Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2012)

Recently, the May/June issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Burkhard Hess***: "Staatenimmunität und ius cogens im geltenden Völkerrecht: Der Internationale Gerichtshof zeigt die Grenzen auf" – the English abstract reads as follows:

This article deals with the decision of the International Court of Justice in Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), critically analysing the question of juridictional immunities of the the state in current public international law.

- ***Björn Laukemann***: "Der ordre public im europäischen Insolvenzverfahren" – the English abstract reads as follows:

The advancing integration of European civil procedure means that the criteria under which European insolvency judgments can be refused recognition on grounds of public policy are constantly modified. The European Insolvency Regulation is not excluded from such a development. Public policy is not something which is solely derived from national law. More and more, a European concept of public policy is becoming the benchmark for interpreting Art. 26. This article will focus on the analysis of the public policy clause in the light of international insolvency law principles – mainly the universal and immediate recognition of insolvency proceedings. Against this background, it will show why and to what extent the interpretation of Art. 26 of the Insolvency Regulation differs from that of Art. 34 n° 1 of the Brussels I Regulation, which is applied in the context of civil procedure. Due to the increasing harmonisation within the EU, the article will also shed light on the relation between the public policy exception and the need for a prior legal defence in the State in which the insolvency proceedings were opened.

- ***David-Christoph Bittmann***: "Der Begriff der „Zivil- und Handelssache" im internationalen Rechtshilfeverkehr" – the English abstract reads as follows:

The OLG Frankfurt/Main had to decide on a case concerning the qualification of the term of "civil and commercial matters" in the German-British Convention on the conduct of legal proceedings of 20 March 1928. On the basis of this convention the High Court Auckland (New Zealand) requested the service of a petition by way of legal aid from the Amtsgericht Frankfurt/Main. Subject of this petition was a penalty, requested from the New Zealand Commerce Commission against the applicant. The Commission accused the applicant of having infringed the Commerce Act of 1986. The applicant opposed against the service of the petition that the Convention from 1928 is not applicable on the requested penalty. The OLG Frankfurt/Main followed this argumentation and denied a civil and commercial matter. The following article analyses the problem of the qualification of "civil and commercial matters" in international civil procedure law at the example of the penalties requested by the New Zealand Commerce Commission.

- ***Oliver L. Knöfel***: "Ordnungsgeld wegen Ausbleibens im Ausland? – Aktuelle Probleme des deutsch-israelischen Rechtshilfeverkehrs" – the English abstract reads as follows:

The article reviews a decision of the Higher Social Court of North Rhine-Westphalia (3.12.2008 – L 8 R 239/07), dealing with the question whether a contempt fine (Ordnungsgeld) can be imposed on a party to a lawsuit who has been summoned to appear before a German consul posted abroad or before a German judge acting on foreign soil, but who has failed to comply with the summons. The author analyses the relevant mechanisms of the Hague Evidence Convention of 1970 as well as German procedural law.

- ***Dirk Otto***: "Präklusion und Verwirkung von Vollstreckungsversagungsgründen bei der Vollstreckung ausländischer Schiedsgerichtsentscheidungen" – the English abstract reads as follows:

The German Federal Supreme Court refused to enforce a foreign arbitration award for lack of a valid arbitration agreement and held that a defendant, who

objected against the arbitration throughout the proceedings is not estopped from invoking Art. V (1) (a) of the New York Convention (NYC) for having failed to initiate set-aside proceedings under the lex arbitri. The Supreme Court stressed that a defendant may opt not to commence court proceedings at the place where the award was rendered but may choose to resist enforcement under Article V NYC. This interpretation is in line with case law in other Convention countries. However, a defendant may be estopped from invoking grounds for non-enforcement if he participates in arbitration proceedings but fails to protest against any deficiencies. Furthermore, if a defendant does opt to seek annulment of an award at the place of origin, he has to put forward all reasons for setting aside, otherwise he may be precluded from raising them before the enforcing court.

- ***Frauke Wedemann***: "Die Regelungen des deutschen Eigenkapitalersatzrechts: Insolvenz- oder Gesellschaftsrecht?" – the English abstract reads as follows:

Under German law, shareholder loans are subordinate to the claims of all other creditors in the case of the insolvency of a company whose members are not personally liable. In its "PIN Group" decision, the German Federal Supreme Court (BGH) held that this rule also applies to companies founded in another EU Member State for which insolvency proceedings have been opened in Germany. The Court stated that the rule is to be characterised as a matter of insolvency law – not company law – and based this ruling on Art. 4(2)(g) and (i) of the European Regulation on Insolvency Proceedings. The author agrees with the decision, but critically examines and refines its reasoning. She analyses in detail whether the application of the German rule to a foreign company is compatible with the freedom of establishment (Art. 49, 54 TFEU). Furthermore she discusses the characterisation of other German rules concerning (1) the rescission of repayments of shareholder loans after the opening of insolvency proceedings or after the refusal to open such proceedings for lack of funds, (2) loans for which a shareholder has provided a security, and (3) the relinquishment of items or rights for use or exercise by a shareholder to the company. She argues that all these rules are to be characterised as matters of insolvency law.

- ***Heinrich Dörner***: "Der Zugriff des Staates auf erbenlose Nachlässe – Fiskuserbrecht oder hoheitliche Aneignung?" – the English abstract reads as follows:

The state's right to succeed to heirless estates may be construed either as a succession under private law or as an act of occupation under public law. In the present judgement the "Kammergericht" deals with the legal nature of the state's right of succession under the Civil Code of the former Russian Soviet Federative Socialist Republic and correctly characterises it as private intestate succession. According to the former Russian law of succession a cousin of the decedent was not entitled to a statutory portion. This regulation does not constitute an infringement of the German public order.

- ***Dirk Looschelders***: "Der Anspruch auf Rückzahlung des Brautgelds nach yezidischem Brauchtum" – the English abstract reads as follows:

In the discussed case the groom's family agreed to pay nuptial money to the father of the bride in compliance with the requirements for marriage in the Yazidi tradition. According to this tradition and the parties' agreement this money had to be repaid, because the marriage was dissolved after the wife had suffered under severe abuse by her husband.

The agreement on nuptial money has not to be qualified contractually but as a question of engagement. The determination of the statute of engagement is controversial, in the present case, however, German law is decisive according to all opinions. Pursuant to § 138 BGB the agreement on nuptial money is void as it violates public policy. A claim for repayment on grounds of unjustified enrichment fails due to § 817 sent. 2 BGB, because the violation of public policy is not only caused by the money receiving party but also the paying claimant.

- ***Martin Illmer***: "West Tankers reloaded – Vollstreckung eines feststellenden Schiedsspruchs zur Abwehr der Vollstreckung einer zukünftigen ausländischen Gerichtsentscheidung" – the English abstract reads as follows:

After the European Court of Justice's decision in West Tankers and the Court of Appeal's conclusions in National Navigation, anti-suit injunctions as well as

declaratory decisions by the state courts at the seat of the arbitration regarding the existence and validity of the arbitration agreement are either not available or not effective in preventing torpedo actions frustrating the arbitration agreement. In light of this unsatisfactory status quo, after having succeeded in the arbitration proceedings in London (declaring West Tankers' non-liability for the damage under dispute), West Tankers sought to enforce the arbitral award in England so as to prevent recognition and enforcement of a future Italian judgment on the merits. Whether an arbitral award constitutes a ground for refusing a declaration of enforceability of a foreign decision under Art. 34, 45 Brussels I Regulation is, however, disputed. The High Court as well as the Court of Appeal held that the issue was not decisive for the outcome of the case while it clearly was. This is at last proven by the fact that the High Court implicitly determined the issue by upholding the declaration of enforceability of the arbitral award. This article scrutinises the High Court's decision and the Court of Appeal's dismissal of the appeal in light of the interface of the Brussels I Regulation and arbitration. Furthermore, it discusses the crucial question whether an arbitral award may constitute a ground for refusing a declaration of enforceability under the Brussels I Regulation and whether such a ground would be compatible with the ECJ's decision in West Tankers.

- ***Weidi LONG***: "The First Choice-of-Law Act of China's Mainland: An Overview" – the abstract reads as follows:

On 28 October 2010, China promulgated the Act of the People's Republic of China on Application of Law in Civil Relations with Foreign Contacts, which came into force in China's Mainland on 1 April 2011. The Act is remarkable for its brevity and lack of concrete solutions. The legislators have opted for generality, while leaving specific issues to the courts and in particular, to the Supreme People's Court. Thus, the legislature has merely set the stage for the judiciary by providing a preliminary framework for future Chinese private international law. Pending interpretive instruments by the Supreme People's Court, this Note stays with an overview of the Act. It first introduces the legal background to Chinese private international law, followed by a brief retrospect of the legislative history of the Act. It then discusses the general features of the Act, viz., the residual role of the closest connection rule, the liberal attitude towards party autonomy, the free-spirited approach to forum mandatory rules, enhanced (possibilities of) content-orientation, and adoption of the habitual-

residence principle. Finally, it concludes by observing that Chinese private international law is moving towards a regime with greater flexibility, and that this move is inspired by the demands for substantial justice and the wish to promote national interests.

