Second Issue of 2013's ICLQ

The second issue of *International and Comparative Law Quarterly* for 2013 includes three articles exploring private international law issues and a case commentary of the *VALE Építési Kft* decision of the European Court of Justice.

Pablo Cortés and Fernando Esteban de la Rosa, *Building a Global Redress System for Low-Value Cross Border Disputes*

> *This article examines UNCITRAL's draft Rules for Online Dispute Resolution (ODR) and argues that in low-value e-commerce cross-border transactions, the most effective consumer protection policy cannot be based on national laws and domestic courts, but on effective and monitored ODR processes with swift out-of-court enforceable decisions. The draft Rules propose a tiered procedure that culminates in arbitration. Yet, this procedure neither ensures out-of-court enforcement, nor does it guarantee compliance with EU consumer mandatory law. Accordingly, this article argues that the draft Rules may be inconsistent with the European approach to consumer protection.*

Sirko Harder, *The Effects of Recognized Foreign Judgment in Civil and Commercial Matters*

> *This article investigates what effects a recognized foreign judgment in civil and commercial matters has in English proceedings. Does the judgment have the effects that it has in the foreign country (extension of effects) or the effects that a comparable English judgment would have (equalization of effects), or a combination of these? After a review of the current law, it will be discussed what approach is preferable on principle. The suggested approach will then be illustrated by considering whether a foreign decision on one legal basis of a certain claim ought to preclude English proceedings involving another legal basis of the same claim. Finally, it will be discussed whether and how the effects of a recognized foreign judgment in England are affected by interests of a third country.*

Christopher Bisping, *The Common European Sales Law, Consumer Protection and Mandatory Overriding Provisions in Private International Law*

This article analyses the relationship of the proposed Common European Sales Law (CESL) and the rules on mandatory and overriding provisions in private international law. The author argues that the CESL will not achieve its stated aim of taking precedence over these provisions of national law and therefore not lead to an increase in cross-border trade. It is pointed out how slight changes in drafting can overcome the collision with mandatory provisions. The clash with overriding mandatory provisions, the author argues, should be taken as an opportunity to rethink the definition of these provisions.

Belgian Court Rules on Jurisdiction for Restitution Claims

On 13 December 2012, the Court of Appeal of Liege held that restitution claims fall within the scope of Article 2 of the Brussels I Regulation.

A Belgian company was suing a Luxembourg company in Belgium. The companies had concluded a contract for carriage of goods. The Belgian company claimed restitution of certain payments from the Luxembourg party.

The Belgian Court wondered whether restitution claims belong to Article 5.1 or 5.3 of the Brussels I Regulation. It concluded that they do not, because under the Belgian law of obligations a claim in restitution is quasi-contractual and thus neither contractual nor delictual. As a consequence, the court held, only Article 2 applied.

It is unclear whether any party argued that there might be autonomous interpretation of the Brussels I Regulation, and that the European Court of Justice judgment in *Kalfelis* might well stand for the proposition that quasi-contractual claims are delictual for the purpose of Article 5.3 of the Regulation.

First Issue of 2013's Flemish PIL E-Journal

The first issue of the Belgian e-journal on private international law *Tijdschrift@ipr.be / Revue@dipr.be* for 2013 was just released.

The journal is meant to be bilingual (French/Dutch), but this issue is almost exclusively in Dutch, except for one judgment from the Court of Appeal of Liege.

No article in this issue.

New French Book on International Commercial Law

Catherine Kessedjian, who is professor of law at Paris II University and a former Deputy Secretary General to the Hague Conference, has published a new treatise on French International Commercial Law.

As is traditional in France, the book includes developments on international commercial contracts, but also on the law governing corporations (including international insolvency) and international dispute resolution.

A table of contents and more details are available here.

Born on the European Private International Law of Book-Entry Securities

Michael Born has published a book on the European Private International Law of Book-Entry Securities (*Europäisches Kollisionsrecht des Effektengiros*, Tübingen, Mohr Siebeck 2013). The official summary reads as follows:

> *The law applicable to securities held in book-entry form in securities accounts is subject to a variety of European private international law rules. However, these provisions have not yet established a complete and consistent conflict of laws regime. Michael Born analyses the inconsistencies and gaps and also examines the options for eliminating the identified shortcomings.*

Further information is available on the publisher's website (in German).

Cuniberti on Lex Mercatoria

I (University of Luxembourg) have posted Three Theories of *Lex Mercatoria* on SSRN.

> *One of the most remarkable developments in international commercial law over the last fifty years has been the gradual acceptance of the existence of a new merchant 'law', or lex mercatoria, spontaneously generated by the international community in the shadow of national legal orders. While the notion that there might be law beyond the state aroused the interest of legal scholars and theorists around the world, few wondered whether international commercial actors had a genuine interest in the development of an autonomous*

transnational law. This Article offers empirical evidence suggesting that commercial parties almost never opt into lex mercatoria pursuant to their freedom to contract, but instead use that freedom to select a particular national law to govern their contracts. This conclusion begs the question of whether anybody else might benefit from lex mercatoria.

In a groundbreaking article published in 2005, Christopher Drahozal argued that the idea had lost practical significance and offered a signaling theory of lex mercatoria: the interest in the idea can be explained by the willingness of would be arbitrators to market themselves. While essentially agreeing with Drahozal, this Article offers two other theories explaining the development of lex mercatoria. First, I argue that deciding disputes on the basis of lex mercatoria can bring important benefits to international arbitrators. If that is the case, though, their interests may conflict with that of the parties who hired them. That raises an agency problem which needs to be both acknowledged and addressed. Secondly, I demonstrate how lex mercatoria can also benefit organizations which are involved in the business of producing model contracts and maintain that the active promotion of the use of non-state law – thereby side-stepping mandatory rules of national law – is intended to reduce the costs of producing international model contracts by such organizations.

