Job Vacancy at the University of Bonn

Professor Dr. Matthias Lehmann, currently University of Halle-Wittenberg, is looking for a research assistant at his new Chair at the University of Bonn as of October 1, 2014. The candidate is required to speak and write English at the level of a native speaker and have knowledge in Private International Law and/or Banking and Financial Law

The position will be half-time (50%) and will be paid at around 1.700 Euro (approx. 1.200 Euro net) per month. The contract will start on 1 October 2014. It will run for two years, with an option to renew. Your tasks include the support in research and teaching, as well as to teach your own classes (2 hours per week), in particular in the areas of private law and private international law and/or banking and financial law.

You need:

- knowledge of English at the level of a native speaker, at least basic knowledge of the German language
- a University degree in law equivalent to the First German State Exam with an above-average result
- knowledge in private and/or business law
- computer literacy (at least MS-Office)

We offer:

- the possibility to obtain a doctorate (provided that the Faculty's rules are fulfilled)
- a stimulating working environment
- payment as a German civil servant
- possibility to buy cheap public transport ticket

The University is committed to a policy of equal opportunity. Candidates with disabilities will be preferred in cases where they have the same qualifications as others.

If you are interested in this position, please send an application (consisting of

your cv, bachelor's degree, an overview of your performance during your law studies as well as your diploma for the law degree and any other titles you may hold) by August 2, 2014 to:

Institut für Internationales Privatrecht und Rechtsvergleichung, c/o Ms Fabricius, Adenauerallee 24-42, 53113 Bonn, Germany, reference no. 28/14/3.13.

For further enquiries, please contact Professor Dr. Lehmann: matthias.lehmann@gmail.com

Only applications sent per post will be considered. Applications made by email will unfortunately not be accepted. If you wish to have your documents returned after the recruitment process, please include a self-addressed envelope with your application.

Cross-Border Effects of Banking Resolution

As part of the overhaul of the financial system, the EU has recently enacted two texts that will profoundly change the way in which banking crises will be dealt with. Those texts are the Bank Recovery and Resolution Directive (BRRD) and the Regulation on a Single Resolution Mechanism (SRM). Under them, supervisory authorities will have the power to order the transfer of assets, rights and liabilities of a bank to a purchaser or to a bridge institution. They may also prescribe the mandatory bail-in of creditors by conversion of their claims into equity or by a write down to zero. These measures may affect assets situated in other countries or rights and liabilities governed by foreign law. This raises serious conflict of laws issues. These and related topics will be dealt with during a conference on Thursday, 10 July 2014, at the British Institute of International and Comparative Law (BIICL) in London. The conference will be chaired by Professor Dr Rosa Lastra (Queen Mary). Speakers are Dr Anna Gardella (EBA), Professor Dr

Matthias Lehmann (University of Halle-Wittenberg), Dr Philipp Paech (LSE) and Dr Peter Werner (ISDA). Further details can be found here.

Oil Spills in Nigeria, Damages in the UK

On June 20, a United Kingdom Court delivered a judgment on preliminary issues raised in the legal action brought by about 15,000 members of a Nigerian community against Shell Petroleum Development Company of Nigeria, seeking compensation for damages caused by two oil spills in 2008 and 2009. The ruling comes as part of a civil claim brought by people from the Bodo community in the Niger Delta; the legal action was instituted at the High Court in March 2012, following the breakdown of talks over compensation and a clean- up package for the community. A full trial will commence next year.

The hearing took place in April 2014 before the President of the Technological and Construction Court, Justice Akenhead. The preliminary judgment rendered last week ruled that whilst Shell did not have an obligation to provide policing or military defence (which is the function of the state), it could be legally liable if it has failed to take other reasonable steps to protect the pipeline such as the use of appropriate technology (leak detection systems), a system of effective surveillance and reporting to the police and the provision of anti-tamper equipment. The ruling has thus opened the door for Nigerian claimants to demand compensation if oil leaks were a result of sabotage or theft – if the sabotage or theft was due to neglect on the part of the [licence] holder or his agents, servants or workmen to protect, maintain or repair any work structure or thing.

