Good news: Greeks and Germans talking to each other about European economic law

Klaus J. Hopt, Director emeritus at the Max-Planck-Institute for Comparative and Private International Law, Hamburg, and *Dimitris Tzouganatos*, Professor of Law at the National University of Athens, have edited a conference volume (in German) on "The New Challenges Facing European Economic Law. With Contributions from Germany and Greece" (Mohr Siebeck, Tübingen, 2014). The book, which is based on a symposium that took place near Athens in July 2013, deals with the "new" European economic and business law acts and proposals following the financial crisis, plus the problems of transformation and practical consequences for member states, taking as examples Germany and Greece. Particular attention is paid to European and international banking, company and capital market law, as well as consumer law, international procedural law – Brussels I*bis* and the European Account Preservation Order – and antitrust. Further information is available here.

A Court's Inherent Jurisdiction to Sit Outside its Home Territory

Another step in the evolution of the common law on this issue has been taken by the Court of Appeal for Ontario in *Parsons v Ontario*, 2015 ONCA 158 (available here). The court disagrees in some respects with the earlier decision, on the same issue, of the British Columbia Court of Appeal in *Endean v British Columbia*, 2014 BCCA 61 (available here) (discussed by me over a year ago here). It may be that in light of this conflict the Supreme Court of Canada will end up hearing appeals of either or both decisions.

People infected with the Hepatitis C virus by the Canadian blood supply between

1986 and 1990 initiated class actions in each of Ontario, Quebec and British Columbia. These actions were settled under an agreement which provided for ongoing administration of the compensation process by a designated judge in each of the three provinces. In 2012 the issue arose as to whether the period for advancing a claim to compensation could be extended. Rather than having three separate motions in each of the provinces before each judge to address that issue, counsel for the class proposed a single hearing before the three judges, to take place in Alberta where all of them would happen to be on other judicial business. In the face of objections to that process, motions were brought in each province to determine whether such an approach was possible. The initial decision in each province was that a court could sit outside its home province. The Quebec decision was not appealed but the other two were.

The Court of Appeal for Ontario has now released its decision on the appeal, and the three judges are quite divided. They divide even over a preliminary issue, namely whether the order made below is "final" or "interlocutory" for purposes of the appeal route. If it is the former, the appeal is properly brought to the Court of Appeal, but not if it is the latter (in which case the appeal would be to the Divisional Court). The judges split 2-1 in deciding the order is final.

Turning to the merits, the judges remain divided. Justice LaForme upholds the order below. He concludes the court has the inherent jurisdiction to sit outside Ontario and that it can do so without violating the open court principle, even in the absence of a video link to an Ontario courtroom (for spectators and perhaps some lawyers). Justice Lauwers agrees that the court has the inherent jurisdiction to sit outside Ontario, but that doing so without a video link back to Ontario would be a violation of the open court principle. He reverses the order below, but only to the extent that he insists on such a link. Justice Juriansz agrees with the result reached by Justice Lauwers but his reasoning is quite different. He relies on Ontario's Rules of Civil Procedure which allow for a motion to be heard by video-conference. In his view, the proposed hearing outside of Ontario falls within these rules if there is a video link back to an Ontario courtroom. No resort to inherent jurisdiction is required and the open court principle is not impaired.

I remain somewhat skeptical that the court has the jurisdiction to sit outside the province. I would rather see such a process addressed by statute rather than through invocation of the court's inherent powers. I am also concerned that

Justice Juriansz's approach is something of a fiction, using the video-conference rules to in essence pretend that the hearing is actually being held in the courtroom to which the video feed is transmitted. I consider such a video link essential, but for me it goes to the question of the open court principle and not to jurisdiction.

A side note: this is my first post in many months. My sense, and that of many of my colleagues in Canada, is that we have had a dearth of interesting developments in private international law over the past year.