- **Duygu Damar**:"Deutsch-türkisches Nachlassabkommen: zivilprozess- und kollisionsrechtliche Aspekte" – the English abstract reads as follows:

The German-Turkish Agreement on Succession of 1929 is of substantial importance for more than one and a half million Turkish nationals with habitual residence in Germany. The Agreement on Succession does not only regulate the applicable law regarding movable and immovable estate as well as the international competence of German and Turkish courts, but also grants important powers, in line with given tasks, to German and Turkish consuls. These powers generally cause doubts in German practice, whether the certificate of inheritance should be issued by the Turkish consul in case of death of a Turkish national in Germany. The
article gives an overview on the conflict of laws rules set in the Agreement on Succession and clarifies the questions of civil procedure with regard to the issuance of certificates of inheritance and their consideration in Turkish law of civil procedure.

- ***Erik Jayme/Carl Friedrich Nordmeier*** on the conference of the German-Lusitanian Association in Cologne: "Anwendung und Rezeption lusophoner Rechte: Tagung der Deutsch-Lusitanischen Juristenvereinigung in Köln"
- ***Erik Jayme*** on art trade and PIL: "Kunsthandel und Internationales Privatrecht – Zugleich Rezension zu Michael Anton, Rechtshandbuch – Kulturgüterschutz und Kunstrestitutionsrecht"
- ***Marc-Philippe Weller*** on the PIL Session 2011 of the Hague Academy of International Law: "Les conflits de lois n'existent pas! Hague Academy of International Law – Ein Bericht über die IPR-Session 2011"

Kein Abstract

French Supreme Court Rules on European Enforcement Order

On January 6th, 2012, the French Supreme Court for Private and Commercial Matters (*Cour de cassation*) ruled for the first time on the European Enforcement Order established by Regulation 804/2005.

The issue before the court was whether a European Enforcement Order (EEO) certificate could stand and justify enforcement measures after the certified decision had been set aside in its legal order of origin. The *Cour de cassation* held that it could not despite the fact the the certificate had not been withdrawn in its legal order of origin.

Facts

The parties were a German couple who had married in 1970 in Germany. They had separated 20 years later. The husband was paying maintenance to his wife. In 2005, she sued before a German court arguing that he was not paying her what he ought to and claiming almost 1 million euros. The husband had moved to France, and thus probably did not hear about the case.

In October 2005, a Stuttgart Court issued a judgment ordering payment of 1 million euros. In January 2006, the same court certified the 2005 judgment as a European Enforcement Order. In December 2006, the wife attached a bank account and a house in France.

It seems that the husband realized at that point what had been going on in Germany. He challenged the German 2005 judgment in Stuggart, which transfered the case to a Court in Mainz. He also sought a stay of the enforcement proceedings in France, that he obtained. In 2007, the Mainz Court found that he owed nothing at all to his wife. She appealed. In 2008, the Court of appeal of Karlsruhe confirmed that she had no claim against her husband.

The husband then petitioned the French enforcement court to lift all enforcement

measures carried out in France. The wife argued that this could not be done as long as she would have a valid EEO certificate. The French court disagreed and lifted all enforcement measures. The wife appealed to the Caen court of appeal, and then to the *Cour de cassation*.

Is the EEO Certificate Autonomous?

The reason why an EEO certificate must be issued is that it will then be the title used by enforcement authorities abroad to enforce the certified judgment. One could argue, therefore, that enforcement authorities in Europe should only be concerned with the EEO certificate.

In many of its provisions, the EEO Regulation provides that certificates wrongly issued must be withdrawn by the court of origin (see, eg, Article 10). Article 6 of the EEO Regulation even provides so for cases when the certified decision has ceased to be enforceable.

> *6.2 Where a judgment certified as a European Enforcement Order has ceased to be enforceable or its enforceability has been suspended or limited, a certificate indicating the lack or limitation of enforceability shall, upon application at any time to the court of origin, be issued, using the standard form in Annex IV.*

One possible interpretation of these provisions could be that certificates only stop producing their effects when they are withdrawn, and that they stand autonomously until this happens.

Another interpretation, however, is that EEO certificates only facilitate the circulation of judgments, and they are therefore not autonomous. If such judgments disappear, they cannot stand anymore.

This interpretation is seemingly endorsed by the *Cour de cassation*, which relies on the following provision:

> *Article 11 Effect of the European Enforcement Order certificate*
>
> *The European Enforcement Order certificate shall take effect only within the limits of the enforceability of the judgment.*

The Court rules that the EEO certificate could thus not found enforcement

measures in France after the German court of appeal had ruled that the German certified judgment was not enforceable anymore. Existing enforcement measure had to be lifted.

Liability

The French lower courts had also held the wife liable for abuse of process. The *Cour de cassation* confirms the liability of the holder of the certificate, who is found to have committed a wrong for continuing to enforce the certificate after the German court of appeal had finally ruled that the wife had no claim against her husband.

In France, creditors seeking to enforce EEO certificates after the underlying judgment has been finally set aside are thus committing a wrong.

Issue 2011.4 Nederlands Internationaal Privaatrecht

The fourth issue of 2011 of the Dutch journal on Private International Law, Nederlands Internationaal Privaatrecht includes the following articles on Brussels I and abolition of exequatur, the proposal European Arrest Preservation Order, Service of Documents and Intercountry surrogacy:

Xandra Kramer, Abolition of exequatur under the Brussels I Regulation: effecting and protecting rights in the European judicial area, p. 633-641. The abstract reads:

As a consequence of the policy to gradually abolish the exequatur in the EU, the Commission proposal on the Recast of Brussels I envisages the abolition of intermediate proceedings. In line with previous instruments that abolish the exequatur for specific matters or in relation to specific proceedings, the proposal at the same time intends to abolish most grounds to challenge the enforcement. It

is submitted that recent instruments and proposals in the area of European civil procedure, including the Brussels I proposal, primarily focus on obtaining and effecting rights by the claimant, sometimes at the expense of the protection of the right to effectively defend oneself. As a way forward, it is viable to abolish the formality of the ex ante declaration of enforceability, while retaining the grounds to challenge the enforcement in the Member State of enforcement.

Bart-Jan van het Kaar, Het Europees bankbeslag en het Nederlands conservatoire derdenbeslag in Europees verband, p. 642-651. The English abstract reads:

This article deals with the international scope of a Dutch third party garnishment order. The scope of a third party garnishment order is in the current situation limited to the territory of the court granting this order (territorial effect). It is not possible to recognise and enforce such an order in accordance with the rules of the Brussels I Regulation. The judgment of the European Court of Justice in the Denilauler case (ECJ 21 May 1980, C-125/79) is a barrier against enforcement. It prevents granting any cross-border effect to a judgment delivered in ex parte proceedings, without the defendant being summoned to appear and the opportunity to be heard on the merits of the case. In most cases garnishment orders are given on a purely ex parte basis, and therefore are barred from enforcement in another member state. There are two recent developments that might change this current situation. Firstly, the European Commission published a Proposal for a European Account Preservation Order ('EAPO') to facilitate cross-border debt recovery in civil and commercial matters (COM (2011) 445 final). This proposal introduces harmonised European proceedings through which a claimant can request the issuance of an EAPO with the aim of preserving and attaching bank accounts held in other member states. Secondly, there is the proposal by the European Commission to change or revise the Brussels I Regulation. In this proposal the Denilauler restriction is removed for ex parte decisions. This is the case for decisions granted by a court having jurisdiction on the substance of the matter (Arts. 2 and 5-23). Both developments put the international scope of a Dutch third party garnishment order into a different light. This paper discusses both proposals in depth and investigates if and to which extent this new set of rules will result in the future possibility for a Dutch court to grant cross-border effect to a garnishment order.

Chr.F. Kroes, Deformalisering van de internationale betekening in een drieslag. The English abstract reads:

In less than two years, the Dutch Supreme Court has handed down four decisions on the service of documents abroad in civil and commercial matters. The first decision concerns the Service Regulation. The Supreme Court finds that the Service Regulation does not apply if, under local rules, service may take place at the offices of the lawyer who was most recently instructed by the defendant. Such service is allowed in the case of opposition and an appeal, both to the Court of Appeal and the Supreme Court. In its second and third judgment, the Supreme Court extended this rule to the Hague Convention on Service. In its fourth judgment, the Supreme Court found that, in the case of service on a foreign defendant at the offices of his (former) lawyer, only the short-term service needs to be observed that applies to domestic service and which is a week, instead of the four weeks that must be observed in case of the application of the Service Regulation or the Hague Convention. These decisions of the Supreme Court certainly make the practitioner's life somewhat easier, but they are not entirely free of any risks. It remains to be seen whether the judgments of the Supreme Court will stand up to the scrutiny of the European Court of Justice if recognition and enforcement pursuant to the Brussels Regulation would be challenged in a judgment by default against a foreign defendant where service has only taken place in accordance with local rules.

