Drahozal on the Economics of Comity

Christopher Drahozal (University of Kansas Law School) has posted Some Observations on the Economics of Comity on SSRN.

> *Comity is the deference one State shows to the decisions of another State. Comity is manifested in an array of judicial doctrines, such as the presumption against the extraterritorial application of statutes and the presumption in favor of recognition of foreign judgments. Comity does not require a State to defer in every case (it is not "a matter of absolute obligation"), but determining when comity requires deference poses difficult doctrinal and theoretical issues.*
>
> *This paper offers some observations on the economics of comity in an attempt to provide insights into those issues. It first describes the (largely unsatisfactory) attempts to define comity and identifies the various judicial doctrines that are based on comity. Generalizing from the existing literature, which uses game theory (most commonly the prisoners' dilemma game) to analyze legal doctrines based on comity, the paper then sets out a basic and tentative economic analysis of comity. Comity often serves a cooperative function: courts rely on comity as the basis for doctrines that enhance cooperation with other States. In such cases, refusing to grant comity to a decision of another State constitutes defection from the cooperative solution. But if the original decision itself constitutes defection — such as a State opportunistically entering a judgment against a foreign citizen — refusing to grant comity would not be defection but would instead be an attempt to sanction the other State's defection. Thus, the central inquiry when a court decides whether to grant comity can be framed as whether the State decision being examined constitutes cooperation or defection. Further, given the uncertainty courts face in making such a determination, comity itself then can be seen as establishing a default presumption that a particular type of State decision constitutes cooperation (or, in cases in which courts refuse to grant comity, as a default presumption of defection).*
>
> *The paper then argues that any rule a court adopts on the basis of comity should be treated as a default rule rather than a mandatory rule. The argument*

in favor of default rules over mandatory rules is a familiar one, and seems to apply well here. Thus, as U.S. and U.K. courts have held — but contrary to decisions of the European Court of Justice — comity concerns should not preclude a court specified in an exclusive forum selection clause from entering an anti-suit injunction against foreign court litigation. An arbitration clause, by comparison, provides a much weaker case for finding that the parties contracted around the comity-based default. Finally, the paper suggests possible avenues for future research: in particular, examining the importance of rent-seeking and judicial incentives in the economics of comity.

The paper is forthcoming in *The Economic Analysis of International Law* (Eger & Voigt eds, 2013).

Alien Tort Statute

For those interested in current thinking on the United States Supreme Court's consideration of the Alien Tort Statute in *Kiobel v. Royal Dutch Petroleum*, SCOTUSBlog has a fascinating online symposium available here.

Eidenmüller on the Optional Common European Sales Law as a Regulatory Tool

Horst Eidenmüller, Professor at the University of Munich and the University of Oxford, has posted "**What Can Be Wrong with an Option? An Optional Common European Sales Law as a Regulatory Tool"** on SSRN. The paper can

be downloaded here. The abstract reads as follows:

> *This paper analyses the proposed optional Common European Sales Law (CESL) as a regulatory tool. In principle, an optional CESL can be a sensible means to achieve some level of harmonization and the associated transaction costs savings plus network benefits and at the same time subject the CESL to a market test. However, whether these goals will actually be achieved depends on the design conditions and the content of the option. The CESL option which is currently on the table is harmful. The Draft CESL (DCESL) is a defective product. It might nevertheless become a success on the European market for contract laws or be at least highly influential as a reference text.*

Regulation on the Mutual Recognition of Protection Measures in Civil Matters

In June 2011 the European Council adopted a Resolution entitled "Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings", immediately published (OJ *C* 187, June 2011, 28th). I might of course be mistaken, but it seems to me that both the Resolution and its immediate consequences in the civil realm have gone largely unnoticed . Let's fill (if only a bit) the gap.

The document starts reminding that in the Stockholm programme "An open and secure Europe serving the citizen", the European Council had stressed the importance to provide special support and legal protection to those who are most vulnerable, such as persons subjected to repeated violence in close relationships, victims of gender-based violence, or persons who fall victim to other types of crimes in a Member State of which they are not nationals or residents. In the

same vein, responding to the Stockholm programme, the European Commission has proposed a package of measures on victims of crime including a Regulation on the mutual recognition of protection measures in civil matters [Com(2011) 276 *final*, May 2011, 18]. The Regulation intends to help preventing harm and violence and ensure that victims who benefit from a protection measure taken in one Member State are provided with the same level of protection in other Member States, should they move or travel there; and that protection be awarded without the victim having to go through additional procedures. In order to ensure a quick, cheap and efficient mechanism of circulation of protection measures in the European Union, the *rationale* of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ('Brussels II-bis'), and in particular Articles 41 and 42 (therefore automatic recognition and the abolition on intermediate procedures such as exequatur) thereof, has been followed.