Symeon C. Symeonides, The Choice-of-Law Revolution Fifty Years after Currie: An End and a Beginning

Dean Symeon C. Symeonides (Willamette University – College of Law) has posted a new article to SSRN. It is to be published in the University of Illinois Law Review, Vol. 2015, No. 2, 2015. Here is the abstract:

> *This Article is part of a symposium marking the fiftieth anniversary from the passing of Brainerd Currie (1913-1965), the protagonist of the American choice-of-law revolution that began in the 1960s.*
>
> *The Article consists of four parts. Part I discusses what was wrong and what is right with the key component of Currie's "governmental interest analysis" — his concept of "governmental" or state interests. It contends that, when properly conceived, state interests can provide a rational basis for usefully classifying conflicts into three categories and sensibly resolving conflicts falling within two of those categories ("false" and "true" conflicts).*

Parts II-IV discuss the revolution's past, present, and future. Part II chronicles the revolution in tort and contract conflicts by tracing the gradual abandonment of the lex loci delicti and lex loci contractus rules in the majority of states of the United States. Part III summarizes the methodological changes produced by the revolution and the substantive results reached by the courts that joined it. Part IV builds the case for an exit strategy that will turn the revolution's numerical victory into a substantive success by using the vehicle provided by the process of drafting the Third Conflicts Restatement.

Sandra Wandt on Party Autonomy in European Private International Law

Sandra Wandt has published an interesting doctoral thesis (in German) on „Party Autonomy in European Private International Law – A Study on the Main Codifications regarding Coherence, Completeness and Regulatory Efficiency" (*Rechtswahlregelungen im europäischen Kollisionsrecht – Eine Untersuchung der Hauptkodifikationen auf Kohärenz, Vollständigkeit und rechtstechnische Effizienz*; PL Academic Research, Frankfurt/Main 2014). The thesis was accepted *summa cum laude* by the law faculty of the Ludwig-Maximilians-University in Munich under the supervision of Professor Dr. Abbo Junker. In her thesis, Wandt provides for an exhaustive analysis of the various rules on party autonomy found in the current EU Regulations on PIL, i.e Rome I, II, III and the Succession Regulation as well as in the Hague Maintenance Protocol and the proposal on marital property. She deals in particular with inconsistencies concerning the admissibility of a free choice of law, the requirements for a valid agreement on the chosen law and the limits imposed on the parties' choice. The book is a valuable contribution to the ongoing debate about achieving a more coherent codification of pervasive issues in European private international law. For those who are interested in further details, the introductory chapter is available here.

International Transport & Insurance Law Conference – Call for Papers

The University of Zagreb Faculty of Law and the Croatian Academy of Legal Sciences organise the **1st International Transport and Insurance Law Conference (INTRANSLAW)** which will ttake place in Zagreb, Croatia, on 15 and 16 October 2015. Thee conference will join togather invited speakers and speakeres selected among those applying to the call. The call for papers is opened until 15 April 2015 and the title and abstract (up to 750 words) may be sent to info@intranslaw.eu. More information on the conference is available at the conference website.

EUPILLAR Project Workshop on "Cross-Border Litigation in Europe: European and British Perspectives on the Private International Law Legislative Framework, Juridical Experience

and Practice" (Aberdeen, 17 April 2015)

The Centre for Private International Law at the Law School of the University of Aberdeen is pleased to announce that the kick-off workshop of the EUPILLAR (European Union Private International Law: Legal Application in Reality) Project, funded by the European Commission, will take place at the University of Aberdeen, King's College Conference Centre on 17 April 2015 between 9am and 5.50pm.

Pre-registration is required via email to b.yuksel@abdn.ac.uk. Please include your name and affiliation. Attendance is free of charge for the first 20 people to register for the event. For subsequent registrations, the Centre for Private International Law reserves the right to charge a small fee for catering costs and will notify those requesting to attend how much this will be if it is required.

The programme is found here.

New Book on the Boundaries of European Private International Law

The new book *Boundaries of European Private International Law*, edited by Jean-Sylvestre Bergé (Université Jean Moulin Lyon 3), Stéphanie Francq (Université catholique de Louvain) and Miguel Gardeñes Santiago (Universitat Autònoma de Barcelona), is the result of two European workshops (funded by the Jean Monnet Programme) that brought together renowned specialists and young researchers. This collective work tackles issues relating to the boundaries of EUPIL from

diverse perspectives and offers a great variety of contributions in English, French and Spanish.