Jinske Verhellen, Intercountry surrogacy: a comment on recent Belgian cases. The abstract reads:

This article has the modest goal of examining five recent Belgian judgments on cross-border surrogacy. In four cases Belgian commissioning parents approached a surrogate mother abroad (California, India and Ukraine) and subsequently asked for recognition of the foreign birth certificates in Belgium. The other case concerned a child that was born in Belgium and thereafter transferred to the Netherlands. On the basis of these cases the article elaborates on the Belgian rules of private international law and the current case-by-case approach of the Belgian judges. It becomes clear that cross-border surrogacy raises complex issues of private international law and child protection. Therefore, there is a pressing need for a more global approach.

Agreements in EU Council on Abolition of Exequatur and Succession

During its meeting of December 13-14, 2011, the Council of Ministers of the European Union has made decisions regarding some forthcoming private international law legislation. The Press Release states:

Main Results:

> *Ministers also reached agreement on the text of a regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of* ***succession*** *and the creation of a European Certificate of Succession. On the recast of a regulation on* ***jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*** *(the so-called "Brussels I" regulation), the Council approved political guidelines for further work.*

More specifically, the Council agreed:

Judgments in Civil and Commercial Matters

> *The Council agreed on political guidelines on the abolition of exequatur on judgements given on matters falling within the scope of the so-called Brussels I regulation.*
>
> *(…)*
>
> *The UK and Ireland have decided to take part in the adoption of the revised regulation. Once adopted, the revised regulation will also be applicable to Denmark in the context of the existing agreement between the EU and Denmark on the matter.*

Succession

> *The Council reached very broad general agreement on the text of the regulation*

on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (18745/11 + ADD 1). (…)

In order to reach a general approach, further work is needed, in particular on two issues:

– the question of restoration of lifetime gifts ("clawback") where considerable differences between member states' legal systems exist: While some member states allow for clawback, others don't.

– the question of the administration of a deceased person's estate: Work will start immediately in order to prepare incoming negotiations with the European Parliament.

Open questions also exist on the recitals as well as the proposed standard forms.

In general, the proposed rules aim to make life easier for heirs, legatees and other interested parties.

The main provisions are:

– The draft act provides for the application of a basic connecting factor for determining both the jurisdiction of the courts and the law applicable to a succession with cross-border implications, namely the deceased's habitual residence at the time of death. The proposed Regulation will also allow a person to choose the law to govern the succession the aw of the State of his/her nationality. This rule would take some of the stress out of estate planning by creating predictability.

– The proposed rules will ensure mutual recognition and enforcement of decisions and mutual acceptance and enforcement of authentic instruments in succession matters.

– A European Certificate of Succession would be created to enable persons to prove their status and/or rights as heirs or their powers as administrator of the estate or executor of the will without further formalities. This should result in faster and cheaper procedures for all those involved in a succession with cross-border implications.

The UK and Ireland have not yet notified the Council that they will participate in the final adoption of the regulation, but have participated actively in the negotiations. Denmark will not take part in the adoption of the proposed regulation.

Many thanks to Niklaus Meier for the tip-off.

Symeonides on Choice of Law in American Courts in 2011

Dean Symeon C. Symeonides (Willamette University – College of Law) has posted Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey on SSRN. It is, as usual, to be published in the *American Journal of Comparative Law* (Vol. 60, 2012). Here is the abstract:

This is the 25th Annual Survey of American Choice-of-Law Cases. It is intended as a service to fellow teachers and students of conflicts law, both within and outside the United States. The Survey covers cases decided by American state and federal appellate courts in 2011. The following are some of the cases discussed:

• Three Supreme Court decisions, one on general jurisdiction, one on specific jurisdiction, and one holding that the Federal Arbitration Act preempts state court rulings that protected consumers by refusing to enforce certain class-arbitration waivers.

• Two state supreme court cases refusing to enforce arbitration clauses that waive tort claims arising from gross negligence and criticizing the Supreme Court for "tendentious reasoning" and for creating new doctrines "from whole cloth."

• A New York case struggling with the Neumeier rules in a case involving the same pattern as Schultz, and a California case worthy of Traynor's legacy in delineating the extraterritorial reach of California statutes.

• A Delaware case holding that Delaware has an interest in "regulating the conduct of its licensed drivers," even when they drive in states with lower standards; a conflict between a dram shop act and an anti-dram shop act; and a product liability case in which a driver who crushed his car after taking a sleeping pill prevailed on the choice-of-law question.

• A case enforcing a foreign arbitration and choice-of-law clause prospectively waiving a seaman's federal statutory rights, even though there was little possibility for a subsequent review of the arbitration award.

• Several cases illustrating the operation of four competing approaches to statutes of limitation conflicts.

• A case rejecting a claim that a Sudanese cultural marriage was invalid because the groom had paid only 35 of the 50 cows he promised as dowry to the bride's father. • Two cases recognizing Canadian same-sex marriages.

• A case holding that the court had jurisdiction to terminate a father's parental rights without in personam jurisdiction over him, as long as the children were domiciled in the forum state.

• A case holding that a state's refusal to issue a revised birth certificate listing two unmarried same-sex partners as the child's parents after an adoption in another state did not violate the Full Faith and Credit clause.

• A case characterizing as penal and refusing to recognize a sister-state judgment imposing a fine for a violation of zoning restrictions.

• Several cases involving sex offenders required by sister-state judgments to register their place or residence, or terminating the obligation to register.

• Four federal appellate decisions holding that corporate defendants can be sued under the Alien Tort Statute for aiding and abetting in the commission of international law violations.

Agreements as to Succession

On the 31st. October the Spanish magazine *La Ley-Unión Europea* published a paper on Article 18 (Agreements as to succession) of the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession. Authors, Professor Santiago Álvarez-González and Isabel Rodríguez-Uría-Suárez (University of Santiago de Compostela) highlight that the mere existence of a special rule for agreements as to successions is to be welcome. Nevertheless, they propose some amendments to the current text and the need of rethinking some general options. Some of these proposals are similar to ones made by others scholars or Institutions (actually, authors agree on a wide extent with the Max Planck Comments); some others reflect the need to explore new solutions.

Authors propose the express inclusion of joint wills in the text of Article 18. They also consider that the substantive scope of the rules on applicable law to the agreements as to successions must be clarified, especially in its relationship with the lex succesionis. They disagree with the rule of Article 18 (4) of the Proposal. It is a rule that introduces a vast amount of uncertainty in the parties' expectations; this is the reason why they claim it must be suppressed. Furthermore, they consider than the place given to the possibility to make a choice of law to the whole agreement by the Article 18 (3) of the Proposal should be enlarged, allowing the parties involved in a such agreement to choose the law of the habitual residence of each of them and not only the law that they could have chosen in accordance with Article 17; that is, the law of each of their nationalities at the moment of choice.

The "rule of validation" of Article 18 (1) is analysed to conclude that, although it introduces an instrument to provide the *favor validitatis*, well acknowledged in comparative law, it could sometimes bring uncertainty as to the extent of the testamentary freedom (ie, parties are aware that the agreement they made is null and void according to the applicable law and the person whose succession is

involved makes a new will). In the same sense, authors agree with the alternative solution (habitual residence of any of the persons whose succession is involved) provided by Article 18(2) for agreements concerning the succession of several persons, but they wonder whether such a conflict-rule-substantive approach is legitimate in the European Law context.

Anuario Español de Derecho Internacional Privado, vol. X (2010)

A new volume of the *Anuario Español de Derecho Internacional Privado* has just been released. It includes a number of unique studies, most of which are in-depth developments of the ideas briefly presented both by Spanish and foreign scholars at the International Seminar on Private International Law, held last March at the Universidad Complutense de Madrid; that is why the volume is as rich as the seminar was. Patricia Orejudo, secretary of the magazine since 2010, has kindly provided the abstract of each single publication:

> **JACQUET, J.M.: "La aplicación de las leyes de policía en materia de contratos internacionales", pp. 35–48.**
>
> *This article analyses from a current perspective some of the issues raised by the application of overriding mandatory provisions, with a special emphasis on questions of EU Law. On the one hand, the author identifies the practical obstacles which hinder the effective application of overriding mandatory provisions, either by means of a control to be carried out prior to their application, or by means of jurisdictional mechanisms intended to obstruct such application, as for example choice of court agreements and arbitration agreements. On the other hand, the author points out possible solutions –both material and procedural– that can be used to overcome the obstacles previously detected, in order to guarantee that the imperative character of*

overriding mandatory provisions is respected and, consequently, that such provisions are effectively applied to all the cases falling within their scope of application.

BERGÉ, J–S.: "El Derecho europeo ante la fragmentación del Derecho aplicable a las relaciones internacionales: la mirada del internacional–privatista", pp. 49–68.

When we evoke the question of the European law (European Union) confronted with the fragmentation of the choice of law to the international relations, by what law do we speak? For the private lawyer, two answers are outlined. The fragmentation of the choice of law can result, at the first level, from a confrontation of the solutions and the methods of the private international law and from the European law. But it can also find accommodation, at the second level, in the appropriate constructions of the European private international law.

MEDINA ORTEGA, M.: "El Derecho patrimonial europeo en la perspectiva del programa de Estocolmo", pp. 69–90.