As regards PIL, several interesting issues were pointed out by the Judge: the significant jurisdictional problems that arise when claims relating to Nigerian land are brought in England rather than in the Nigerian courts that have jurisdiction in relation to such land; and the need to apply and therefore interpret Nigerian law (in particular, the Nigerian Oil Pipelines Act). Both will be analyzed

in the main trial next year.

Mennesson v. France, ECtHR 26.06.2014

I happened to be in France when I heard the news about the ECtHR finding against France in *Menesson v. France*, on surrogate motherhood. The Court considered established a violation of Art. 8.1 ECHR as regards the twin daughters of the couple. Here is a resumée of the case (together with a similar one, *Labassee v. France*) as presented in the Press release issued by the Registrar of the Court. The judgment itself can be found here, but only in French.

The applicants in the first case are Dominique Mennesson and Sylvie Mennesson, a husband and wife, French nationals who were born in 1955 and 1965 respectively, and Valentina Mennesson and Fiorella Mennesson, American nationals, who were born in 2000. They live in Maisons-Alfort (France). The applicants in the second case are Francis Labassee and Monique Labassee, a husband and wife, French nationals who were born in 1950 and 1951 respectively, and Juliette Labassee, an American national who was born in 2001. They live in Toulouse. The French authorities have refused to recognise the family relationship, legally established in the United States, between, on the one hand, the children Valentina Mennesson and Fiorella Mennesson, and Juliette Labassee, children who were born following surrogate pregnancy agreements, and on the other, the intended parents, the Mennesson and Labassee spouses respectively.

Mr and Mrs Mennesson had recourse to surrogate pregnancy in the United States, in which embryos created from Mr Mennesson's sperm and donated ova were implanted in the uterus of a third woman. Mr and Mrs Labassee also used this procedure. Judgments delivered respectively in California, in the first case, and Minnesota in the second, indicate that Mr and Mrs Mennesson are the parents of Valentina and Fiorella, and that Mr and Mrs Labassee are the parents of Juliette. In France, the applicants requested that the American birth

certificates be entered in the French civil status registers; Mr and Mrs Labassee further applied for a notarial deed to be entered as a marginal note. They were dismissed at final instance by the Court of Cassation on 6 April 2011 on the ground that such entries or marginal notes would give effect to an agreement on surrogate pregnancy, null and void on public-policy grounds under the French Civil Code.

The seven applicants, relying on Article 8 (right to respect for private and family life), complain about the fact that, to the detriment of the best interests of the child, they had been unable to obtain recognition in France of a family relationship legally established abroad. The applicants in the Mennesson case, relying on Article 14 (prohibition of discrimination) taken together with Article 8, allege that, on account of this refusal by the French authorities, they experience a discriminatory legal situation compared to other children in exercising their right to respect for their family lives. Further relying on Article 12 (right to marriage), they allege a violation of their right to found a family and, under Article 6 (right to a fair hearing), complain about the proceedings at the close of which the French courts refused to recognise the effects of the "American" judgment.

Guest Post by Professor Vivian Grosswald Curran: The French Supreme Court Reverses Itself in an Islamic Veil Case in « L'Affaire Baby Loup »

Professor Curran is a Distinguished Faculty Scholar and Professor of Law at the University of Pittsburgh School of Law. The Editors are grateful for this contribution.

France's Cour de cassation decided yesterday (June 25, 2014) in plenary session

that a private day care center could terminate an employee for wearing an Islamic veil (or outward sign of another religion) where the latter contravenes company rules deemed to be reasonable and proportionate in terms of the employer's mission. The case had made its way to the Supreme Court once before, in March of 2013. At that time, the Court had held that the employee could not be terminated because the private company's prohibition against outward signs of religion infringed its workers' religious freedom. A key word here is « private.» Where the employer is public, by contrast, the principle of laïcité , or secularism in the public space, is deemed to justify the absence of manifestations of religious conviction.

Yesterday, however, the Court reversed itself, finding for Baby Loup, a rare day care center open seven days a week and around the clock, so that poorer women and especially single mothers, sometimes working night shifts, can find a place for their young children. The Court approved the lower court's finding that the restriction on religious freedom at issue was justified inasmuch as the center was a small business whose employees come into continual contact with young children and their parents, such that the day care center has a legitimate interest in trying to make parents from all backgrounds feel welcome.