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The full table of contents is available here.

Boundaries of European Private International law, Bruylant, 2015 – 698 pages.

ISBN 9782802746973. Publication date: 1 April 2015.

Many thanks to Céline Camara for the hint.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2015: Abstracts

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

Moritz Brinkmann, **„Clash of Civilizations" oder effektives Rechtshilfeinstrument? Zur wachsenden Bedeutung von discovery orders nach Rule 28 U.S.C. § 1782(a)**
The author analyses two recent decisions by U.S. federal courts on Rule 28 U.S.C.

§ 1782(a). Under this rule a court may grant judicial assistance with respect to a foreign or international tribunal by ordering the respondent "to give his testimony or statement or to produce a document or other thing". The decision of the District Court for the Southern District of New York in In re Kreke concerns inter alia the question whether discovery under § 1782(a) is available also with respect to documents which are not located in the U.S. The CONECEL case, decided by the Court of Appeals for the Eleventh Circuit, touches upon the highly contested issue whether under § 1782(a) judicial assistance may also be obtained with respect to arbitration tribunals.

Peter Mankowski, **International Jurisdiction in Insurance Matters: Professional Lessor as Injured Party and Standardized, not Case-by-case Assessment of Need of Protection**

The injured party can sue its opponent's liability insurer at its own domicile under Art. 11 II in conjunction with Art. 9 I lit. b Brussels I Regulation/Art. 13 II in conjunction with Art. 11 I lit. b Brussels Ibis Regulation. This holds true also where the injured party is not a natural person but a legal entity. Likewise, it does not matter whether the injured party is a professional. Generally, the protective regimes of the Brussels I/Ibis Regulations including the regime governing insurance matters apply irrespective of whether any protected party deserves protection measured by a concrete yardstick. Conversely, the standard is abstract and typical in line with efficiency, legal certainty and predictability of jurisdiction.

Carl Friedrich Nordmeier, **Coordination of parallel proceedings according to Art. 27 Brussels I Regulation and exclusive jurisdiction – including an analysis of the scope of Art. 22 no. 1 Brussels I Regulation**

Parallel proceedings are coordinated by Art. 27 Brussels I Regulation on the ground of the principle of priority according to which the court first seized examines its international jurisdiction. The present judgment breaks this principle if the court second seized bases its jurisdiction on an in rem claim (Art. 22 no. 1 Brussels I Regulation). In the first part, this article argues that Art. 22 no. 1 Brussels I Regulation covers neither proceedings for the consent to register the transfer of ownership with the German Land Register nor proceedings for a declaration that the exercise of the right of pre-emption under German Law was ineffective and invalid. The second part shows that the reason for strengthening the court second seized – which can be identified in Art. 31 no. 2 Brussels I Regulation (recast) as well – is the protection of the especially close link between

the matter in dispute and the place of trial. In contrast, the reliability to predict the (non-)recognition of the judgment which the court first seized may hand down cannot serve as a justification to break the principle of priority. Other potential reasons of non-recognition than the infringement of an exclusive jurisdiction do not allow the court second seized to continue its proceedings.

Hannes Wais, **The concept of a particular legal relationship in Article 23 Brussels I Regulation and application of Article 5 No. 1 Brussels I Regulation in matters relating to a non-competition clause**

The Higher Regional Court of Bamberg had to deal with mainly two questions: Whether, pursuant to Art 23 (I) Brussels I Regulation, choice of court agreements in sales contracts had a binding effect for a dispute arising from negotiations over a distribution agreement between the same parties (1), and whether a claim, based on an alleged violation of a non-competition agreement, qualified as contractual, pursuant to Art 5 No. 1, or as tort, pursuant to Art 5 No. 3 Brussels I Regulation (2). The court answered the first question in the negative. With respect to the second question, the court held that this claim, even though it may qualify as tort under national law, had to be qualified as contractual under the Brussels I Regulation.