The principle of mutual recognition and its extension to the rules of jurisdiction, recognition and enforcement of decisions and Law applicable is not enough satisfactory for a European Union which aims at creating an internal market where persons, goods, capitals and services are not subject to the arbitrary application of a given legal order, on grounds of legal technique. No matter the reasons that could be bestowed to uphold the "living" nature of Law and its connexion to the national culture and traditions, the European Union, as a great area of supranational peace, is developing its own society and its own social and legal culture. Such culture may not be split on basis of whimsy sociological and legal theories that are nostalgic of the culture of the "peoples of Europe", for these "peoples" are nowadays melting in a unified political community, right before our eyes. The European "acquis" in contractual matters is already important; though still spread in a set of instruments whose purpose is the harmonization of certain fields: mainly the field of consumer protection. In this context, the CFR is an ambitious project. It still has an uncertain future, but both the Commission and the European Parliament are doing their best to take it forward, in its most cautious character, i.e., that of an optional instrument to which parties could resort in

order to avoid a particular state Law. The task is not easy, but the multiplication of efforts over the past decade by the common institutions to achieve a harmonization of European property law shows that it is a necessary and urgent task that the European citizens demand today as an essential part of the Area of Freedom and Justice established by the Treaties of the European Union.

RÜHL, G.: "La protección de los consumidores en el Derecho internacional privado", pp. 91–120.

The majority of cross–border consumer contracts are governed by general contract terms provided by the professional. In most cases these terms provide for a choice of law clause. From an economic perspective these clauses pose serious problems. However, this is not because consumers are "weaker" than professionals, but rather because they know less about the applicable law and have no incentive to invest into the gathering of the relevant information. Professionals, in contrast, enter into a large number of similar contracts on the same market. As a result, they have an incentive to gather information about the applicable law in order to choose the law that provides the most benefits for them and the least benefits for consumers. Since consumers are not able to distinguish between professionals who choose consumer–friendly laws and those who don't, this may lead to a race to the bottom and a market for lemons. The self–healing powers of markets are unlikely to avoid these problems. Therefore, it is necessary to directly regulate consumer transactions by modifying the general provisions determining the applicable law. An analysis of the various models that are applied around the world lead us to conclude that the general European model, which is also to be found, albeit with differences in detail, in Japan, Korea, Russia, Turkey and the United States, promises the greatest benefits in terms of efficiency.

MIQUEL SALA, R.: "El fracaso de la elección del Derecho a la luz del Reglamento Roma I y de las libertades fundamentales", pp. 121–154.

According to an obiter dictum in the decision Alsthom Atlantique, it seems that party autonomy excludes the control by the ECJ of a possible limitation of the fundamental freedoms by the chosen law. This paper analyses the implications and the convenience of this rule, not considering the cases in which despite freedom of choice of law the parties have not been able to avoid

the application of the given legal system. In order to find out to what extent the parties should carry the risk of the application of rules which are contrary to community law, it focuses on the issues of the admissibility and the validity of the choice–of–law agreement under the Rome I Regulation and the Spanish civil law.

Later on, the paper discusses the practical problems of the application of this doctrine and the arguments in favour and against of the control of dispositive law by the ECJ.

OREJUDO PRIETO DE LOS MOZOS, P.: "El idioma del contrato en el Derecho internacional privado", pp. 155–182.

Where the parties to a contract do not share the same mother tongue, an additional question arises. It happens to be necessary to choose the language to be employed within their relationship and to conclude the contract. Each party will try to impose its own language, so as to avoid linguistic risks, and the election will become a matter of negotiation. The parties may agree to use a third neutral language (habitually, English), the language of one of them or both. In any case, specific language clauses will be needed in order to solve or prevent conflicts. The language finally chosen will be paramount to manifest the concepts, and it will impinge on the interpretation of the contract. But it might also have some effect on international jurisdiction, the law applicable to the contract and the service of documents and acts.

UBERTAZZI, B.: "Derechos de propiedad intelectual y competencia exclusiva (por razón de la materia): entre el Derecho internacional privado y público", pp. 183–257.

In the last years, prestigious courts of different countries around the world have declined jurisdiction in matters related to foreign -registered or not- intellectual property rights: in particular, when an incidental question concerning the validity of the right arise. This incidental question comes up both when the proceedings concern the violation of intellectual property rights and the defendant argues that the right is void or null, so there is no violation at all; and when the claimant aims at a declaration of no-violation of the right, on grounds of its nullity. The present paper takes up and develops a thesis that is being held by the majority of scholars and has been brought to

the most recent academic works, such as the Principles of the American Law Institute and the Draft CLIP Principles. According to this thesis, the rules on exclusive jurisdiction in matters of intellectual property are not suggested by Public International Law, and are illicit according with the general principles of denial of justice and the fundamental human right of access to jurisdiction. Therefore, the said rules must be abandoned not only in the matters related to the violation of the right, but also when a question concerning the validity of the right arises.

REQUEJO ISIDRO, M.: "Litigación civil internacional por abusos contra derechos humanos. El problema de la competencia judicial internacional", pp. 259–300.

In 2008, the Committee on Civil Litigation and the Interests of the Public of the International Law Association launched a research into the area called "private litigation for violations of human rights", with particular focus on the private international law aspects of civil actions against multinational corporations. In its 2010 report, the Committee presented the issue of international jurisdiction as one of the most serious obstacles to such actions. Our study examines personal jurisdiction criteria in the U.S. (so far the prime forum for this kind of litigation), and Europe (as potential forum, likely to become a real one to counterbalance the increasingly serious restrictions to access to American jurisdiction). Not surprisingly, we conclude that the situation is unsatisfactory, and that as far as Europe is concerned, the proposal for amending EC Regulation No. 44/01 does not alter such result. Changes in PIL will not be enough for private litigation to become a useful regulatory mechanism of corporations in relation to human rights; a much more comprehensive action is needed, supported by international consensus. In other words: still a long way to run.

ESPINIELLA MENÉNDEZ, A.: "Incidencia de la nacionalidad de las sociedades de capital en su residencia fiscal", pp. 301–317.

Rules on tax residence in Spain and rules on Spanish Nationality in respect of corporate enterprises are consistent because they are both based on the incorporation under the Spanish Law and the placement of the registered office in Spain. Nevertheless, tax rules are silent on certain issues of dual nationality and change of nationality.

MICHINEL ÁLVAREZ, M.A.: "Inversiones extranjeras y sostenibilidad", pp. 319–338.

International investment Law has been generally drawn upon a model which largely assumes first the need to solve the problem about protection of investors, in despite of the interests of the host States, in particular the developing countries, whose needs for foreign investments are much more intense. That situation is shown not just by the text of the agreements itself, but also when they are applied in the arbitration proceedings. However, a number of significant problems have emerged, considering the tension between the policies oriented towards the sustainable development of host States – regarding basically environmental protection and social welfare– and the protection of foreign investments. This kind of problems must be solved through a new International Investment Law. This paper highlights those tensions and focuses on the ways to find the proper balance.

ÁLVAREZ GONZÁLEZ, S.: "Efectos en España de la gestación por sustitución llevada a cabo en el extranjero", pp. 339–377.

This paper points out the current situation that arises in Spain after some recent events related to surrogacy. Two contradictory statements triggered new rules to be enacted at a civil registry level. The first one, delivered by the DGRN (administrative body depending on the Ministry of Justice), recognizes Californian surrogacy in order to register it on the Spanish civil register. This statement (resolución) was revoked by a Court of Justice, that ruled the statement of the DGRN was unlawful. The author deals with the new situation and points out that these new rules are clearly unsatisfactory to offer an adequate and proper answer to the wide constellation of problems arising from surrogacy. According to him, the fact that surrogacy is banned by the Spanish civil law is not enough reason to consider surrogacy as opposite to Spanish international public policy. So it would be possible nowadays to recognise some situations of foreign surrogacy. The main question is to determine the precise conditions to admit foreign surrogacy and to act in order to provide an adequate degree of stability for the recognized cases. In this context, the author also proposes a change at civil level: the admission of surrogacy in Spanish civil law. The admission under certain conditions of foreign surrogacy jointly with the maintenance of its ban in Spanish law brings as unsatisfactory outcome the promotion of a undesirable

discrimination between people that can afford a foreign surrogacy and those who can not. From a methodological perspective, the author deals with the delimitation between conflict of laws and recognition method and, related to this second issue, with the scope of public policy and the question of fraus legis.

HELLNER, M.: "El futuro Reglamento de la UE sobre sucesiones. la relación con terceros Estados", pp. 379–395.

The proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession follows a recent trend in EU private international law regulations in that its rules on jurisdiction are intended to apply universally. In order to compensate for the non–referral to national rules of jurisdiction, the proposed Regulation itself contains rules on subsidiary jurisdiction in Article 6 which foresees a kind of jurisdiction based on the location of property. And an Article 6a on forum necessitatis *has also been added in the latest text discussed in the Council. But the proposal has some lacunae, that must be remedied before the final adoption or there is great risk that a situation of unnecessary 'limping' devolutions of estates will occur. The paper proposes three different ways to avoid such 'limping' devolutions: renvoi, deference to the foreign devolution and limiting the devolution to assets located in the EU and the inclusion of mechanisms for taking a foreign distribution into account.*

GONZÁLEZ BEILFUSS, C.: "El Acuerdo franco–alemán instituyendo un régimen económico matrimonial común", pp. 397–416.