The fact that the proposal follows the *rationale* of existing EU instruments on judicial cooperation in civil and commercial matters implies that many provisions are similar or equal to the correspondent articles in the mentioned legislation. This is not a problem in itself; it might be, nevertheless, as certain protection measures are already covered by the Brussels I and Brussels II-bis Regulations. It is therefore important to clarify the articulation of the proposal with these regulations. According to the Commission, as the new Regulation establishes special rules in relation to protection measures, following a general principal of law it shall supersede the general rules set out by Brussels I. As for the Regulation Brussels II-bis, the aim of which is to centralise all proceedings relating to a given divorce or legal separation the situation is different: the proposal must not jeopardise rules governing jurisdiction and the recognition of judgments contained in the Brussels II-bis Regulation by offering the possibility to seize the jurisdiction of another Member State as regards the protection measures taken in the context of the ongoing proceedings. For this reasons, all protection measures entering into the scope of Brussels II-bis shall continue to be governed by this instrument. Examples of measures that do not fall under the application of Brussels II-bis are protection measures which would concern a couple which has not been married, same sex partners or neighbours.

The proposal provides for a speedy and efficient mechanism to ensure that the

Member State to which the person at risk moves will recognise the protection measure issued by the Member State of origin without any intermediate formalities. A standardised certificate issued by the competent authority of this Member State, either ex-officio or on request of the protected person, will contain all information relevant for the recognition. The beneficiary of the measure will contact the competent authorities in the second Member State and provide them with the certificate. The competent authorities of the second Member State will notify the person causing the risk about the geographical extension of the foreign protection measure, the sanctions applicable in case of its violation and, where applicable, ensure its enforcement.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2012)

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

- ***Eva-Maria Kieninger***: "Das auf die Forderungsabtretung anzuwendende Recht im Licht der BIICL-Studie" – the English abstract reads as follows:

> *In the Rome I Reg., the question of the law applicable to priority conflicts arising from the assignment or subrogation of claims has deliberately been left open (see Art. 27 (2) Rome I Reg.). As a first step towards a future solution, the EU-Commission has requested the British Institute of International and Comparative Law (BIICL) to prepare an empirical and legal study and to elaborate options for a legislative solution. The article presents the study and partly criticises its proposals. The introduction of a restricted choice of law seems overly complex and may lead to unforeseeable results, so that the rather limited addition of flexibility seems to be outweighed by its drawbacks. The alternatively suggested applicability of the law governing the claim goes not far enough in its exemptions of bulk assignments whereas the last proposal,*

putting forward the law of the assignor's domicile is accompanied by exemptions which are not elaborated with the necessary precision and possibly too broad. The article welcomes, however, the BIICL's proposal to extend any future rule on priority conflicts in Art. 14 Rome I Reg. to all proprietary relationships including that between assignor and assignee.

- ***Peter Mankowski***: "Zessionsgrundstatut v. Recht des Zedentensitzes – Ergänzende Überlegungen zur Anknüpfung der Drittwirkung von Zessionen" – the English abstract reads as follows:

The proprietary aspects erga omnes of the assignment of debts have not been dealt with by Art. 14 Rome I Regulation. They are a topic of constant debate which appears to have come to some stalemate in recent times, though. But there still are some aspects and issues which deserve closer inspection than they have attracted yet, in particular the interfaces with the European Insolvency Regulation and the UN Assignment Convention.

- ***Kilian Bälz***: "Zinsverbote und Zinsbeschränkungen im internationalen Privatrecht" – the English abstract reads as follows:

This article challenges the widely held opinion that provisions prohibiting and restricting interest are mandatory provisions in the sense of Art. 9 Rome I Regulation. According to this opinion, provisions prohibiting and restricting interest at the debtor's seat may apply also in the case another law has been determined as the proper law of the contract.Prohibitions on taking interest which are based on the Islamic legal tradition, however, demonstrate that it is not appropriate to treat respective restrictions generally as mandatory. Normally, there are far reaching exemptions, so that one cannot speak of a prohibition of interest of general application in Muslim jurisdictions. Against this backdrop it is more than questionable whether the respective provisions are mandatory in the sense of Art. 9 (1) of the Rome I Regulation.