David-Christoph Bittmann, **The legitimacy of substantive objections against a European Enforcement Order in the state of enforcement**

In its judgment of 21/11/2014 the Oberlandesgericht Cologne had to deal with the controversial question whether it should be permitted to a debtor to contest a European Enforcement Order in the state of enforcement by the way of substantive objections, raised in a remedy like the Vollstreckungsabwehrklage according to § 767 of the German Code of Civil Procedure (ZPO). To answer this question, the Oberlandesgericht had to deal with two issues: First, the Senate stated that the courts of the state of enforcement have jurisdiction for such remedies according to art. 22 no. 5 of Reg. (EC) 44/2001. In its argumentation the Oberlandesgericht refers to the judgment of the ECJ in the case Prism Investments BV. Second, the Senate stated, that § 1086 ZPO, which gives a debtor the possibility to raise substantive objections by the way of the Vollstreckungsabwehrklage, is not in contrast to the provisions of Reg. (EU) 805/2004. This judgment is in line with the majority of legal writers. An analysis of the wording, the systematic and the objective of Reg. (EU) 805/2004 shows however, that § 1086 ZPO violates European Law, because the regulation

concentrates substantive objections at the courts of the state of origin. A comparison with the procedure of declaration of enforceability according to Reg. (EC) 44/2001 confirms this result.

Leonhard Hübner, **Cross-border change of legal form – implementation of ECJ's Vale judgment into German law**

The following article discusses the national implementation of the cross-border change of legal form by means of transfer of the statutory seat against the background of the Vale judgment of the ECJ. First, it treats the issues arising in case of a cross-border change of legal form to Germany. These include the missing legal foundation, the treatment of the de-registration of the company from the foreign register, and the protection of the stakeholders. It then examines the reverse situation – the cross-border change of legal form to a foreign country.

Thomas Rauscher, **Unbilligkeit bei Versorgungsausgleich mit Auslandsbezug**

Both decisions in comment apply the hardship clause in article 17 (3) (2) introductory law to the civil code (EGBGB). The article explains intertemporal and substantial consequences of the coming into force of the Rome III-Regulation on the law applicable to divorce as far as the distribution of pension rights (Versorgungsausgleich) is concerned. As to the boundaries between the international hardship clause under article 17 (3) 2, the material hardship clause (para 27 Law on the Distribution of Pension Rights, VersAusglG) and forfeiture of rights the author favors a narrow interpretation of the scope of application of the international clause.

Kurt Siehr, **Habitual Residence of Abducted Children before and after Their Return**

Two children, born in 2002 and 2003, had been abducted by their mother from La Palma (Spanish Canary Islands) to Germany. Both parents had custody rights (patria potestad) according to Spanish law. In Germany the parents agreed on 13 February 2013 that the children had to be returned to La Palma. In March 2013 the children were brought back by their mother. In La Palma the Spanish court declined jurisdiction because, according to Spanish law, the mother is entitled to take the children to Germany. She returned with them to Germany and here the father applied for enforcement of the agreement of 13 February 2013 and for an order to return the children to La Palma. The mother argued that she had already performed her obligation by returning the children to La Palma in March 2013.

The father, however, objected and was of the opinion, supported by a decision of the Court of Appeal of Karlsruhe of 14 August 2008, that a child is only returned if it had established habitual residence in the state of origin. But this was not the case in the present situation because the children, after a short visit in La Palma in March/April 2013, returned to Germany. The Court of Appeal for the German State of Schleswig-Holstein (Oberlandesgericht in Schleswig), seized of this matter, finally decided that the duty of the mother to return the children had been performed in March 2013. The establishment of a new habitual residence in the state of origin is not necessary for the performance of the duty to return. Therefore no new return order is given by the court. – Discussed is the habitual residence of an abducted child before and after return to the country of origin from which the child has been abducted. Mentioned is also the English case O v. O (Abduction: Return to Third Country), [2013] EWHC 2970 (Fam), in which the "return" of a child was ordered to a country (USA) from which the child had not been abducted and in which the child was not habitually resident immediately before being abducted. The child had to be "returned" to the state in which the parents agreed to establish their new habitual residence after having given up their former habitual residence in Australia.