A note on French procedure may be of interest. Since the Supreme Court can only in the rarest of cases directly decide the substantive result of cases, in 2013 it had remanded to the Court of Appeals for further decision-making. In France, moreover, courts of appeal need not agree with the Supreme Court in its initial ruling, and the second appellate court rejected the high court's ruling, thus leading the plaintiff to appeal to the Supreme Court a second time, yielding yesterday's decision.

The facts of the case beyond those mentioned above add a potentially pragmatic cast to the plaintiff's quest. She had been an assistant manager of the day care center before taking three years of maternity leave, followed by another three years of parental leave. When she returned after six years, she asked her employer to release her from her contract through a rupture conventionnelle, which would have guaranteed her certain benefits. The company refused, saying she would have to resign. Instead, she returned to work wearing an Islamic veil, knowing that it violated the company's rules because she had helped draft those rules. When the company then terminated her employment for violating the prohibition, she sued.

A last legal option remaining to the plaintiff is an appeal to the European Court of Human Rights. Baby Loup, meanwhile, according to press accounts, is skirting financial failure due to the accumulated costs of its legal defense.

For those who read French, the decision is Arrêt n° 612 du 25 juin 2014 (13-28.369) – Cour de cassation – Assemblée Plénière – ECLI:FR:CCASS:2014:AP00612, and is available here.

First Issue of 2014's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The first issue of 2014 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features three articles, one comment and two reports.

Alberto Malatesta, Professor at the University Cattaneo-LIUC in Castellanza, examines the interface between the new Brussels I Regulation and arbitration in **"Il nuovo regolamento Bruxelles I-bis e l'arbitrato: verso un ampliamento dell'*arbitration exclusion*"** (The New Brussels I-bis Regulation and Arbitration: Towards an Extension of the Arbitration Exclusion; in Italian).

> *This article covers the "arbitration exclusion" as set out in the new EU Regulation No 1215/2012 of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, recasting the old "Brussels I" Regulation, No 44/2001. The new Regulation apparently retains the same solutions adopted by the latter by providing only for some clarifications in lengthy Recital No 12. However, a careful analysis shows that under the new framework the above "exclusion" is more far reaching than in*

the past and it impinges on some controversial and much debated issues. After reviewing the current background and the 2010 Proposal of the European Commission on this issue – rejected by the Parliament and by the Council –, this article focuses mainly on the following aspects: i) the actions or the ancillary proceedings relating to arbitration; ii) parallel proceedings before State courts and arbitration and the overcoming of the West Tankers judgment stemming from Recital No 12; iii) the circulation of the Member State courts' decisions ruling whether or not an arbitration agreement is "null and void, inoperative or incapable of being performed"; iv) the recognition and enforcement of a Member State judgment on the merits resulting from the determination that the arbitration agreement is not effective; v) the potential conflicts between State judgments and arbitral awards.

Pietro Franzina, Associate Professor at the University of Ferrara, addresses the issue of lis pendens involving a non-EU Member State in **"Lis Pendens Involving a Third Country under the Brussels I-bis Regulation: An Overview"** (in English).

The paper provides an account of the provisions laid down in Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I-bis) to deal with proceedings concurrently pending in a Member State and in a third country (Articles 33 and 34). It begins by discussing the reasons for addressing the issue of extra-European lis pendens and related actions within the law of the European Union. Reference is made, in this connection, to the relevance accorded to third countries' proceedings and the judgments emanating therefrom under the Brussels Convention of 1968 and Regulation (EC) No 44/2001, as evidenced inter alia by the rule providing for the non-recognition of decisions rendered in a Member State if irreconcilable with a prior decision coming from a third country but recognized in the Member State addressed. The paper goes on to analyse the operation of the newly enacted provisions on extra-European lis pendens and related actions, in particular as regards the conditions on which proceedings in a Member State may be stayed; the conditions on which a Member State court should, or could, dismiss the claim before it, once a decision on the merits has been rendered in the third country; the relationship between the rules on extra-European and intra-European lis pendens and related actions in cases where several proceedings on the same

cause of actions and between the same parties, or on related actions, have been instituted in two or more Member States and in a third country.