Further, interest rate caps normally are determined in view of a specific currency. From this it follows that under Art. 9 (3) Rome I Regulation interest rate caps can only be recognised in cases where there is a congruence of applicable law and currency. Finally, interest rate caps cannot be recognised where local banks are exempted from the respective restrictions. In the latter

case, the interest rate cap merely serves the purpose of protecting the local credit market. As a result, provisions prohibiting or restricting interest can only be recognised as "mandatory provisions" in very exceptional circumstances.

- ***Stefan Arnold***: "Entscheidungseinklang und Harmonisierung im internationalen Unterhaltsrecht" – the English abstract reads as follows:

Within a world which becomes smaller and smaller, Private International Law also gains importance with respect to the area of maintenance obligations. Harmonization measures – like the new European rules on the law applicable to maintenance obligations – promise legal certainty here. The new regime established by the Hague Protocol from November 23rd 2007 is not sufficiently coordinated with the European Regulation No. 4/2009 on Maintenance Obligations, however. This paper introduces into the main aspects of the new rules on the law applicable to maintenance obligations and suggests a way to establish better coherence between the Conflict of Laws rules and the procedural possibilities established by the Regulation No. 4/2009.

- ***Kurt Siehr***: "Kindesentführung und EuEheVO – Vorfragen und gewöhnlicher Aufenthalt im Europäischen Kollisionsrecht" – the English abstract reads as follows:

The annotated cases deal with alleged child abductions covered by the Hague Abduction Convention of 1980 and the Brussels II Regulation of 2003. The case McB. of the European Court of Justice (ECJ) had to decide whether an Irish unmarried father of three children had custody rights with respect to his children in order to qualify him to prevent a removal of the children from their home in Ireland and, if removed to England, ask for return to Ireland under the Hague Abduction Convention of 1980 and the Brussels II Regulation of 2003. The ECJ decided very quickly in the PPU-proceedings (procédure préjudicielle d'urgence) and found that at the time of removal the father had no right of custody under Irish law and therefore could not blame the mother of having illegally removed the children to England. This is correct. In the PPU-proceedings the ECJ could not go into details and evaluate Irish law under the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights.

In the cases of the ECJ in Mercredi v. Chaffe and of the Austrian Supreme Court of 16 November 2010 the term "habitual residence" was correctly defined and could be applied by the lower national courts. In Mercredi v. Chaffe the English Court of Appeal finally raised doubts whether there was a wrongful removal of the child from England to the French overseas department La Réunion at all.

- ***Francis Limbach***: "Nichtberechtigung des Dritten zum Empfang einer der Insolvenzmasse zustehenden Leistung: Zuständigkeit, Qualifikation und Berücksichtigung relevanter Vorfragen" – the English abstract reads as follows:

Upon opening German insolvency proceedings, the insolvency debtor loses the right to dispose of his assets. Thus, holding a claim against another person, the insolvency debtor is legally unable to instruct the latter to pay a third party the sum owed. In such an event, the insolvency administrator may demand recovery of the amount received by the third party on the grounds of Paragraph 816(2) of the German Civil Code. The Higher Regional Court of Hamm had to deal with such a case: It involved an insolvency debtor who had presumably instructed a party with a debt to her to perform not to herself but to her mother who eventually received the payment. The insolvency administrator then filed a claim against the mother to recover the respective sum. As the amount paid might have originated in a contract governed by Portuguese law, the Court had to consider whether the filed action appeared as an "annex procedure" related to an insolvency case, implying an international jurisdiction on the grounds of Article 3(1) of the European Insolvency Regulation. Furthermore, in order to identify the applicable law in this matter, the Court had to determine whether the respective legal relationship was to be qualified as of insolvency or as of general private law. At last, it had to consider relevant preliminary questions regarding the source of the claim filed.

- ***Tobias Helms***: "Vereinbarung von Gütertrennung durch Wahl des Güterstandes anlässlich einer Eheschließung auf Mauritius" – the English abstract reads as follows:

In this case the German-based parties (the husband being a German citizen and the wife a Mauritian national) appeared before the Federal Supreme Court

(Bundesgerichtshof) to contest whether they had validly agreed on the matrimonial property regime of Gütertrennung (separation of goods) when they concluded their marriage in Mauritius. Mauritian law does not provide for a default statutory matrimonial property regime. The engaged couple is instead given a choice between separation of goods and community of goods. The courts of lower instance considered the fact that the couple had chosen separation of goods while concluding their marriage in Mauritius to be irrelevant as the matrimonial property regime in this case is governed by German law according to Art. 15 Sect. 1 EGBGB in connection with Art. 14 Sect. 1 No. 2 EGBGB. However, the Federal Supreme Court correctly disagreed with this assessment and held that the parties had validly agreed to adopt the German Gütertrennung. It was held that the deciding factor was that the spouses had given mutual declarations of their intent to regulate their property regime. This procedure was held to be equivalent to the conclusion of a marriage contract under German law (§ 1408 BGB).