The article is forthcoming in the *Columbia Journal of Transnational Law*.

Nehne on Methodology and Principles of European Private International Law

Timo Nehne, University of Cologne, has written a new book on methodology and general principles of European Private International Law (*Methodik und allgemeine Lehren des europäischen Internationalen Privatrechts.* Tübingen, Mohr Siebeck 2012). The author has kindly provided us with the following

summary:

The Private International Law regulations adopted by the European Union so far stipulate issues of methodology and "general principles" in fragments only. The dissertation "Methodik und allgemeine Lehren des europäischen Internationalen Privatrechts" (Methodology and General Principles of European Private International Law) focuses on their examination. The book encompasses six chapters. In chapter 1, the conceptual and methodological basis for the work is established. After the definition of the term "European Private International Law" and a short description of its history (§ 1), the introduction of a uniform terminology for this field of law is discussed (§ 2). Afterwards, dogmatic fundamental questions for the construction of European Union Private International Law (EU PIL) and for filling its gaps are scrutinised (§ 3). On that basis, methodic proposals of how to interpret EU PIL (§ 4) and how to close existing gaps (§ 5) are developed. Beside the creation of homogeneous Latin technical terms, both of these techniques are applied in chapters 2 to 5 to work out further methods for the handling of European conflict of laws and to fathom its principles. In doing so, the dissertation follows the path of application of EU PIL regulations. Thus, chapter 2 deals with the scope of European Private International Law (§ 1) and its relationship with national law, EU law as well as international conventions (§ 2). Subsequently, subjects concerning the legal category of a European choice of law rule are investigated (chapter 3) namely characterization (§ 1) and the solving of preliminary questions (§ 2). After having identified the applicable legal category, a European legal practitioner will be faced with a specific connecting factor. What kind of connecting factors EU PIL provides, is depicted in chapter 4. After an introducing summary (§ 1) it broaches the issues of party autonomy (§ 2) and "objective" connecting factors (§ 3). In any case, the connecting factor of a EU choice of law rule leads to the legal system governing the case at hand. In this respect, European conflict of laws follows the principle of exclusion of renvoi (chapter 5 § 1) which gives rise to the question whether it allows exceptions (§ 2). A further problem consists in the handling of the applicable law of states with more than one legal system (§ 3). Finally, chapter 6 compiles the results of the preceding chapters (§ 1) and closes with a suggestion which rules a Rome 0 Regulation or a EU PIL code should comprehend at least (§ 2).

Further information is availbale on the publisher's website.

Keitner on Human Rights Enforcement through Transnational Litigation

Chimene Keitner (UC Hastings College of Law) has posted Transnational Litigation: Jurisdiction and Immunities on SSRN.

> *Through transnational litigation, national courts enforce human rights norms "horizontally." Jurisdictional doctrines and immunity principles both shape the permissible contours of horizontal enforcement. Conflicts may arise between the principles of state sovereignty and non-interference, on the one hand, and the goals of promoting accountability and providing remedies for victims, on the other. This chapter in the forthcoming Oxford Handbook of Human Rights explores the bases for asserting jurisdiction in human rights cases and focuses on the development, and limits, of foreign official immunity and foreign state immunity. It also discusses claims against non-state actors including private corporations for committing or assisting human rights violations. While the horizontal enforcement of human rights norms by national courts carries the potential for both salutary and disruptive effects, national courts remain important developers and enforcers of international human rights law.*
>
> *The pre-publication text of this chapter will be available on SSRN while the Oxford Handbook of Human Rights is still in production.*

Deinert on International Labor Law

Olaf Deinert, Professor at the Georg-August-University Göttingen, has written a book on (German and European) international labor law (*Internationales Arbeitsrecht. Deutsches und europäisches Arbeitskollisionsrecht*, Tübingen, Mohr Siebeck 2013). The official summary reads as follows:

> *Olaf Deinert studies all the issues pertaining to applicable law in labor law cases with a foreign element. He gives a detailed description of the conflict of law rules and, in a discussion which includes all fields of labor law, looks at the extent to which applicable law (lex causae) is superseded by overriding mandatory rules of private law and public law. He examines this from the perspective of comparative law, since this is significant for the uniform interpretation of European regulations on international labor law, illustrating as it does the problems involved and serving as an example of how to solve individual issues in the conflict of laws.*

Further information is available on the publisher's website (in German).

Kroll-Ludwigs on Party Autonomy in European Private International Law

Kathrin Kroll-Ludwigs, University of Bonn, has authored a book on the role of party autonomy in European Private International Law (*Die Rolle der Parteiautonomie im europäischen Kollisionsrecht*, Tübingen, Mohr Siebeck 2013). It provides a broad overview of the design of party autonomy in the law of contractual and non-contractual obligations, family and succession law. The

official summary reads as follows:

> *Why did the European legislator decide on a broad freedom of choice of law in the law of contractual and non-contractual obligations on the one hand and on a limited choice in family law and the law of succession on the other hand? Kathrin Kroll-Ludwigs' analysis of the reasons for this divergency leads to the very basis of party autonomy as a fundamental right of individual freedom. She suggests a change of paradigm.*

Further information is available at the publisher's website (in German).