Chiara E. Tuo, Researcher at the University of Genoa, examines the recognition of foreign adoptions in the framework of cultural diversities in **"Riconoscimento degli effetti delle adozioni straniere e rispetto delle diversità culturali"** (Recognition of the Effects of Foreign Adoptions and Respect for Cultural Diversity; in Italian).

This paper focuses on the protection of cultural identities (or of cultural pluralism) in the context of proceedings for the recognition of the effects of adoptive relationships established abroad. The subject is dealt with in light of the case-law of the European Court of Human Rights (ECtHR) as it has recently developed with regard to Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which, as it is well known, enshrines the right to family life. According to the ECtHR's case-law, a violation of Art. 8 of the Convention may be ascertained when personal status legally and stably constituted abroad are denied transnational continuity. Thus, on the basis of said ECtHR jurisprudence, this paper raises some questions (and tries to provide for the related answers) with regard to the consistency therewith of the conditions that familial relationships created abroad must satisfy when their recognition is sought pursuant to the relevant provisions currently applicable within the Italian legal system.

In addition to the foregoing, the following comment is featured:

Sara Tonolo, Associate Professor at the University of Trieste, **"La trascrizione degli atti di nascita derivanti da maternità surrogata: ordine pubblico e interesse del minore"** (The Registration of Birth Certificates Resulting from Surrogacy: Public Policy and Best Interests of the Child; in Italian).

Nowadays surrogacy is a widespread practice for childless parents. Surrogacy laws vary widely from State to State. Some States require genetic parents to obtain a judicial order to have their names on the original birth certificate, without the name of the surrogate mother. Other States (e.g. Ukraine) allow putting the name of the intended parents on the birth certificate. In Italy all forms of surrogacy are forbidden, whether traditional or gestational,

commercial or altruistic. Act No 40 of19 February 2004, entitled "Rules on medically-assisted reproduction", introduces a prohibition against employing gametes from donors, and specifically incriminates not only intermediary agencies and clinics practicing surrogacy, but also the intended parents and the surrogate mother. Other penal consequences are provided by the Criminal Code for the registration of a birth certificate where parents are the intended ones, as provided by the lex loci actus (Art. 567 of the Italian Criminal Code, concerning the false representation or concealment of status). In the cases decided by the Italian Criminal Courts of First Instance (Milan and Trieste), the judges excluded the criminal responsibility of the intended parents applying for the registration of foreign birth certificates which were not exactly genuine (due to the absence of genetic ties for the intended mothers), affirming in some way that subverting the effectiveness of the Italian prohibition of surrogacy may be justified by the best interests of the child. Apart from the mentioned criminal problems, several aspects of private international law are involved in the legal reasoning of the courts in these cases: among these, probably, the one that the principle of the child's best interests should have been read not like an exception to the public policy clause but like a basic value of this clause, in light, among others, of the case law of the European Court of Human Rights.

Finally, this issue of the Rivista di diritto internazionale privato e processuale features two reports on recent German case-law on private international and procedural issues, and namely:

Georgia Koutsoukou, Research Fellow at the Max Planck Institute Luxembourg, **"Report on Recent German Case-Law Relating to Private International Law in Civil and Commercial Matters"** (in English).

Stefanie Spancken, PhD Candidate at the University of Heidelberg, **"Report on Recent German Case-Law Relating to Private International Law in Family Law Matters"** (in English).

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale. This issue is available for download on the publisher's website.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2014)

The latest issue (July/August) of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** contains the following articles:

- ***Maximilian Hocke***: "Characterizing the culpa in contrahendo under Art. 12 Rom II-Regulation" – The English abstract reads as follows:

This article explores the scope of Art. 12 Rome II Regulation. According to Recital (30) Rome II Regulation, personal injuries shall not be covered by Art. 12, but rather disclosure duties as well as negotiation breakdowns. The article argues that the recent construction – Art. 12 addresses specific transactional duties and Art. 4 general duties – is too vague. Instead, a precise characterization of the culpa in contrahendo will be established by referring to comparative law. This characterization focuses on expectation as a condition for respective claims.