- ***Rolf Wagner***: "Vollstreckbarerklärungsverfahren nach der EuGVVO und Erfüllungseinwand – Dogmatik vor Pragmatismus?" – the English abstract reads as follows:

Article 45 of Council Regulation (EC) No 44/2001 (Brussels I-Regulation) deals with the limits within which the national courts of the State of enforcement may refuse or revoke a declaration of enforceability. The European Court of Justice (ECJ) had to decide whether this provision precludes the court with which an appeal is lodged under Article 43 or Article 44 of that regulation from refusing or revoking the declaration of enforceability on the ground that there had been compliance with the judgement in respect of which the declaration of enforceability was obtained. The article discusses the decision of the ECJ and raises the question whether the German law has to be changed.

- ***Katharina Hilbig-Lugani***: "Forderungsübergang als materielle Einwendung im Exequatur- und Vollstreckungsgegenantragsverfahren" – the English abstract reads as follows:

The German Federal Supreme Court's decision concerns a complaint against a declaration of enforceability pronounced for a Swiss judgement under the Hague Convention of 2 October 1973 on the Recognition and Enforcement of

Decisions Relating to Maintenance Obligations and the German execution provisions, contained until 18 June 2011 in the AVAG, now in the new AUG. The case raised the well-discussed questions of whether the court deciding on enforceability could take into account defenses of the debtor based on a modification of the judgement, on partial performance of the maintenance and on reasons to modify the judgement. But it particularly raised the new question of the effect of the legal transfer of the debt enshrined in the judgment to the public authority who has provided the maintenance creditor with subsidiary social security benefits. Convincingly, the Federal Supreme Court decided that this as well qualified as a defense to be taken into account in the exequatur decision (under Section 12 AVAG). As before, the court seems to limit its statements to those defenses which are undisputed or which are based on circumstances having acquired the force of res iudicata. Pursuant to the author, the legal appreciation of the claim's transfer should be the same as the one provided by the Federal Supreme Court under the new German execution provisions in the AUG and under the maintenance regulation 4/2009.

- ***Andreas Piekenbrock***: "Ansprüche gegen den ausländischen Schuldner in der deutschen Partikularinsolvenz"
- ***Eva-Maria Kieninger***: "Abtretung im Steuerparadies" – the English abstract reads as follows:

The Austrian Supreme Court has held that the account debtor of a claim in damages cannot rely on provisions subjecting the effectiveness of an assignment to the (prior) consent of the account debtor, if those provisions do not form part of the law governing the assigned claim (art 12 (2) Rome Convention). The case note discusses the possible impact of the decision on the presently debated reform of art 14 Rome I Reg. It suggests that the term "assignability" in art 14 (2) Rome I Reg. should be replaced by a more precise definition of those rules which limit or exclude the assignability of claims in the interest of the debtor.

- ***Helen E. Hartnell:*** U.S. Court of Appeals Rules on Effect of One Country's Article 96 Reservation on Oral Contract Governed by the CISG (in English)

The U.S. Court of Appeals for the Third Circuit has decided an important case on Article 96 CISG, which permits a State "whose legislation requires contracts of sale to be concluded in or evidenced by writing" to make a declaration of inapplicability in regard to any CISG provision that disavows a writing requirement for international sales contracts. Only 11 Contracting States have such declarations in effect. In Forestal Guarani S.A. v. Daros International, Inc. (2010), the court addressed the question of how to apply Article 96 to a case involving one party with its place of business in Argentina, which made an Article 96 declaration, and one based in the U.S., which made no such declaration. The court embraced what it called the "majority approach" and held that the Article 96 declaration did not absolutely bar an action to enforce the oral contract. Rather, the court held that Article 96 CISG gives rise to a gap that permits resort to the forum's private international law rules per Article 7(2), and remanded to the lower court with instructions on how to proceed. If Argentine law governs, then the lower court should examine Argentine domestic law to ascertain the enforceability of the oral contract. However, if U.S. law governs, then the lower court should apply the U.S. domestic law to the issue of enforceability, in lieu of CISG provisions disavowing a writing requirement. The article criticizes the result for its turn to domestic law in the latter situation, and questions the viability of Article 96 declarations by States that do not totally prohibit oral contracts.