In February 2010 France and Germany signed a bilateral Uniform law Convention on the property relations between spouses. This paper analyzes this agreement, which introduces a common matrimonial property regime of Participation in acquisitions into the respective substantive law, from the perspective of its eventual interest for Catalan law and as a possible model for European private law.

CARO GÁNDARA, R.: "(Des)confianza comunitaria a la luz de la jurisprudencia del Tribunal de Justicia sobre el Reglamento Bruselas II *bis*: algunas claves para el debate", pp. 417–439.

The judgments handed down by the Court of Justice in 2010 relating to the interpretation to be given to the rules of the Brussels Regulation II bis concerning the custody of minors, have reinforced the principle of mutual trust as between the courts of the Member States exercising jurisdiction on the merits. The Court has indicated that no limits or exceptions are to apply to the mutual recognition of decisions, not even when this might result in a possible violation of a minor's rights under the Charter of Human Rights of the European Union. But the Court has also set down a premise: the principle of mutual trust presupposes the high degree of responsibility of the courts that hear the cases. If that condition is not satisfied, the judiciaries will not be trusted and their provisional measures will not produce their intended effect. Countenancing training for the personnel assigned to the administration of Justice in the different Member States, along with the harmonization of rules of Civil Procedure, will help foster that level of trust required for the consolidation of a genuine common European space for Justice.

AÑOVEROS TERRADAS, B.: "Los pactos prematrimoniales en previsión de ruptura en el Derecho internacional privado", pp. 441–469.

The significant social developments occurred in Family Law, and especially the increase of the so called mobile marriages, have rise the use of the so called pre–nuptial agreements, even before marriage, in order to establish in advance the economic consequences of divorce. The laws of the different jurisdictions with regard to such agreements vary considerably from one state to the other. Such legal disparities (both substantive and conflicts) may jeopardise the preventive character of the prenuptial agreement and create legal uncertainty. For this reason, a suitable Community private international law legislation is needed (both in the field of jurisdiction and with regard to the applicable law to the agreement) in order for the spouses to have guaranteed the enforceability and validity of the prenuptial agreement.

PAREDES PÉREZ, J.I.: "La incidencia de los derechos fundamentales en la ley aplicable al estatuto familiar", pp. 471–490.

The universalist scope of human rights, instead of tempering the particularities among different legal systems, has widened the conflict among civilizations, and thus, the alteration of the role of international private law.

Apart from the coordination role among legal systems, current international private law (IPL) has become an IPL of intercultural cooperation, more concerned with avoiding limping legal situations than with the classical goal of solution's international harmony. IPL in family matters becomes, in this sense, a real testing ground of the impact that fundamental rights have had, and still have, not only regarding goals of the IPL but also in the construction of the legal system and the functioning of the regulation techniques themselves.

GUZMÁN PECES, M.: "¿Hacia un Derecho dispositivo en materia de estatuto personal y familiar?. Reflexiones a la luz del Derecho internacional privado español", pp. 491–510.

This paper analyzes the recent legal reforms in matters of personal and family status to be induced if there is a trend to a law device in the current private international law both in the field of international jurisdiction and in the sector of applicable law. To this end, we analyze various legal institutions such as parenthood, marriage and marital crisis and maintenance obligations.

NAGY, C.I.: "El Derecho aplicable a los aspectos patrimoniales del matrimonio: la ley rectora del matrimonio empieza donde el amor acaba", pp. 511–529.

The matrimonial property regimes and maintenance are questions which have a great practical importance in the international litigations derived from the dissolution of the marriage. These questions carry problems of characterization and problems of context, because they change according to the system to which there belongs the jurisdiction that knows about the case (common Law or civil law). After analyzing some conceptual aspects of the Draft Regulation on Matrimonial Property, one can conclude that it, though with some exceptions, introduces uniform rules of conflict of law throughout the European Union in this matter. Nevertheless, this instrument does not serve to break with the national diversity that in this field exists in Europe – from a theoretical point of view–, since it does not address the issue of characterization and inter–relation. In order to achieve the wished result it might be tried by two ways: through of party autonomy, or with the insertion of escape clauses (option not foreseen in the Draft Regulation on Matrimonial Property).

BOUTIN I., G.: "El fideicomiso–testamentario en el Derecho internacional privado panameño y comparado", pp. 531–546.

The testamentary trust in the Panamanian private international and comparative law summarizes the development of this evolution from the common law and how it will be assimilated by the Spanish–American coded systems, thanks to the conceptualization from Alfaro and Garay, who introduce the notion of trust in the Region. Similarly, the applicable law is interpreted and the recognition of the trust will, based on the rule of conflict of the self–registration autonomy and the subsidiary rule of the law of administration of trust, without neglecting the issue of jurisdiction or conflict of jurisdiction based on two potential options at the arbitral forum and the attributive clause forum of the jurisdiction; both figures regulated by the autonomy of the settlor.

ARENAS GARCÍA, R.: "Condicionantes y principios del Derecho interterritorial español actual: desarrollo normativo, fraccionamiento de la jurisdicción y perspectiva europea", pp. 547–593.

Spanish Civil Law is a complex system. Not only Central State, but also some Autonomous Communities have legislative competence in the field of Civil Law. During the past thirty years, Spanish Autonomic Communities have developed their own civil laws. This development has exceeded the lines drawn by the Spanish Constitution of 1978 and caused some tension. This tension affects the articulation of the different Spanish Civil Laws and the unity of jurisdiction. The increasing relevance of the UE in PIL is another factor to take into consideration, thus the personal and territorial scope of the Spanish civil laws is affected by the UE Regulations.

ÁLVAREZ RUBIO, J.J.: "Hacia una vecindad vasca: la futura ley de Derecho civil vasco", pp. 595–614.

Given the diversity that characterizes the internal regulations Basque Civil Law, the purpose of these reflections is directed from a historical angle to an appreciation of the Basque regional legislature's intention of trying to adapt to their particular circumstances, which require specific policy responses. These are articulated through rules that have a special role within the inter–law, framed in a subcategory that might be described as interlocal law in a spring

ad intra of the system, with the aim of responding to the specific features of the fragmentation of Legislative jurisdiction and diversity that characterizes the Basque regional civil law.

PÉREZ MILLA, J.: "Una perspectiva de renovación y dos parámetros de solución en los actuales conflictos internos de leyes españolas", pp. 615–637.

Spain is a plural Legal system that is organized territorially. However, the territoriality has created inefficiencies that are compounded both by the expansion of Regional Law as well as the economic crisis. This study analyzes how to overcome the distortions of territoriality with two parameters. First, from a constitutional point of view, strengthening the balance of the multi Legal organization; second, implementing a new principle of action that comes from the Services Directive. The stated purpose of the study is to facilitate the communication between the different Spanish territories and develop sufficiently the internal Spanish Conflicts of Law system.

RODRÍGUEZ–URÍA SUÁREZ, I.: "La propuesta de reglamento sobre sucesiones y testamentos y su posible aplicación al Derecho interregional: especial consideración de los pactos sucesorios", pp. 639–665.

This contribution analyzes the possibility of resolving Spanish interregional conflicts related to agreements as to succession through an European rule of law. At a first stage, we apply both the Proposal for a Regulation of successions and wills and also art. 9.8º of the Spanish Civil Code (hereinafter, Cc) to three different cases with an interregional factor involving agreements as to succession. Secondly, we deal with the feasible solutions under the point of view of the interests of agreements as to succession and the requirements of the interregional law system. We conclude reaching our own decision and suggesting new ways of possible interpretations of art. 9.8º Cc.

HSU, Yao–Ming: "Los nuevos códigos de Derecho internacional privado de China y Taiwán de 2010–especial referencia a la materia de familia", pp. 669–689.

We briefly summarize the respective amendment or new codification of private international law in Taiwan and in China. These new regulations both

ambitiously show the intention to cope with the newest international regulatory trends but also carefully keep their own specificities. Especially in the domain of lex personalis*, Taiwan keeps the choice of* lex patriae*, but China chooses the path of habitual residence as connecting factor. This difference in legislative principle result in the diverse applicable law in family matters on both sides of the strait. After their promulgation of the new laws, from the 26 May 2011 on in Taiwan and from the first April 2011 on in China, these differences will probably create other divergences for resolving the cross–strait family matters, even though on both sides there exists other specific regulation for the interregional conflict of laws. Besides, there exist some ambiguities in some provisions both in Taiwanese and Chinese new codes. More jurisprudences and doctrinal explanations would be needed for the future application.*

ASAMI, E.: "La ley japonesa sobre las normas generales de aplicación de las leyes (Ley 78/2006 de 21 de junio)", pp. 691–705.