- ***Sebastian Mock***: "Verschuldete und unverschuldete Fristversäumnis im Europäischen Mahnverfahren"
- ***Felix Koechel***: "Section 23 of the German Code of Civil Procedure: For Domestic Claimants only?" – The English abstract reads as follows:

Seemingly in line with former case law, the Third Civil Panel of the German Federal Court of Justice (BGH) held that Section 23 of the German Code of Civil Procedure (ZPO) – providing for an exorbitant ground of jurisdiction based on the location of property of the defendant – is to be interpreted restrictively. According to case law, this provision requires (beyond its wording) a "sufficient connection of the dispute" with the State of forum. However, the Third Civil Panel virtually turned Section 23 ZPO into a claimant's forum when it held that

the plaintiff's domicile in Germany already establishes such a connection. What started in 1991 as a quest of the Eleventh Civil Panel of the BGH to diminish the exorbitant character of Section 23 ZPO has thus been exploited to openly privilege domestic claimants. This article gives an overview on the development of the case law, and illustrates the inconsistency of the decision of the Third Civil Panel.

- ***Carl Friedrich Nordmeier:*** "French proceedings for the determination of paternity and German proceedings for a right to a compulsory portion: scission of the estate and coordination of proceedings according to § 148 German Code of Civil Procedure" – The English abstract reads as follows:

Under French and German law, the right to a compulsory portion of the estate depends on the number of descendants the deceased left. The present article analyses a succession with connections to France and Germany, in which the ancestry of one of the persons involved is doubtful. In case of scission of the estate, the calculation of a right to a compulsory portion in one part of the estate has to take into account the designation as an heir in another part of the estate if the rational of this right demands so. From a procedural point of view, the coordination of French proceedings for the determination of paternity and German proceedings for a right to a compulsory portion is discussed. Pursuant to § 148 (1) German Code of Civil Procedure, German proceedings can be stayed as a result of assessing the individual circumstances of the case in the light of the purposes of this provision. Results of foreign procedures for the safeguarding of means of proof can be used in German proceedings according to § 493 (1) German Code of Civil Procedure if the foreign proceedings are substitutable for a German independent procedure of taking evidence.

- ***Heinrich Dörner***: "The qualification of § 1371 Sect. 1 Civil Code – a missed opportunity" – The English abstract reads as follows:

It is still discussed controversially whether § 1371 Sect. 1 Civil Code can be applied when succession after the deceased spouse is controlled by foreign law. The Federal Court of High Justice did not comment on this question in its judgment of 9th September 2012. This article will summarize current jurisprudence and outline the legal situation after the European Regulation on jurisdiction and applicable law in matters of succession will have come into

force.

- ***Marianne Andrae:*** "Post-marital maintenance concerning a failed marriage between a German and a Swiss spouse" – The English abstract reads as follows:

The key aspect of the decision, which is discussed, lies on the law applicable to maintenance obligations. The issues to be resolved concern, in particular, the delimitation between the Hague Convention on the law applicable to maintenance obligations (HU
1973) and the Hague Protocol of 2007 for the determination of the law applicable to maintenance obligations (HUP) and the requirements for the use of the escape clause for the conjugal maintenance (Art. 5 HUP). Another aspect covers the assignation of the appropriate maintenance in accordance with § 1578 b BGB, if the dependent spouse has moved in consequence of the marriage from abroad to Germany and as consequence of the marriage is not gainfully employed. The last issue concerns the qualification of a contractual provision on the right to a monetary payment, which is drawn from Art. 164 Swiss Civil Code (ZGB).

- ***Tobias Helms***: "Implied choice of law applicable to divorce under Article 5 (1) of the Rome III Regulation?" – The English abstract reads as follows:

Contrary to the opinion of the OLG Hamm, it is highly doubtful whether Article 5 (1) of the Rome III Regulation permits an implied choice of law applicable to divorce. The fact that Iranian spouses agree in their marriage contract on offering the wife under certain, strict conditions the possibility to divorce does definitely not constitute such an implied choice of law. The finding made by the OLG Hamm on the point that Article 10 of the Rome III Regulation does not necessarily preclude the choice of Iranian law, is, however, correct.

