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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:

- *Reinhard Zimmermann*, **Text and Context – Introduction to the Symposium on the Process of Law Making in Comparative Perspective,** pp. 315-328(14)

  On 29 June 2013, on the occasion of the annual meeting of the Association of Friends of the Hamburg Max Planck Institute, a symposium took place on the topic of "The Process of Law Making". This essay is based on the lecture introducing that symposium. First, it provides an overview of the position in Germany: the procedure to be adopted, the different actors involved, and the documents produced in the various stages of law making by means of legislation. Secondly, the essay analyzes the role and influence of legal scholarship in the process of law making by means of legislation. And, thirdly, it reflects on the fact that the application of a statute normally involves two stages. A statute is a text that has been formulated at a specific time by specific persons and in response to, or in contemplation of, specific problems or challenges. It needs to be understood against that background and in that context. This implies a historical approach. Such understanding provides a reliable basis for a critical reflection of that text from today's perspective, and in view of the challenges and problems with which the modern lawyer is faced.

- *Jörg Schmid*, **The Process of Law Making in Switzerland,** pp. 329-345(17)

  This paper explores the importance of the law-making process from the Swiss perspective. After explaining the term "preparatory works" (*Gesetzesmaterialien*, "legislative materials", i.e. materials which document the process of the formation of a new act or section) and distinguishing different types thereof, the article presents the formative players in Swiss legislation. In Switzerland, these are the Federal Council (government)

and the Federal Assembly (parliament). The Federal Council submits bills to the Federal Assembly which are explained in the Federal Council's Dispatch (*Botschaft des Bundesrates*). The Federal Assembly (with its two chambers: the National Council and the Council of States) is the formal legislative power on the federal level. The Federal Council's drafts and explanations are debated by the Federal Assembly and are often explicitly or implicitly approved. In other cases the texts are modified and the Federal Assembly creates its own rationale. As an exception, a statutory rule does not derive from parliament, but from a majority of the electorate and the cantons (approved popular initiative). As there are no law commissions in Switzerland, it is academic opinion and jurisprudence which indicate the need for legal reforms.The article furthermore explores the meaning of the law-making process for the interpretation and gap-filling of statutes. Firstly, the author explains how Swiss law is interpreted in general. Secondly, he examines how the Federal Supreme Court applies a purposive approach particularly when interpreting recently enacted statutory law. However, the Federal Supreme Court employs the purposive approach in a rather "result-oriented" way (called "pluralism of methods"). Thirdly, the author argues that unpublished preparatory documents (i.e. preparatory works that are not open to the public) must not be taken into account for the interpretation of the law.

- *Guillaume Meunier*, ***Les travaux préparatoires*** **from a French Perspective: Looking for the Spirit of the Law,** pp. 346-360(15)

The French Constitutional Supreme Court attributes a constitutional value to the objective of making the law more accessible and more understandable, in order to facilitate its acceptance by the country's citizens. The European Court of Human Rights has also ruled that the law must be adequately accessible and that a norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable citizens to regulate their conduct.Yet, it is admitted that when the letter of the law is obscure, ambiguous, or incomplete, denying the judge the power to search for the *ratio legis* may be considered to be a denial of justice. But where can we find the *ratio legis*, if not in the *travaux préparatoires*?

The identification of a theory of *travaux préparatoires* requires, first of all, a definition of that term. This, in turn, requires an overview of the

legislative process, from the informal ministerial drafting phase to the formal phase involving the debates before the two chambers of Parliament. The true spirit of the law, i.e.the will of Parliament, can only, of course, be established by documents that are accessible to the public. The principle of secrecy overshadowing parts of the legislative process presents a considerable obstacle.

The merits of interpreting a statute by reference to its *travaux préparatoires* are disputed. A comprehensive investigation into the legislative history of a statute, including its historical context, takes more time than busy practitioners often have. None the less, the *travaux préparatoires* have established themselves as an important interpretative tool when courts have to determine the conformity of a national statute with an international Treaty, or with the Constitution.

- *Jens M. Scherpe,* **The Process of Statute Making in England and Wales,** pp. 361-382(22)

English statutory drafting has traditionally taken the position that the words "for the avoidance of doubt" should not appear in a statutory provision, because to do so implies that without it the words might generate doubt. This article addresses how the traditional approach to statutory drafting can and should continue in England. It first describes the "technical" side of the drafting of statutes in England, by looking in particular at the role of Parliamentary Counsel, bill teams and the Law Commission. Then it examines the interpretation of statutes and especially the roles that Parliamentary debates as recorded in Hansard, explanatory notes and Law Commission papers play in this. The article concludes that while the English system of legislative drafting might have been very effective in the past, this appears not to be the case anymore. The speed with which legislation needs to be drafted and the workload of the individuals involved means that this system in its current form might not be fit for the 21st century.