Alexandra Hansmeyer, **Legal effects of a third party notice (Streitverkündung) filed in German court proceedings on court and arbitration proceedings in China**

As the world's second largest economy and its largest exporter, China's manufacturers occupy an increasing number of positions across the supply chains of a wide range of industries. With Chinese manufactured or processed products being sold globally, many international product liability cases require bringing claims up the supply chain against Chinese manufacturers. Third party notices ("Streitverkündung") provide a mechanism for courts to recognize specific aspects regarding such claims made in a preceding court proceeding. The article examines the legal impact of third party notices filed in German court proceedings against a Chinese party on subsequent proceedings in Chinese civil courts or by the China International Economic and Trade Arbitration Committee ("CIETAC"). The article concludes that according to the current Chinese law and state of jurisprudence, third party notices have no legally binding effect on subsequent proceedings in China, neither with regard to ordinary courts, nor with regard to CIETAC arbitrations. Further, even if a Chinese party accedes to German court proceedings, such action, according to Chinese contract law,

cannot be deemed as an implicit waiver of an arbitration clause in an underlying Chinese law contract.

Marc-Philippe Weller/Alix Schulz, **Maintenance obligations and Legal kidnapping – Jurisdiction at the illegally established habitual residence?**
The following article discusses ”habitual residence” as a ground for jurisdiction in maintenance claims according to Art. 5 Nr. 2 Brussels-I-Regulation as well as pursuant to Art. 3 of the Regulation n° 4/2009 on maintenance obligations. In cases of legal kidnapping by one of the parents, it may be worth discussing whether habitual residence can be established in the destination state, even if the change of the child’s living environment itself has been illegal.

Carl Zimmer, **The change in the habitual residence under the 2007 Hague Maintenance Protocol**
The Austrian Supreme Court’s case gave rise to two crucial questions concerning the application of the Hague Maintenance Protocol from 2007: First, whether a change of habitual residence may already occur as from the moment of relocation to another State and secondly, whether Art. 4 para 3 or Art. 3 para 1 Hague Maintenance Protocol applies when, at the moment of commencement of proceedings, the maintenance creditor and the maintenance debtor have their habitual residence in the same state. While the second instance court addressed both questions, the Austrian Supreme Court did not: the father’s appeal was dismissed because of a lack of motivation. The author supports the solution of the second instance court to grant the claimant a choice of procedure with regard to Art. 4 para 3 Hague Maintenance Protocol. The court’s concept of habitual residence based on a fixed time-criterion, however, seems questionable.

4th Petar Šarcevic Conference on Competition and State Aid

The fourth Petar Šarcevic international scientific conference is entitled EU Competition and State Aid Rules: Interaction between Public and Private

Enforcement. Its aim is to explore the contemporary questions of antitrust law, in particular those arising in the context of public and private enforcement on the EU and national levels. The review of the recent practices in these areas is provided first hand from those involved in the decision-making process. Additionally, the focus is on the novelties related to the enactment of the Directive on Antitrust Damages Actions. Of interest to the readers of this blog is probably the last section of the conference dedicated to the private international law aspects.

The conference is to be held on 9-10 April 2015 in Rovinj, Croatia. More information is available at the conference website ps4conference.law.hr.

XV World Congress Procedural Law (IAPL) – Istanbul 25-28 May 2015

The XVth World Congress of the International Association of Procedural Law will be held in Istanbul from 25-28 May 2015.

The Congress is dedicated to **Effective judicial relief and remedies in an age of austerity.**

The key note speeches will be given by *Richard Marcus (*Hastings College of Law) and *Teresa Wambier (*Sao Paolo University). The presentations of the General reports will focus on:

- **Interim relief** (*Muhammet Özekes* and *David Bamford)*
- **Relief in small and simplified matters** (*Xandra Kramer* and *Shusuke Kakiuchi*)
- **Civil constraints on personal mobility** (Soraya Amrani Mekki and *Dirk van Heule*)
- **Coercive in personam orders** (*Selçuk Öztek* and *Antony TH Smith*)

- **Reform of institutions** (*Baki Kuru* and *Hakan Pekcan?tez)*

For the last session on **Forms of relief** there is a Call for papers (open till 31 March).

For more information and registration visit the Congress website.