on European private international law (including international civil procedure), “Europäisches Zivilprozess- und Kollisionsrecht (EuZPR/EuIPR)”, has started. So far, the volumes II (covering the EU Regulation on the European Order for Uncontested Claims, the Regulation on the European Order for Payment, the Small Claims Regulation, the Regulation on the European Account Preservation Order, the Service of Process and the Taking of Evidence Regulations as well as the Insolvency Regulation and the Hague Convention on Jurisdiction Agreements) and IV (covering, inter alia, Brussels IIbis, the Maintenance Regulation and the new Regulation on mutual recognition of protective measures in civil matters) have been published. The various Regulations have been commented on by *Marianne Andrae, Kathrin Binder, Urs Peter Gruber, Bettina Heiderhoff, Jan von Hein, Christoph A. Kern, Kathrin Kroll-Ludwigs, Gerald Mäsch, Steffen Pabst, Thomas Rauscher, Martin Schimrick, Istvan Varga, Matthias Weller* and *Denise Wiedemann*. Further volumes will cover Rome I and II as well as the Brussels Ibis Regulation. This German-language commentary has established itself internationally as a leading, in-depth treatise on European private international law, dealing with the subject from a comprehensive, functional point of view and detached from domestic codifications. For more details, see [here](#).

All Member States of the European Union to accept the accession of Singapore and Andorra to the Hague Child Abduction Convention

On 15 June 2015, the Council of the European Union adopted a decision authorising certain Member States to accept, in the interest of the European Union, the accession of Andorra to the 1980 Hague Convention on the Civil Aspects of International Child Abduction, and an analogous decision regarding the acceptance of the accession of Singapore to the same Convention (publication of both decisions in the Official Journal is pending).

The two decisions rest on Opinion 1/13 of 14 October 2014. In this Opinion, the ECJ — having regard to Regulation No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels IIa) — stated that the declarations of acceptance under the Hague Child Abduction Convention fall within the exclusive external competence of the Union.

Before the ECJ rendered this Opinion, some Member States had already accepted the accession of Andorra and Singapore. Presumably, they did so on the assumption that the European Union was not vested with an exclusive competence in this respect and that, accordingly, each Member State was free to decide whether to become bound by the Convention *vis-à-vis* individual acceding third countries, as provided by Article 38(3) of the Convention itself (for an updated overview of the accessions to the Convention and the acceptances thereof, see this page in the website of the Hague Conference on Private International Law).

The two Council decisions of 15 June 2015 are addressed only to the Member States that have not already accepted the accession of Andorra and Singapore, respectively. In fact, the Council preferred not to question in light of Opinion 1/13

the legitimacy of 'old' declarations made by Member States, and noted, with pragmatism, that a decision regarding the acceptance of the two accessions was only needed with respect to the remaining Member States.

In two identical statements included in the minutes of the above Council decisions (see [here](#) and [here](#)), the European Commission regretted that the decisions "cover only the Member States which have not yet accepted Andorra and Singapore", so that "the Member States which proceeded to accept third States' accessions in the past are not covered by any authorisation by the Union, which is in principle necessary pursuant to Article 2(1) TFEU" (according to the latter provision, "when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts").

In its statements, the Commission also stressed "that any future acceptance by Member States of the accession of a third country must be covered by a prior authorisation".

Building the legal infrastructure of the Digital Single Market - A conference in Brussels

A conference organised by AIGA, the Italian Association of Young Lawyers, will take place on 2 July 2015 in Brussels, in the Paul-Henri Spaak building of the European Parliament, to discuss the legal aspects of the Digital Single Market (the creation of which is one of the ten priorities of the European Commission presided by Jean-Claude Juncker).

The conference, which is titled *Building the legal infrastructure of the Digital Single Market*, will consist of three sessions.

The first session, *Setting the policy framework*, will be chaired by Hans Schulte-Nölke of the University of Osnabrück. It will feature presentations by Gintare Surblyte of the Max Planck Institute for Innovation and Competition in Munich (*Internet and Regulation: the debate on Net Neutrality*) and Oreste Pollicino of the Bocconi University of Milan (*The sense of the Court of Justice of the European Union for digital privacy: interpretation or manipulation?*).

Michael Lehmann of the Max Planck Institute for Innovation and Competition will chair the second session, devoted to *A European law for digital contents: the challenge of harmonisation*. It will feature presentations by Johannes Druschel of the Ludwig Maximilian University of Munich (*Digital contents under the European Sales Law*) and Alberto De Franceschi of the University of Ferrara (*The issue of digital contents after the Consumer Rights Directive – The ‘button solution’ and the right of withdrawal*).