The beginning of the Japanese private international law dates back to the late 19th century when the Japanese jurists, under the guidance of European experts, prepared the "Act on the Application of Laws" known as Horei*. After more than 100 years of existence,* Horei *has been entirely reformed and in 2006 culminated in the enactment of the "Act on General Rules for Application of Laws". This is a special code which contains only the choice–of–law rules, whereas the rules regarding the international jurisdiction as well as the recognition and enforcement of foreign judgements are found in the Code of Civil Procedure. The most notable change is the modernization of Japanese language which is considered to be a big progress. It will contribute to raise awareness of Japanese law internationally, thanks to the more comprehensive writing of the Japanese language. This article explores the background of the reform and highlights features of the new law.*

ELVIRA BENAYAS, M.J.: "Matrimonios forzosos", pp. 707–715.

Multicultural societies are faced with situations that are alien, but that affect its members. This is the case of forced marriages involving significant numbers of women and girls in the world and demand of these societies, sometimes an overwhelming response to a practice that involves the violation of Fundamental Rights and Freedoms. Response must be multidisciplinary,

with a required preventive function, but also care and legal assistance to victims, where there are several trends that include both the intervention of criminal law, civil law and private international law.

STAATH, C.: "La excepción de orden público internacional como fundamento de denegación del reconocimiento del repudio islámico", pp. 717–729.

When it comes to the recognition of foreign judgments or legal situations, the public policy exception constitutes the last legal tool to ensure the protection of the fundamental values of the forum's legal order, which include Human Rights. This has been perfectly illustrated by the case law on recognition of Islamic talaq divorces in occidental countries. The talaq is a unilateral act that consists of the dissolution of the bond of matrimony under the exclusive and discretionary initiative of the husband. In Europe, various courts have denied recognition of the talaq for its incompatibility with the principle of equality between spouses as embodied in article 5 of the 7th additional Protocol to the European Convention on Human Rights, on the grounds of the public policy exception. Although a talaq could not normally be pronounced in Europe, some courts, such as the French ones, have sometimes accepted to recognize a foreign talaq depending on the degree of connection between the legal situation and the forum. However, such a difference of treatment based on the residence and/or nationality of the parties is not legitimate when it comes to the protection of Human Rights, especially when they are of universal reach, as in the case of the principle of equality between spouses.

GUZMÁN ZAPATER, M.: "Gestación por sustitución y nacimiento en el extranjero: hacia un modelo de regulación (sobre la Instrucción DGRN de 5 de octubre de 2010)", pp. 731–743.

The Instrucción (resolution) of the Dirección General de los Registros y del Notariado of October 5th 2010 is meant to reduce the difficulty to access to Spanish (consular) registries to those born from surrogate mothers in a foreign country. Said Instrucción introduces changes from the previous case law in order to provide a greater protection in these cases in the interest of the child and of the mother through the judicial control of the surrogation contract. Access to the Spanish registry is hereinafter possible only when judicial control has taken place. The Instrucción also creates the legal regime

for recognition of the foreign judicial decision. Yet several difficulties remain in place which would make a review of the system advisable.

SÁNCHEZ–CALERO, J. y FUENTES, M.: "La armonización del Derecho europeo de sociedades y los trabajos preparatorios de la *European Model Company Act* (EMCA)", pp. 745–758.

This paper aims to expose the initiative for a few years developed with regard to the elaboration of a European Model Company Act (EMCA), intended to be inserted in the construction of European company law. This is a project led by renowned academics from across Europe, which aims to develop a kind of law–model (following the paradigm of the U.S. Model Business Corporation Act) on corporations. For now, the serveral draft chapters already made, show the approach to be made: dispositive rules, information, and a wide range of self–regulation. The working method followed is that of comparative law, so that the EMCA keep in mind the differences and similarities of the European legal systems.

IRURETAGOIENA AGIRREZABALAGA, I.: "Los APPRI en la Unión Europea post–Lisboa", pp. 759–791.

In the European Union, the debate on the future of Bilateral Investment Treaties (intra–EU and extra–EU BITs) is more alive than ever. The Lisbon Treaty has included the subject of foreign direct investment within the Common Commercial Policy, stating the exclusive competence of the Union to conclude treaties in this field with third countries. In this new scenario, the EU is taking the first steps to design a common investment policy, which will gradually replace the network of extra–EU BIT still in force. On the other hand, intra–EU BITs require differentiated analysis. The coexistence of these BIT and EU law raises questions difficult to answer, both from the perspective of international law and from the perspective of EU law. In short, the following question is made: Will the EU be an area without BITs in the near future?

BORRÁS, A.: "La aplicación del Reglamento Bruselas I a domiciliados en terceros Estados: los trabajos del Grupo Europeo de Derecho Internacional Privado", pp. 795–814.

The European Group for Private International Law / Group Européen de Droit

international privé *(GEDIP) is working on the revision of the Brussels I Regulation: a revision that will also lead to the modification of the Lugano Convention in its amended version of 2007. A paramount element in this revision is the extension of the scope of application of the Regulation, so that it could be applied also when the defendant is domiciled in a third country. This modification is a step forward in the communitarization or –in more accurate terms nowadays– the europeization of the rules on jurisdiction and recognition and enforcement of decisions in civil and commercial matters. It is the time now to assess whether member States are willing to take the step or, on the contrary, this part of the revision must be postponed, as it will probably happen with other elements. Some clear examples might be seen in the GEDIP proposal: in particular, concerning the introduction of "mirror rules" in matters of exclusive grounds of jurisdiction and prorogation clauses, and the settlement of rules on recognition and enforcement of the decisions of third countries.*

SALVADORI, M.: "El Convenio sobre acuerdos de elección de foro y el Reglamento Bruselas I: autonomía de la voluntad y procedimientos paralelos", pp. 829–844.

The Hague Convention of 30 June 2005 on Choice of Court Agreements, not yet entered into force, offers a new international instrument to enhance legal certainty and predictability with respect to choice of court agreements in international commercial transactions. The Convention is limited to "exclusive choice of court agreements concluded in civil or commercial matters" and excludes consumer and employment contracts and other specific subject matters. The Convention contains three main rules addressed to different courts: the chosen court must hear the case if the choice of court agreement is valid according to the standards established by the Convention (in particular there is no possible forum non conveniens *in favour of courts of another State); any court seized but not chosen must dismiss the case unless one of the exceptions established by the Convention applies; any judgment rendered by the court of a Contracting State which was designated in an exclusive choice of court agreement that is valid according to the standards established by the Convention must be recognised and enforced in other Contracting States unless one of the exceptions established by the Convention applies. Between the Choice of Court Agreements Convention and the*

Brussels I Regulation important differences rise when the operational systems of the two instruments are compared. In this context the Recast of Brussels I Regulation (December 2010) enhance of the effectiveness of choice of court agreements: giving priority to the chosen court to decide on its jurisdiction, regardless of whether it is first or second seized, and introducing a harmonised conflict of law rule on the substantive validity of choice of court agreements. Thereby it will be easy the conclusion of this Convention by the European Union.

ECHR Finds Immunity Violates Right to Access to Court

We should have reported earlier about this interesting judgment of the European Court of Human Rights of June 29th, 2011 (*Sabeh El Leil v. France*), where the Great Chamber of the Court ruled that France violated Article 6 of the European Convention by failing to give access to a court to an ex-employee of the Koweiti embassy in Paris suing his employer after it had dismissed him in 2000.

The ECHR had already ruled a year before in *Cudak v. Lithuania* that while sovereign immunities coud justify limiting the right to access to courts, preventing employees of embassies from suing their employers was a disproportionate limitation to their right when they were neither diplomatic or consular staff, nor nationals of the foreign states, and when they were not performing functions relating to the sovereignty of the foreign state.

In *Sabeh El Leil*, the French Courts had mentioned that the employee had "additional responsabilities" which might have meant that he was involved in acts of government authority of Koweit. The European court finds that the French courts failed to explain how it had been satisfied that this was indeed the case, as the French judgements had only asserted so, and had not mentioned any evidence to that effect.

Here are extracts of the Press Release of the Court:

An accountant, fired from an embassy in Paris, could not contest his dismissal,in breach of the Convention

Principal facts

The applicant, Farouk Sabeh El Leil, is a French national. He was employed as an accountant in the Kuwaiti embassy in Paris (the Embassy) as of 25 August 1980 and for an indefinite duration. He was promoted to head accountant in 1985.

In March 2000, the Embassy terminated Mr Sabeh El Leil's contract on economic grounds, citing in particular the restructuring of all Embassy's departments. Mr Sabeh El Leil appealed before the Paris Employment Tribunal, which awarded him, in a November 2000 judgment, damages equivalent to 82,224.60 Euros (EUR). Disagreeing with the amount of the award, Mr Sabeh El Leil appealed. The Paris Court of Appeals set aside the judgment awarding compensation. In particular, it found Mr Sabeh El Leil's claim inadmissible because the State of Kuwait enjoyed jurisdictional immunity on the basis of which it was not subject to court actions against it in France.

Complaints, procedure and composition of the Court

Mr Sabeh El Leil complained that he had been deprived of his right of access to a court in violation of Article 6 § 1 of the Convention, as a result of the French courts' finding that his employer enjoyed jurisdictional immunity.