- ***Marc-Philippe Weller/Alix Schulz***: "The application of § 64 GmbHG to foreign companies" – The English abstract reads as follows:

The following article discusses the classification of § 64 GmbHG, pursuant to which directors are obligated to compensate payments effectuated to single

creditors of the company despite of its insolvency. We are going to demonstrate that § 64 GmbHG is part of the lex concursus and thus falls into the scope of Art. 4 European Insolvency Regulation. The liability rule of § 64 GmbHG would then be applicable to managing directors of foreign companies having their centre of main interest in Germany. In a second step it is, however, to be determined whether the application of § 64 GmbHG violates the freedom of establishment (Art. 49, 54 TFEU) of EU-foreign companies with their centre of main interest in Germany.

- ***Thomas Pfeiffer:*** "Again: The Market as a Connecting Factor and the Country of Origin Principle in the Area of E-Commerce" – The English abstract reads as follows:

The decision of the Austrian Supreme Court of November 28th, 2012 demonstrates the difficulties of the interplay between the E-Commerce Directive and the Rome II-Regulation; it needs to be analyzed not only against the background of the ECJ's eDate Advertising decision but also with regard to other sources of EU conflicts law: Whereas the Directive's Country of Origin-Principle does not exclude Member State choice of law rules, such rules may be applied only insofar as they are in line with inter alia the Rome II-Regulation. The Austrian § 20 Electronic Commerce Act, if construed as a conflict of laws rule, is not acceptable under this standard. Therefore the applicable choice of law rule for commercial practices in the area of E-Commerce is to be found in Art. 6(1) Rome II-Reg. With regard to advertisements, this provision has to be construed as referring to the laws of the state where the advertisement affects its addresses, not the state where the services are rendered or the goods delivered. In case an advertisement has effects in more than one state, there is a need for some limits as to an application of laws of a state where the effect is only minimal; it is, however, doubtful whether Art. 6 Rome II-Reg. is open for this interpretation. Additionally, the courts of the country of origin have to make sure that standards of their own laws are met (Art. 3(1) E-Commerce-Directive); this requirement only applies if the target country is an EU Member State. The latter statement, however, is not an acte clair.

- ***Martin Metz***: "Narrowing personal jurisdiction: Recent US Supreme Court jurisprudence" – The English abstract reads as follows:

After remaining silent on the topic for 25 years, the US Supreme Court recently reentered the contentious field of personal jurisdiction. With four decisions issued in the short period from 2011 to 2014, the Court reshaped and confined the concepts of personal jurisdiction and minimum contacts. In Goodyear and Daimler the Court narrowed the concept of general jurisdiction. In order to assert general jurisdiction over a corporate defendant, corporate affiliations with the forum state must be so continuous and systematic as to render the corporation "essentially at home" in the forum state. The McIntyre decision restricted specific jurisdiction in product liabilities cases, whereas theWalden decision limited specific jurisdiction in tort cases. In both instances, personal jurisdiction cannot be based solely on the fact that the conduct or the injury occurred in the forum state. Rather, it is crucial that the defendant purposefully created contacts with the forum state. Taking into account all four decisions with regard to personal jurisdiction, the Court is currently re-emphasizing considerations of territoriality over considerations of litigational fairness.

- ***Hilmar Krüger/Wagih Saad***: "Private International Law in the Sultanate of Oman" – The English abstract reads as follows:

The Sultanate of Oman is – with only the state of Bahrain still missing – the penultimate state among the small countries of the Arab Peninsula to codify its rules of conflict of laws. The Omani rules of private international law are contained in the Introductory Chapter of the Civil Code (act no. 29 of 2013). The Omani Civil Code entered into force August 12, 2013. The act is based on the models of Egypt, Jordan, and the UAE. Deviations are rare.

Latest Issue of RabelsZ: Vol. 78 No 2 (2014)

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.