- *Hans-Heinrich Vogel,* **The Process of Law Making in Scandinavia,** pp. 383-414(32)

In all Scandinavian Countries (in Denmark with the Faroe Islands and

Greenland, in Finland with the Åland Islands, in Iceland, Norway, and Sweden) legislative materials are regarded as very important documents – so important that lawyers sometimes forget that the law primarily has to be identified by means of the enacted text of the statute and not the materials. Law-making procedures are streamlined and similar in all Scandinavian countries and so are the main documents emanating from them. The series of documents usually starts with a report of a government-appointed committee, which will be circulated for comment. Report and comment will be considered by the government, and a government bill will be drafted, which after extensive internal checks and necessary adjustments will be sent to parliament. Members of parliament may propose changes, and their motions will be considered together with the bill by one of parliament's standing committees. The committee will report on the matter to the full house and submit its recommendations for a formal vote. Then, the house will debate the report and the recommendations and will finally vote on the recommendations as such – not on any reasons for or against the legislation. Both the debate and the vote will be recorded in minutes. And finally, parliament will notify the government of its decision. The government then will publish the adopted act in the Official Gazette.Nowadays almost all key documents (committee reports, hearing results, government bills, reports of parliamentary committees, minutes of parliamentary debates, and adopted acts) are highly standardized. All are published, with only very rare exceptions. Extensive publication on internet sites of both the government and parliament is the rule in all Scandinavian countries. Through these interlinked sites all key documents are easily available and accessible for everyone. Professional legal research has traditionally been made easy by footnotes or endnotes to published documents, now elaborate linkage systems across internet sites facilitate it even more. As a consequence, legislative materials have gained enormous importance even for everyday legal work. The methodological difficulties, which their use had caused earlier and which jurisprudence traditionally had to deal with, are more or less evaporating by means of the ease of use of *travaux préparatoires* in Scandinavia today. But the advice has to be honored that the law must be identified primarily by means of the enacted text.

- *Oliver Unger,* **The Process of Law Making as a Field for Comparative**

Research, pp. 415-428(14)

Whereas legal literature considering the legislative process traditionally had more regard to formal parliamentary laws, the recent past has seen the emergence of a comprehensive and more contoured conception of treatises, taking into account the diverse forms that legal provisions assume in modern times (e.g. regulations, by-laws, administrative rules). The role to be played by comparative scholarship in this inquiry is still very much in its early stages of definition. Whereas studies can be found for most European legal systems as regards the various stages of law making and the legislative materials created in this process, comparative analyses that go beyond providing merely a descriptive overview are relatively rare. Such efforts are generally limited to isolated proposals for the reform of a given legal system, aiming at the drafting of “better” laws.Thus, the topics explored at the symposium “The Development of Legal Rules in Comparative Perspective” (“Die Entstehung von Gesetzen in rechts vergleichender Perspektive”), held on 29 June 2013 at the Max Planck Institute in Hamburg, posed distinct challenges for the comparative scholars in attendance. The present paper makes a first attempt at addressing the matter in a systematic manner and should at the same time serve to summarize the conference findings and inspire further work. The article considers six different aspects of law-making which would appear to have particular relevance within a comparative framework: the role of governmental institutions, the role of interest groups and private stakeholders, the language of the law, the relevance of legislative materials, the role of academia and the importance of comparative research.

Round table on the Insolvency Regulation Revision

For those living in Paris or willing to stop by: a round table on the reform of the cross-border insolvency Regulation is taking place next Monday at the University Paris-Panthéon, 17.30, with Prof. Khairrallah, Prof. d'Avout, and Mr. Dupoirier.

Festschrift for Dieter Martiny (Mohr Siebeck, 2014)

Normann Witzleb, *Reinhard Ellger, Peter Mankowski, Hanno Merkt* and *Oliver Remien* have edited a collection of essays in honor of Dieter Martiny's 70th birthday (Festschrift für Dieter Martiny zum 70. Geburtstag, Mohr Siebeck, 2014). The volume contains more than 60 contributions from friends and colleagues covering topics in German, European and international family law, international private law, international civil procedure, European and public law, as well as sociology of law and comparative law.

More information, including a full survey of contents, is available on the publisher's website.

TDM Call for Papers: "Arbitration

in the Middle East – Expectations and Challenges for the Future”

The volume of international business either in the Middle East or with a Middle Eastern element is increasing and many of the contracts being used provide for arbitration. While arbitration (“tahkim” in Arabic) has long-standing religious and cultural roots in the Middle East, there are a number of differences and tensions between the Western perception of arbitration and certain Islamic legal principles.