- ***Hans Jürgen Sonnenberger***: "Deutscher Rat für Internationales Privatrecht – Spezialkommission „Drittwirkung der Forderungsabtretung"
- ***Hans Jürgen Sonnenberger***: "German Council for Private International Law – Special Committee: "Third-party effects of assignment of claims"

French Court Rules Parallel Litigation in France Bars Recognition of Foreign Judgment

In a judgment of June 20th, 2012, the French supreme court for private and criminal matters (*Cour de cassation*) ruled that parallel litigation in France could be a ground for denying recognition to a foreign judgment.

The case was concerned with an Algerian couple separating after 45 years of marriage. The couple had married in Algeria in 1962. They then moved to France where they were to spend 45 years and have 6 children. In June 2007, the husband left and went back to Algeria. Seven months later, in February 2008, the wife initiated proceedings in France seeking maintenance.

In April 2008, the husband sought divorce in Algeria and obtained it a month and a half later, in May 2008. He then relied on the Algerian judgment in France, claiming that it had *res judicata* and that the French proceedings should thus be terminated.

Fraude au jugement

The *Cour de cassation* denied recognition to the Algerian judgment on the ground that the wife had first sued in France, and that the husband had sued "in haste" for the purpose of defeating the French proceedings.

Algerian and Morrocan divorce orders are regularly denied recognition in France on the ground that they violate public policy (either because the wife is not informed of the proceedings, or because Islamic law is discriminatory against women). However, they are virtually never denied recognition on the ground of strategic behavior of the parties (*fraude*).

The theory is that *fraude* is a ground for denying recognition to foreign judgments. *Fraude* occurs when one party sues abroad for the **sole** purpose of avoiding French justice. French scholars have long wondered, however, whether *fraude* can be found in cases where the party allegedly frauding has a strong connection with the foreign court, which is another requirement for recognizing

foreign judgments under the French common law of judgments. This is because it seems hard to demonstrate that a party domiciled in a given country would petition his own courts for the sole reason of defeating French justice: he may just be suing at home because he lives there.

I had reported on a couple of jugdments of the *Cour de cassation* ruling that American wives suing in the U.S. right after their French husband had initiated proceedings in France were not committing *fraude* as it seemed perfectly legitimate for them to sue at home. Much like the Algerian husband, they had first lived as a family in France, and had then left their husband and gone back home where they had been living for more than 6 months. This was enough to make it legitimate, from a French perspective, to sue at home.

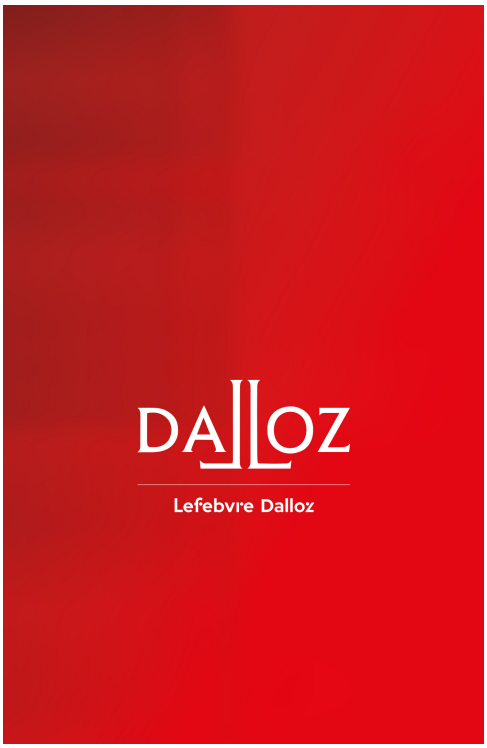
These cases are hard to reconcile with the Algerian one. The Algerian husband had moved to Algeria seven months before his wife sued him before French courts.

Why was it illegitimate, then, for him to sue at home?

- Because he had not taken the kids with him?
- Because *fraude* can only be committed by males, and not by females?
- Because the law is different for Arabs and for Americans?

Liber Amicorum Patrick Courbe

A French Liber Amicorum was recently published in memory of the late Patrick Courbe, a French scholar of private international law and family law who taught at the University of Rouen (*Mélanges à la mémoire de Patrick Courbe ; le droit entre tradition et modernité*).