Under the title *Managing legal diversity within the Digital Single Market*, the third session, chaired by Francisco Garcimartín Alférez of the Universidad Autónoma of Madrid, will address some private international law issues relating to the functioning of the Digital Single Market. Presentations will be delivered by Lorna E. Gillies of the University of Leicester (*Cross-border online digital service contracts: Which court decides ? What law applies?*) and Pietro Franzina of the University of Ferrara (*Localising digital torts: settled and open issues*).

Admittance is free, but, for security reasons, those wishing to attend the conference must send an e-mail by Wednesday, 24 June 2015 to Mario Galluppi di Cirella, Vice-President of the AIGA Foundation, at mariodicirella@hotmail.com. The seating capacity of the conference room is limited. Successful applicants will receive a confirmation by 27 June 2015.

The poster of the conference may be downloaded [here](#).

Harmonization of Private International Law in the Caribbean (book)

It is my pleasure to announce the release of this work aiming at the preparation of a Model Law OHADAC of private international law. The project has been carried out thanks to the cooperation between ACP Legal, based in Guadeloupe (France), and the entity Iprolex, SL, Madrid, financed by European funds from the INTERREG project for actions in the field of harmonization of business law in the Caribbean.

The initiative began with the establishment of a team led by experts from Spain, France and Cuba: Prof. Dr. Santiago Álvarez González (Santiago de Compostela), Prof. Dr. Bertrand Ancel (Paris II), Prof. Dr. Pedro A. de Miguel Asensio (Complutense, Madrid), Prof. Dr. Rodolfo Dávalos Fernández (La Habana), and Prof. Dr. José Carlos Fernandez Rozas, (Complutense, Madrid). In carrying out this ambitious project Iprolex, SL has also benefited from the support of a large group of specialists who have worked along three distinct stages for a period of over a year.

In the book the preparatory works in view of the Model Law are preceded by in-depth studies on the various systems involved: Jose Maria DEL RIO VILLO, Rhonson SALIM and James WHITE: "Private International Law in the Commonwealth Caribbean and British Overseas Territories"; Bertrand ANCEL, "Départements et collectivités territoriales françaises dans l'espace caraïbe"; Lukas RASS-MASSON, "Enquête sur le droit international privé des territoires de l'Ohadac - l'héritage des Pays-Bas"; José Luis MARÍN FUENTES, "Caracteres generales del sistema de Derecho internacional privado colombiano", Patricia OREJUDO PRIETO DE LOS MOZOS, "Le droit international privé colombien et le projet de Loi modèle de l'Ohadac"; José Carlos FERNÁNDEZ ROZAS y Rodolfo DÁVALOS FERNÁNDEZ, "El Derecho internacional privado de Cuba"; Enrique LINARES RODRÍGUEZ, "Le droit international prive du Nicaragua et le projet de loi modèle de l'Ohadac"; Ana FERNÁNDEZ PÉREZ, "El Derecho internacional privado de Puerto Rico: un modelo de americanización malgré lui"; José Carlos FERNÁNDEZ ROZAS, "Pourquoi la République Dominicaine a-t-elle besoin d'une

loi de droit international prive ?”; Claudia MADRID MARTÍNEZ, “Características generales del sistema de Derecho internacional privado venezolano”.

The volume, written in Spanish, French and English and conceived as a combination of structured reflections and general proposals at a time, aims to achieve two main objectives. The first one is to consistently gather quantitative data and qualitative information in view of an assessment of already existing instruments that may be useful for optimizing the codification of private international law in the Caribbean geographical context. The second objective is to identify the need, social or institutional demands that must be met by a regulation, evaluating its legal and substantive feasibility and setting up the materials, steps and reports which are deemed appropriate to reach the final aim.

The great political and economic importance of the proposed Model Law, together with the fact that the regulation is complex and very broad, suggests that the involvement of stakeholders (through lobbies or directly), being crucial, may prove insufficient or incomplete. For this reason, public dissemination of the Draft is essential in order to make it known and to invite all agents or individuals interested in participating to express their views, opinions or propositions about a possible adjustment of the work while in progress. The following email address has been set for this purposes: iprolex@iprolex.com.

The deliberations that will start after the release of Draft will be vital: they will provide a sufficient perspective of the views and concerns expressed, thus allowing moving on to elaborate a final proposal, which will then be submitted to the corresponding legislative process.

Armonización del Derecho Internacional Privado en el Caribe. L'harmonisation du Droit International Privé dans le Caraïbe - Harmonization of Private International Law in the Caribbean. Estudios y materiales preparatorios y proyecto de Ley Modelo OHADAC de derecho internacional privado de 2014, Madrid, Iprolex, 20015, 687 pp. ISBN: 978-84-941055-2-4.