The application was lodged with the European Court of Human Rights on 23 September 2005 and declared admissible on 21 October 2008. On 9 December 2008, the Court's Chamber relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected.

Decision of the Court

Access to a court (Article 6 § 1)

Referring to its previous case-law, the Court noted that Mr Sabeh El Leil had also requested compensation for dismissal without genuine or serious cause and that his duties in the embassy could not justify restrictions on his access to a court based on objective grounds in the State's interest. Article 6 § 1 was thus applicable in his case.

The Court then observed that the concept of State immunity stemmed from international law which aimed a promoting good relations between States through respect of the other State's sovereignty. However, the application of absolute State immunity had been clearly weakened for a number of years, in particular with the adoption of the 2004 UN Convention on Jurisdictional Immunities of States and their Property. That convention had created a significant exception in respect of State immunity through the introduction of the principle that immunity did not apply to employment contracts between States and staff of its diplomatic missions abroad, except in a limited number of situations to which the case of Mr Sabeh El Leil did not belong. The applicant, who had not been a diplomatic or consular agent of Kuwait, nor a national of that State, had not been covered by any of the exceptions enumerated in the 2004 Convention. In particular, he had not been employed to officially act on behalf of the State of Kuwait, and it had not been established that there was any risk of interference with the security interests of the State of Kuwait.

The Court further noted that, while France had not yet ratified the Convention on Jurisdictional Immunities of States and their Property, it had signed that convention in 2007 and ratification was pending before the French Parliament. In addition, the Court emphasised that the 2004 Convention was part of customary law, and as such it applied even to countries which had not ratified it, including France.

On the other hand, Mr Sabeh El Leil had been hired and worked as an accountant until his dismissal in 2000 on economic grounds. Two documents issued concerning him, an official note of 1985 promoting him to head accountant and a certificate of 2000, only referred to him as an accountant, without mentioning any other role or function that might have been assigned to him. While the domestic courts had referred to certain additional responsibilities that Mr Sabeh El Leil had supposedly assumed, they had not specified why they had found that, through those activities, he was officially acting on behalf of the State of Kuwait.

The Court concluded that the French courts had dismissed the complaint of Mr Sabeh El Leil without giving relevant and sufficient reasons, thus impairing the very essence of his right of access to a court, in violation of Article 6 § 1.

Just satisfaction (Article 41)

The Court held, by sixteen votes to one, that France was to pay Mr Sabeh El Leil 60,000 euros (EUR) in respect of all kind of damage and EUR 16,768 for costs and expenses.

Hague Prize Awarded to Paul Lagarde

The Hague Conference has announced that the Hague Prize for International Law 2011 will be awarded to Professor Paul Lagarde "in view of [his] outstanding contribution to the study and promotion of private international law".

*The **Hague Prize for International Law 2011** will be awarded to Professor Paul Lagarde, expert, delegate, chairman and reporter for the Hague Conference, "in view of [his] outstanding contribution to the study and promotion of private international law".*

This prestigious prize was established in 2002 by the municipality of The Hague and is awarded by an independent foundation, the Hague Prize Foundation, "to physical persons and/or legal persons who – through publications or achievements in the practice of law – have made a special contribution to the development of public international law and/or private international law or to the advancement of the rule of law in the world". The prize consists of a medal of honour, a certificate and a monetary amount of € 50,000.

The first recipient of the prize was Professor Shabtai Rosenne (2004), Professor M. Cherif Bassiouni received the prize in 2007 and in 2009 the prize was awarded to Dame Rosalyn Higgins.

The ceremony will take place on 21 September 2011 at the Peace Palace in The Hague.

Paul Lagarde taught at the university of Paris I (Panthéon-Sorbonne) from 1971 to 2001. He is the co-author of a leading treaty of French private international law (with Henri Batiffol).

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2011)

Recently, the May/June issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

Here is the contents:

- ***Catrin Behnen***: "Die Haftung des falsus procurator im IPR – nach Geltung der Rom I- und Rom II-Verordnungen" – the English abstract reads as follows:

> *The extensive reform of the international law of obligations by the Rome I and Rome II-Regulations raises the question of the future classification of the liability of the falsus procurator under international private law. Since the new regulations entered into force, the problem of classification has not only arisen at national law level, but also at the level of European Union Law. Most importantly, it must be questioned, whether the new Regulations contain overriding specifications regarding the classification of the liability of the falsus procurator that are binding for the Member States. This article discusses the applicable law on the liability of an unauthorised agent and thereby addresses the issue of whether normative requirements under European Union law are extant. Furthermore, the Article illustrates how the proposed introduction of a separate conflict of laws rule on the law of agency in the Draft Rome I-Regulation impinges on this question, even though this rule was eventually not adopted.*

- ***Ansgar Staudinger:*** "Geschädigte im Sinne von Art. 11 Abs. 2 EuGVVO" – the English abstract reads as follows:

The present essay discusses the decision of the European Court of Justice in the case of Voralberger Gebietskrankenkasse/WGV-Schwäbische Allgemeine – C-347/08. In this case, the court was concerned with the question whether, under Article 11 Paragraph 2 of the Council Regulation (EC) No. 44/2001 of 22 December 2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters a social insurance agency acting as the statutory assignee of the rights of the directly injured party has the right to bring an action directly against the insurer in the courts of its own Member State. The ECJ denies such a privilege, which is the correct decision in the author's opinion, who, after having reviewed the ECJ's judgement, also discusses the assignability of the decision to other conventions. Afterwards he raises the question to what extent legal entities, heirs or persons who claim compensation for immaterial damages, damages resulting of shock or alimony are allowed to sue the injuring party's insurer at their own local forum.

- ***Maximilian Seibl***: "Verbrauchergerichtsstände, vorprozessuale Dispositionen und Zuständigkeitsprobleme bei Ansprüchen aus c.i.c." – the English abstract reads as follows:

The article firstly deals with the question as to whether and to what extent international jurisdiction can be affected by pre-trial dispositions regarding the asserted claim by the parties to a lawsuit. Secondly, it examines the consequences resulting from the new EC Regulations Rome I and Rome II to the classification of claims out of culpa in contrahendo in terms of international jurisdiction. The background of the article consists of two decisions, one by the OLG (Higher Regional Court) Frankfurt/Main and one by the OLG München. The former concerned a case in which the defendant had pursued commercial resp. professional activities in the Member State of the consumer's domicile in accordance with Art. 15 sec. 1 lit. c) of the Brussels I Regulation at the time he concluded a contract with a consumer, but had ceased to do so before he was sued for damages in connection with the very contract. The latter – against which an appeal has meanwhile been dismissed by the BGH (German Federal High Court of Justice), cf. BGH, 10.2.2010, IV ZR 36/09 – concerned a case in which the party of a consumer contract had assigned his claim based on culpa

in contrahendo to the plaintiff, so that the plaintiff could file a lawsuit against the other party of the contract. Here the question arose as to whether or not the jurisdiction norm of § 29a ZPO (German Code of Civil Procedure) – which provides a special forum for cases concerning consumer contracts negotiated away from business premises – was also applicable, if the plaintiff was not the person who had concluded the contract. The OLG München negated this question. Apart from that the court decided that jurisdiction in this case could not be based on § 29 ZPO which provides a special forum at the place of the performance of the contract, either. This part of the decision gives reason to the examination as to whether or not all claims based on culpa in contrahendo can still be subsumed under § 29 ZPO. Since these claims are now subject to Art. 12 of the Rome II Regulation, it appears to be doubtful whether the traditional German classification of culpa in contrahendo as a contractual claim in terms of jurisdiction can be upheld.

- ***Ivo Bach:*** *"*Die Art und Weise der Zustellung in Art. 34 Nr. 2 EuGVVO: autonomer Maßstab versus nationales Zustellungsrecht" – the English abstract reads as follows:

Article 34 (2) Brussels I in principle allows courts to deny recognition and enforcement of a foreign (default) judgment when the defendant was not served with the document which instituted the proceedings "in a sufficient time and in such way as to enable him to arrange for his defence". As an exception to this principle, courts must not deny recognition and enforcement if the defendant failed to challenge the judgment in the country of origin. In its decision of 21 January 2010, the German Bundesgerichtshof (BGH) dealt with both aspects of Art. 34 (2) Brussels I. Regarding the defendant's obligation to challenge the judgment, the BGH – rightfully – clarified that the obligation exists even when the defendant does not gain knowledge of the judgment before the enforcement proceedings. In such a case the defendant may request a stay of the enforcement proceedings while challenging the judgment in the country of origin. Regarding the time and manner of the service, the BGH relied on the formal service requirements as provided in the German code of civil procedure (ZPO) – Germany being the country where service was effected. The latter part of the decision calls for criticism. In this author's opinion, in interpreting Art. 34 (2) Brussels I courts should not rely on national rules, but rather should look to autonomous criteria. As regards the manner of service, such autonomous

criteria may be taken from the minimum standards-catalogue in Arts. 13 and 14 EEO.