It includes several papers on private international law issues.

- Bertrand Ancel (Univ. Paris II – Panthéon-Assas), *L'épreuve de vérité (brève réflexion en surface sur la transcription des actes de naissance des enfants issus d'une gestation pour autrui délocalisée)*
- Carine Brière (Univ. Rouen), *Le droit des transports: terrain de prédilection des conflits de conventions internationales*
- Pierre Callé (Univ. Caen Basse-Normandie), *Le notaire, les actes notariés et le droit international privé*
- Amélie Dionisi-Peyrusse (Univ. Rouen), *La conformité à l'article 8 de la CEDH des refus de reconnaissance des situations familiales créées à l'étranger au nom de l'ordre public international*
- Hugues Fulchiron (Univ. Jean Moulin – Lyon III), *Droit à une nationalité, droit à la nationalité, droit à sa nationalité? (variations sur le thème de l'évolution contemporaine des rapports entre individu et nationalité).*
- Hélène Gaudemet-Tallon (Univ. Paris II – Panthéon-Assas), *Le divorce international depuis la communication de Patrick Courbe au Comité français de droit international*
- Johanna Guillaumé (Univ. du Havre), *Ordre public plein, ordre public atténué, ordre public de proximité: quelle rationalité dans le choix du juge?*
- Fabienne Jault-Seseke (Univ. Rouen), *Mariages et partenariats*

enregistrés: critique de la diversité des méthodes de droit international privé

- Horatia Muir Watt (École de droit de Sciences-po), *Concurrence ou confluence? Droit international privé et droits fondamentaux dans la gouvernance globale*
- David Robine (Univ. Rouen), *L'appréhension de la situation de confusion des patrimoines dans le cadre du règlement n° 1346/2000 du 29 mai 2000*

More details on the book are available here.

English-language Commentary on the Rome I and II Regulations

It has not yet been mentioned on this blog that there is a new English-language commentary on the Rome I and II Regulations out there. Edited by *Gralf-Peter Calliess* from the University of Bremen and published by Kluwer Law International, the commentary provides an in-depth analysis of the new European conflict rules on contractual and non-contractual obligations. More information is available on the publisher's website.

The official announcement reads as follows:

> *The year 2009 marks a revolution in European conflict of laws. The so-called Rome I and II Regulations, both entering into force this year, will bind the Member States of the European Union to a common set of rules for the choice of law in international private law disputes. They apply to both contractual and non-contractual disputes, their reach even extends to the application of non-Member State law. This poses great challenges to Courts and practitioners in every EU Member State, as there is only little case-law and doctrinal literature on the new rules, the uniform application of which will be overseen by the European Court of Justice. The Commentary answers to these challenges. It is an indispensable companion for both academics and legal professionals seeking their way through the Regulations. Renowned conflict of laws scholars*

comment every provision of the Regulations in a systematic, thorough and comprehensive manner, making them accessible to a broad international legal audience.

Mirroring the German tradition of scholarly commentaries on Parliamentary Acts, the authors are selected from the distinguished group of relatively young German private international law scholars, whose exceptionally high qualifications are represented by their passing through the German "Habilitation"-system (second book requirement) as well as their proven ability to publish in the English language .

The list of authors reads as follows:

- Professor Dr. Dietmar Baetge, University of Hamburg
- Assistant Professor Dr. Frank Bauer, University of Munich
- Professor Dr. Benedikt Buchner, LL.M. (UCLA), University of Bremen
- Professor Dr. Martin Franzen, University of Munich
- Professor Dr. Martin Gebauer, University of Heidelberg
- Professor Dr. Urs Peter Gruber, University of Halle
- Professor Dr. Axel Halfmeier, Frankfurt School of Finance
- Professor Dr. Jan von Hein, University of Trier
- Professor Dr. Lars Klöhn, LL.M. (Harvard), University of Marburg
- Assistant Professor Dr. Leander D. Loacker, University of Zurich
- Research Associate Moritz Renner, University of Bremen
- Assistant Professor Dr. Florian Roedl, University of Bremen
- Professor Dr. Boris Schinkels, LL.M. (Cambridge), University of Greifswald
- Professor Dr. Goetz Schulze, University of Lausanne
- Professor Dr. Matthias Weller, Mag. rer. publ., EBS Law School Wiesbaden

Book: Pocar – Viarengo – Villata (Eds.), Recasting Brussels I

The Italian publishing house CEDAM has published a new volume on the review of the Brussels I regulation: "Recasting Brussels I". The book, edited by *Fausto Pocar*, *Ilaria Viarengo* and *Francesca Clara Villata* (all from the Univ. of Milan) includes twenty-five papers divided into five parts, devoted to the scope of application (I), rules on jurisdiction (II), choice-of-court agreements (III), coordination of proceedings (IV) and recognition and enforcement of judgments (V).