Craig Shepherd and Mike McClure issue this call for papers seeking contributions for a TDM Special to be published later this year entitled “Arbitration in the Middle East – expectations and challenges for the future”. The Special will look at some of the differences between the Western and Middle Eastern perceptions of arbitration, and will also consider expectations for the future. Some potential topics include: (a) the legislative framework to support arbitration, including new arbitration laws and regional arbitral centres; (b) whether the modern concept of arbitration can resolve Shari’a disputes; (c) the role public policy should play in relation to judicial involvement with the arbitral process and enforcement or arbitral awards; (d) whether arbitral processes or arbitral laws could or should be reformed so that arbitration better suits the needs of today’s Middle Eastern users; and (e) claims under international investment treaties arising out of regional regime change, particularly in North Africa. Contributions can focus on one or a number of countries and comparative pieces referencing a number of jurisdictions would be welcome.

Papers should be submitted on or before 30 September 2014 to the editors, with a copy to info@transnational-dispute-management.com when you submit material.

More details are available here.

In Memoriam: Professor Andreas Lowenfeld

For those who have not heard, we have lost a giant in our field. Professor Andreas Lowenfeld has passed away. The New York University School of Law website has information here about Professor Lowenfeld's extraordinarily rich life and legacy. We shall not see his like again.

Justice Council Backs Commission's Proposal on Cross-Border Insolvency

Last Friday the national ministers in the Justice Council backed the Commission's proposal to modernise European rules on cross-border insolvency. The proposal (with some amendments) had been accepted by the European Parliament in February 2014 by an overwhelming majority (580 for, 69 against and 19 abstentions). The Justice Council has essentially accepted the Commission text; however, there are also a number of points where the Council has modified it. The specific elements of the compromise can be consulted here. For the text of the Council click here.

The European Parliament, the Council of Ministers and the Commission will now engage in negotiations to reach an agreement on a final text. The adoption of the modernised Insolvency Regulation is expected by the end of the year.

Checking Out

It has been seven years since I wrote my first post on Conflict of Laws .Net.

The blog has been a lot of fun, but also a lot of work. I am stepping back and leaving the blog in the expert hands of my co-editors.

I am sure I will continue to meet many readers in conferences all over the world.

CJEU Rules Again on Jurisdiction over Co-Perpetrators

By Jonas Steinle

Jonas Steinle, LL.M., is a doctoral student at the chair of Prof. Dr. Matthias Weller, Mag.rer.publ., Professor for Civil Law, Civil Procedure and Private International Law at EBS Law School Wiesbaden, Germany.

On 5 June 2014, the Court of Justice of the European Union delivered another judgment on Art. 5 No. 3 Brussels I Regulation in *Coty Germany GmbH ./. First Note Perfumes NV*, C-360/12. With its decision, the Court completed a series of three pending decisions that all concerned cases where there are several supposed perpetrators and one of them is sued in a jurisdiction other than the one he acted in.

Facts

The German based claimant, the *Coty Germany GmbH,* sells and manufactures perfumes and cosmetics in Germany. Among its products there is one perfume that comes in a bottle, corresponding to a three-dimensional Community trademark whereof *Coty Germany* is the proprietor. The defendant, *First Note*, is a Belgium based perfume wholesaler. One of the perfumes of *First Note* was sold in a bottle, similar to the one that is protected by the Community trademark of

Coty Germany. First Note sold this perfume to a German based intermediary, the *Stefan P. Warenhandel.* These sales were performed entirely outside of Germany since *Stefan P. Warenhandel* had collected the perfumes directly at the premises of *First Note* in Belgium and resold them in Germany.

Coty Germany claimed that the distribution of the perfume in Belgium by *First Note* constituted an infringement of its Community trademark and commenced proceedings against *First Note* before German (!) courts, although these sales had been performed entirely outside of Germany. *Coty Germany* argued that jurisdiction of the German courts could be established pursuant to Art. 93 para. 5 of the Trademark Regulation, which requires that the defendant allegedly acted within the territory of the seized court. The second basis for establishing jurisdiction of the German courts was Art. 5 No. 3 Brussels I Regulation, which provides for the place where the damage occurred. *Coty Germany* claims that the acts of the German based *Stefan P. Warenhandel* can be imputed to the Belgium based defendant, *First Note,* and that therefore jurisdiction may be established before the German courts. Both heads of jurisdiction formed each a question for reference to the Court.