- ***Rolf A. Schütze:*** "Der gewöhnliche Aufenthaltsort juristischer Personen und die Verpflichtung zur Stellung einer Prozesskostensicherheit nach § 110 ZPO" – the English abstract reads as follows:

Under § 110 ZPO (German Code of Civil Procedure) the court – on application of the defendant – has to make an order for security for costs if the claimant is resident abroad but not resident in an EU or EWR Member State. The ratio of this provision is that the defendant who successfully defends a baseless claim should be able to enforce a cost order against the claimant. Residence means the place where a person habitually and normally resides. The decision of the Oberlandesgericht Munich rules that a company (or other legal entity) is ordinarily resident in a place if its centre of management is at that place. Whilst the former Reichsgericht and the Bundesgerichtshof rule that the amount of the security must cover the possible claim of the defendant for recompensation of costs for all possible instances, the Oberlandesgericht Munich states that only the costs for the current instance and the appeal up to the time when the defendant can file a new application for security can be included in the calculation. The decision in both of its aspects is in accordance with the ratio of § 110 ZPO.

- ***Peter Mankowski/Friederike Höffmann***: "Scheidung ausländischer gleichgeschlechtlicher Ehen in Deutschland?" – the English abstract reads as follows:

Same-sex marriages are on the rise if seen from a comparative perspective. In contrast, German constitutional law strictly reserves the notion of "marriage" to a marriage celebrated between man and woman. This must also have its impact in German PIL. Same-sex marriages are treated like registered partnerships and subjected to the special conflicts rule in Arts. 17b EGBGB, not to the conflicts rules governing proper marriage as contained in Art. 13–17 EGBGB. Hence, a proper divorce of a same-sex marriage can as such not be obtained in Germany but ought to be substituted with the dissolution of the registered partnership inherent in the so-called "marriage". Although theoretically a principle of recognition might be an opportunity (if one succumbs to the notion

of such principle at all), the limits of such recognition would be rather strict in Germany nonetheless.

- ***Alexander R. Markus/Lucas Arnet***: "Gerichtsstandsvereinbarung in einem Konnossement" – the English abstract reads as follows:

In its decision 7 Ob 18/09m of 8 July 2009 the Austrian Supreme Court of Justice (Oberster Gerichtshof, OGH), judged as substance of the case, the validity of an agreement conferring jurisdiction incorporated in a bill of lading, its character as well as its applicability to a civil claim for damages resulting from a breach of the contract of carriage on which the bill of lading was based. Aside from that, questions concerning the relation between the Lugano-Convention (LC) and the Brussels I Regulation arise in this judgement. An agreement conferring jurisdiction included in a bill of lading issued unilaterally by the carrier fulfils the requirements established in art. 17 par. 1 lit. c LC since in the international maritime trade the incorporation of agreements conferring jurisdiction in bills of lading can clearly be considered to be a generally known and consolidated commercial practice. Concerning the (non-)exclusivity of the agreement conferring jurisdiction (art. 17 par. 1/par. 4 LC) the OGH makes a distinction from its earlier case law and bases the decision on the European Court of Justices judgement of 24 June 1986, case 22/85, Rudolf Anterist ./. Credit Lyonnais. According to the in casu applicable Swiss Law the prorogatio fori in the bill of lading covers the contract of carriage as well, although in principle the contract does not depend on the bill of lading. Lastly, to identify the relation between the LC and the Brussels I Regulation, the analogous application of art. 54b par. 1 LC is decisive.

- ***Götz Schulze:*** "Vorlagebeschluss zur intertemporalen Anwendung der Rom II-VO" – the English abstract reads as follows:

The Engl. High Court in Homawoo v. GMF has referred the question concerning the interpretation of Art. 31 and 32 of the Rome II-Regulation to the European Court of Justice for ay Preliminary Ruling according to Art. 267 TFEU. Judge Slade recommends to specify Art. 31 Rome II-Regulation (entry into force) by the date of application on 11 January 2009 set out in Art. 32 Rome II-Regulation. Judge Tomlinson in Bacon v. Nacional Suiza prefers a strict literal interpretation with an entry into force on 20 August 2007 and a procedural

understanding of Art. 32 Rome II-Regulation.

- ***Bettina Heiderhoff:*** **"**Neues zum gleichen Streitgegenstand im Sinne des Art. 27 EuGVVO" – the English abstract reads as follows:

The Austrian High Court (OGH) found that two actions do not involve the same cause of action when an identical claim is based on two different rules from different national laws and these rules stipulate different requirements. The decision is in conformity with the Austrian dogma that identity of the actions and lis pendens do not apply where a party bases a second claim on new facts. In other words, the identity of the cause of action depends on the facts presented to the court, unlike in Germany where the identity depends on the objective factual situation, no matter whether the claimant has presented all facts to the court in the first action or not. This Austrian point of view threatens uniform jurisdiction in the EU. It allows repetitive actions in different member states and, consequently, may lead to contradicting judgements. It encourages forum shopping. Therefore, it is a pity that the OGH did not present the case to the ECJ under Art. 267 TFEU.

- ***Carl Friedrich Nordmeier:*** "Divergenz von Delikts- und Unterhaltsstatut bei tödlich verlaufenden Straßenverkehrsunfällen: österreichischer Trauerschadensersatz und brasilianisches pretium doloris vor dem Hintergrund der Europäisierung des Kollisionsrechts" – the English abstract reads as follows:

Claims for compensation based on the loss of a maintenance debtor in transborder cases demand the coordination of the law applicable to tort and the law applicable to maintenance obligations. In the present case of the Austrian Supreme Court (Oberster Gerichtshof), concerning a fatal traffic accident in Austria, whose victims were Brazilian nationals, Austrian tort law and Brazilian maintenance law had to be applied. From the Austrian perspective, the Hague Convention on the Law Applicable to Traffic Accidents has priority over the national conflict of law rules and over the Rome II Regulation. This raises questions relating to the possibility of a choice of law in cases that fall within the scope of application of the Convention. Austrian law does not provide a pension for the compensation of grief suffered by relatives of a victim of a fatal traffic accident. A pretium doloris of the Brazilian law is to be qualified as a

question of tort and was rightly not awarded.

- ***Arkadiusz Wowerka***: "Polnisches internationales Gesellschaftsrecht im Wandel" – the English abstract reads as follows:

The Polish applicable international private law provides no specific regulations on the international private law of companies. Also the judicature has up till now delivered no decisions in this matter. The essential principles of the international private law of the companies were developed by the doctrine. Within the frame of the planned reform of the international private law the government has presented the draft of a new regulation on the international private law which, with its provisions on the legal entities and organised entities, should fill the current gap in the subject area. The present article gives an overview on the autonomous international private law of the companies and its current evolution, dealing with the issues of the definition of the company, rules for determination of the law governing the companies, scope of the law governing the companies and finally the question of recognition of companies, in each case with references to the proposals of the government draft regulation.

- ***Christel Mindach:*** "Anerkennung und Vollstreckung von Drittlandsschiedssprüchen in Handelssachen in den GUS-Mitgliedstaaten" – the English abstract reads as follows:

After the collapse of the Soviet Union, the newly founded States, establishing the Commonwealth of Independent States (CIS), had to build a completely new legal system. Quite naturally the legislation of international commercial arbitration played a secondary role during the first years of transformation, apart from the CIS Members Russia, Ukraine and Belarus. In the course of legislation process the most CIS States couldn't base on own legal traditions or experiences in this field. This insufficient situation changed in principle only just, when these States decided about the accession to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. With the exemption of Tajikistan and Turkmenistan the New York Convention came in force for all CIS Members in the meantime. The following article describes in a concise manner some of the fundamental requirements for the recognition and enforcement of foreign arbitral awards in commercial matters rendered in

the territory of a State other than a CIS State under the appropriate national laws of CIS States including the procedure of compulsory enforcement.

- ***Erik Jayme*** on the conference on the Proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, which took place in Vienna on 21 October 2010: "Der Verordnungsvorschlag für ein Europäisches Erbkollisionsrecht (2009) auf dem Prüfstand – Tagung in Wien"
- ***Stefan Arnold:*** "Vollharmonisierung im europäischen Verbraucherrecht – Tagung der Zeitschrift für Gemeinschaftsprivatrecht (GPR)" – the English abstract reads as follows:

On the 4th and 5th of June 2010, the Zeitschrift für Gemeinschaftsprivatrecht (Journal for EU-Private Law, JETL) and the Frankfurter Institut für das Recht der Europäischen Union (Frankfurt Institute for the Law of the European Union, FIREU) hosted a conference on „Full Harmonisation in European Consumer Law" at the Europa-Universität in Frankfurt (Oder). Prof. Dr. Michael Stürner (Frankfurt/Oder) had invited to the conference. The speakers addressed not only the concept of full harmonisation but also the European framework for the harmonisation of Private Law and the consumer protection achieved by the the rules on Conflict of Laws. Moreover, the Draft Common Frame of Reference and the effect of full harmonisation on specific fields of law were discussed. The participants also debated the practical effects of possible full harmonisation measures.

- ***Erik Jayme*** on the congress in Palermo on the occassion of the bicentenary of Emerico Amari's birth: "Rechtsvergleichung und kulturelle Identität – Kongress zum 200. Geburtstag von Emerico Amari (1810–1870) in Palermo"