Here's the table of contents (.pdf file):

PART I – SCOPE OF APPLICATION

- *Rainer Hausmann,* The Scope of Application of the Brussels I Regulation;
- *Ilaria Viarengo*, The Removal of Maintenance Obligations from the Scope of Brussels I;
- *Claudio Consolo – Marcello Stella*, Brussels I Regulation Amendment Proposals and Arbitration;
- *Peter Kindler*, Torpedo Actions and the Interface between Brussels I and International Commercial Arbitration;
- *Stefano Azzali – Michela De Santis*, Impact of the Commission's Proposal to Revise Brussels I Regulation on Arbitration Proceedings Administered by the Chamber of Arbitration of Milan.

PART II – RULES ON JURISDICTION

- *Burkhard Hess*, The Proposed Recast of the Brussels I Regulation: Rules on Jurisdiction;
- *Riccardo Luzzatto*, On the Proposed Application of Jurisdictional Criteria of Brussels I Regulation to Non-Domiciled Defendants;
- *Fausto Pocar*, A Partial Recast: Has the Lugano Convention Been Forgotten?;
- *Alexander R. Markus*, Harmonisation of the EU Rules of Jurisdiction Regarding Defendants Outside the EU. What About the Lugano Countries?;

- *Ruggiero Cafari Panico*, Forum necessitatis. Judicial Discretion in the Exercise of Jurisdiction;
- *Marco Ricolfi*, The Recasting of Brussels I Regulation from an Intellectual Property Lawyer's Perspective;
- *Eva Lein*, Jurisdiction and Applicable Law in Cross-Border Mass Litigation;
- *Zeno Crespi Reghizzi*, A New Special Forum for Disputes Concerning Rights in Rem over Movable Assets: Some Remarks on Article 5(3) of the Commission's Proposal.

PART III – CHOICE-OF-COURT AGREEMENTS

- *Ilaria Queirolo*, Prorogation of Jurisdiction in the Proposal for a Recast of the Brussels I Regulation;
- *Christian Kohler*, Agreements Conferring Jurisdiction on Courts of Third States;
- *Francesca C. Villata*, Choice-of-Court Agreements in Favour of Third States' Jurisdiction in Light of the Suggestions by Members of the European Parliament.

PART IV – COORDINATION OF PROCEEDINGS

- *Luigi Fumagalli*, Lis Alibi Pendens. The Rules on Parallel Proceedings in the Reform of the Brussels I Regulation;
- *Pietro Franzina*, Successive Proceedings over the Same Cause of Action: A Plea for a New Rule on Dismissals for Lack of Jurisdiction;
- *Lidia Sandrini*, Coordination of Substantive and Interim Proceedings;
- *Cristina M. Mariottini*, The Proposed Recast of the Brussels I Regulation and Forum Non Conveniens in the European Union Judicial Area.

PART V – RECOGNITION AND ENFORCEMENT OF JUDGMENTS

- *Sergio M. Carbone*, What About the Recognition of Third States' Foreign Judgments?;
- *Thomas Pfeiffer*, Recast of the Brussels I Regulation: The abolition of Exequatur;
- *Stefania Bariatti*, Recognition and Enforcement in the EU of Judicial Decisions Rendered upon Class Actions: The Case of U.S. and Dutch Judgments and Settlements;

- *Manlio Frigo*, Recognition and Enforcement of Judgments on Matters Relating to Personality Rights and the Recast Proposal of the Brussels I Regulation;
- *Marco De Cristofaro*, The Abolition of Exequatur Proceedings: Speeding up the Free Movement of Judgments while Preserving the Rights of the Defense.

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Title: Recasting Brussels I, edited by *F. Pocar*, *I. Viarengo* and *F.C. Villata*, CEDAM (Series: Studi e pubblicazioni della Rivista di diritto internazionale privato e processuale – Volume 76), Padova, 2012, XXIV – 382 pages.

ISBN 9788813314699. Price: EUR 32,50. Available at CEDAM.