Ruling

In its first part of the judgment, the Court referred to Art. 93 para. 5 of the Trademark Regulation as a potential basis for jurisdiction. The Court ruled that the application of Art. 5 No. 3 Brussels I Regulation is expressly precluded under the Trademark Regulation and that Art. 93 para. 5 of the Trademark must therefore be interpreted independently from Art. 5 No. 3 Brussels I Regulation (para. 31) without making reference to the existing case law of the Brussels I Regulation (para. 32). By referring to the wording and the purpose of that rule, the Court came to the conclusion that Art. 93 para. 5 of the Trademark Regulation does only allow jurisdiction to be established before the courts where the trade mark was presumably infringed and not before the courts, where a potential accomplice had made any such infringements.

With regard to the second referred question on Art. 5 No. 3 Brussels I Regulation, the Court distinguished between the place where the causal event occurred and the place where the damage occurred.

As for the first alternative of this rule, the question at hand was whether one can

impute the action of one perpetrator to his accomplice in order to establish jurisdiction under Art. 5 No. 3 Brussels I Regulation under the place where the causal event occurred. This would essentially allow the claimant to sue any perpetrator at a place of action of his accomplices and hence at a venue where he himself never acted. Here, the Court simply referred to its ruling in the case *Melzer* in 2013, where the Court clearly had denied such possibility as a basis for jurisdiction under Art. 5 No. 3 Brussels I Regulation.

Since the referring court, the German *Bundesgerichtshof,* had not limited the order for reference to the place where the causal event occurred, the CJEU this time could also address the second alternative under Art. 5 No. 3 Brussels I Regulation as a potential basis for jurisdiction, which is the place where the damage occurred. Here, the Court came to a different conclusion by referring to the *Wintersteiger* and *Pinckney* decisions where it had held that the occurrence of damage in a particular Member State is subject to the protection in that relevant Member State (para. 55). Holding that this was also true for infringements of unfair competition, which was the case here, the Court stated:

57 "It must therefore be held that, in circumstances such as those of the main proceedings, an action relating to an infringement of that law may be brought before the German courts, to the extent that the act committed in another Member State caused or may cause damage within the jurisdiction of the court seised."

Accordingly, the Court does allow jurisdiction to be established on the basis of the place of occurrence of damage, to hear an action for damages against a person established in another Member State who acted in that State and whose actions – through the furtherance of another perpetrator – caused damage within the jurisdiction of the seised court.

Evaluation

As far as the ruling refers to the question of imputation of actions among several perpetrators to establish jurisdiction under the place where the causal event took place, this ruling is no big surprise neither for Art. 93 para. 5 of the Trademark Regulation, nor for Art. 5 No. 3 Brussels I Regulation. Here the Court has had its opportunities to make clear that the very existence of a particularly close linking factor between the dispute and the courts of the place where the harmful event

occurred does not allow for such expansive interpretation of Art. 5 No. 3 Brussels I Regulation (which is probably also true for Art. 93 para. 5 of the Trademark Regulation). As far as Art. 5 No. 3 Brussels I Regulation is concerned, this could be expected after the previous rulings of the Court in *Hi Hotel* (C-387/12) (see previous comment on that decision on conflictoflaws.net) and *Melzer* (C-228/11).

The interesting part of the decision is the one on establishing jurisdiction at the place where the damage occurred under Art. 5 No. 3 Brussels I Regulation (para. 52 *et seqq.*). For this part, the Advocate General had very much struggled with the consequences stemming from the *Pinckney* ruling (para. 68 *et seqq.* of the Opinion the Advocate General on *Coty Germany*) and had pointed out that such interpretation of Art. 5 No. 3 Brussels I Regulation would lead to a very extensive application of Art. 5 No. 3 Brussels I Regulation. In fact, it is hard to see the link between the harmful event (sales of a perfume in in Belgium) and the alleged damage stemming from that event (trademark infringement in Germany) without making reference to the furtherance of this damage by another perpetrator (in the case at hand *Stefan P. Warenhandel)*.

For the CJEU however, there does not seem to be any problem by applying the *Pinckney* ruling to the case at hand. What lies behind this must be some sort of attribution of effects with regard to the place where the damage occurred. The Court seems to be much more susceptible to such attribution on the effects-side rather than on the causation-side. Why this is the case is not answered by the Court, nor does it give any sort of criteria in which cases such attribution of effects may be permissible. One can imagine that the mosaic principle on the effects-side incites the Court to that much more relaxed attitude but since the Court does not say a word about all that there is much to be explored about this relatively new concept of attribution of effects and its potential limits.

11th Edition of Mayer and Heuzé’s

Private International Law

A new edition of Pierre Mayer and Vincent Heuzé's leading treaty on French private international law is scheduled for publication in June.

Mayer is professor emeritus, and Heuzé currently teaches, at Paris I (Panthéon-Sorbonne) School of Law.

More details on the book can be found here.

Chinese Supreme Court to Rule on Power of Foreign Insolvency Official

Here.