(Many thanks to Prof. Francesca Villata for the tip-off)

Issue 2012.2 Nederlands Internationaal Privaatrecht

The second issue of 2012 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* includes the following articles on Recognition of (Dutch) Mass Settlement in Germany, the CLIP Principles, the European Patent Court and case note on Brussels I and the Unknown Address (Lindner):

Axel Halfmeier, Recognition of a WCAM settlement in Germany, p. 176-184. The abstract reads:

The Dutch 'Wet Collectieve Afwikkeling Massaschade'(WCAM) [Collective Settlements Act] has emerged as a noteworthy model in the context of the European discussion on collective redress procedures. It provides an opportunity to settle mass claims in what appears to be an efficient procedure. As the WCAM has been used in important transnational cases, this article looks at questions of

jurisdiction and the recognition of these court-approved settlements under the Brussels Regulation. It is argued that because of substantial participation by the courts, such declarations are to be treated as 'judgments' in the sense of the Brussels Regulation and thus are objects of recognition in all EU Member States. Written from the perspective of the German legal system, the article also takes the position that the opt-out system inherent in the WCAM procedure does not violate the German ordre public, but is compatible with fair trial principles under the German Constitution as well as under the European Human Rights Convention. The WCAM therefore appears as an attractive model for the future reform of collective proceedings on the European level.

Mireille van Eechoud & Annette Kur, Internationaal privaatrecht in intellectuele eigendomszaken – de 'CLIP' Principles, p. 185-192. The English abstract reads:

The European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP) presented its Principles in November 2011 to an international group of legal scholars, judges, and lawyers from commercial practice, governments and international organisations. This article sets out the objectives and principal characteristics of the CLIP Principles. The Principles are informed by instruments of European private international law, but nonetheless differ in some important respects from the rules of the Brussels I Regulation on jurisdiction and the Rome I and II Regulations on the law applicable to contractual and non-contractual obligations. This is especially so in situations where adherence to a strict territorial approach creates significant problems with the efficient adjudication of disputes over intellectual property rights or undermines legal certainty. The most notable differences are discussed below.

M.C.A. Kant, A specialised Patent Court for Europe? An analysis of Opinion 1/09 of the Court of Justice of the European Union from 8 March 2011 concerning the establishment of a European and Community Patents Court and a proposal for an alternative solution, p. 193-201. The abstract reads:

Attempts have been made for decades to establish both a Community patent and a centralised European court which would have exclusive jurisdiction in this matter. However, none of these attempts has ever been fully successful. In its Opinion 1/09 from 8 March 2011, the Court of Justice of the European Union (hereinafter CJEU) held, inter alia*, that the establishment of a unified patent litigation system as planned in the draft agreement on the European and Community Patents Court*

would be in breach of the rules of the EU Treaty and the FEU Treaty. However, it is argued in this paper that also in view of Opinion 1/09 the creation of a unified court has not become per se *unattainable. After clarifying in whose interest effective patent protection in Europe should primarily be formed, different constellations of judicial systems shall be discussed. The author will deliver his own proposal for a two-step approach in structure and time, comprising, in a first step, the creation of a specialized chamber of the CJEU for patent litigation, and in a second step the creation of a central EU Court for all EU intellectual property litigation. The paper will finish with an analysis of how the requirements for a unified patent litigation system (indirectly) set up by the CJEU in its Opinion 1/09 could be taken into consideration, and with some further deliberations on effective patent protection and enforcement.*

Jochem Vlek, De EEX-Vo en onbekende woonplaats van de verweerder. Hof van Justitie EU 17 november 2011, zaak C-327/10 (*Lindner*) (Case note), p. 202-206. The English abstract reads:

The author reviews the decision of the ECJ in the case of Hypotecni banka/Udo Mike Lindner *in which the ECJ ruled on the application of the jurisdictional rules of the Brussels I Regulation in the case of a consumer/defendant with an unknown domicile. Several issues are highlighted: first, the existence of an international element in the case of a defendant with unknown domicile whose nationality differs from the state of the court seized; secondly, the application of Article 4(1) Brussels I Regulation if the domicile of the defendant is unknown and (since the ECJ does not apply Article 4(1) in this regard) the interpretation of Article 16(2) Brussels I Regulation; thirdly, the requirement that the rights of the defence are observed, as also laid down in Article 47 of the Charter of Fundamental Rights of the EU. Additionally, the article briefly mentions the subsequent case of* G/Cornelius de Visser*, in which a German Court resorted to public notice under national law of the document instituting the proceedings in the case of a defendant with an unknown address.*