International Maritime Law Essay Competition

The Editorial Board for *ELSA Malta Law Review*, under the Patronage of Prof. David Attard, and in collaboration with the University of Malta's Research, Innovation and Development Trust, are launching this first edition of the IMLI Essay Competition.

The prize of 600 Euros will be awarded to the best essay submitted on any aspect of law covered by the syllabus of the LL.M. Programme offered by the International Maritime Law Institute. First runner-up essay will be awarded a book prize.

Both prizes are being generously offered by Profs. Attard through the University of Malta's Research, Innovation, and Development Trust.

Any member of the European Law Students Association, in any of its regional and national networks, is eligible to participate in this competition, subject to any further restrictions set under the Competition Rules.

Essays must be between 5,000 and 6,000 words long (excluding footnotes) and in the English language. Deadline for entry submissions is 1 October 2012.

More information is available here.

C- 619/10: Art. 34 (1) and (2) Brussels I Regulation

One of the first cases to be addressed by the ECJ after the holiday will be the so-called *Trade Agency*, concerning grounds for refusing recognition and the power of the enforcing court to determine whether the application initiating proceedings had been served on the defendant in default, when service is accompanied by a

certificate as provided for by Article 54 of the regulation. Quoting AG Kokott, this are the items to be solved:

> "Article 34(2) permits the withholding of recognition or enforcement of a default judgment that has been pronounced against a defendant who was not served with the document which instituted the proceedings in sufficient time and in such a way as to enable him to arrange for his defence. Article 54 of the regulation provides for the issue by the State in which judgment was given ('State of origin') of a certificate showing the various underlying procedural data. This certificate has to be submitted together with the application for enforcement of a judgment. The information to be stated there also includes the date of service of the claim form. In light of this, the question in this case concerns the extent to which the court in the State where enforcement is sought should examine service of the claim form: Is it still entitled, despite the date of service being stated in the certificate, to examine whether the document instituting the proceedings was served or does the certificate have binding legal effect in this respect?
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> The ground for withholding recognition under Article 34(2) does not apply if the defendant failed to commence proceedings in the State of origin to challenge the default judgment when it was possible for him to do so. This case provides the Court with an opportunity of further clarifying its case-law on the question of when it is incumbent upon the defendant to lodge an appeal in the State of origin. It is necessary to make clear whether the defendant is obliged to do so even if the decision pronounced against it was served on it for the first time in exequatur proceedings.
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> Finally, the dispute in this case also relates to the public-policy clause in Article 34(1) of Regulation No 44/2001. The referring court would like to know in this connection whether it is compatible with the defendant's right to fair legal process embodied in Article 47 of the Charter of Fundamental Rights of the European Union for the court of the State of origin to neither examine the substance of a claim before pronouncing judgment in default nor to give further reasons for the default judgment."

Judgment is expected next Thursday.

ECJ Rules on Separate Proceedings and Interim Relief

The European Court of Justice (Third Chamber) delivered its judgment in *Solvay v. Honeywell* on July 12 (Case C 616/10).

The facts of the case were the following:

> *12 On 6 March 2009, Solvay, the proprietor of European patent EP 0 858 440, brought an action in the Rechtbank 's-Gravenhage for infringement of the national parts of that patent, as in force in Denmark, Ireland, Greece, Luxembourg, Austria, Portugal, Finland, Sweden, Liechtenstein and Switzerland, against the Honeywell companies for marketing a product HFC-245 fa, manufactured by Honeywell International Inc. and identical to the product covered by that patent.*
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> *13 Specifically, Solvay accuses Honeywell Flourine Products Europe BV and Honeywell Europe NV of performing the reserved actions in the whole of Europe and Honeywell Belgium NV of performing the reserved actions in Northern and Central Europe.*
>
> *14 In the course of its action for infringement, on 9 December 2009 Solvay also lodged an interim claim against the Honeywell companies, seeking provisional relief in the form of a cross-border prohibition against infringement until a decision had been made in the main proceedings.*
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> *15 In the interim proceedings, the Honeywell companies raised the defence of invalidity of the national parts of the patent concerned without, however, having brought or even declared their intention of bringing proceedings for the annulment of the national parts of that patent, and without contesting the competence of the Dutch court to hear both the main proceedings and the interim proceedings.*

The national court wondered, inter alia, whether this was a case where there was

a risk of irreconcilable judgments in the meaning of Article 6 of the Regulation, and whether

> *Article 22(4) of [Regulation No 44/2001] [is] applicable in proceedings seeking provisional relief on the basis of a foreign patent (such as a provisional cross-border prohibition against infringement), if the defendant argues by way of defence that the patent invoked is invalid, taking into account that the court in that case does not make a final decision on the validity of the patent invoked but makes an assessment as to how the court having jurisdiction under Article 22(4) of [that] Regulation would rule in that regard, and that the application for interim relief in the form of a prohibition against infringement shall be refused if, in the opinion of the court, a reasonable, non-negligible possibility exists that the patent invoked would be declared invalid by the competent court?*

The Court answered:

> *1. Article 6(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, must be interpreted as meaning that a situation where two or more companies established in different Member States, in proceedings pending before a court of one of those Member States, are each separately accused of committing an infringement of the same national part of a European patent which is in force in yet another Member State by virtue of their performance of reserved actions with regard to the same product, is capable of leading to 'irreconcilable judgments' resulting from separate proceedings as referred to in that provision. It is for the referring court to assess whether such a risk exists, taking into account all the relevant information in the file.*
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> *2. Article 22(4) of Regulation No 44/2001 must be interpreted as not precluding, in circumstances such as those at issue in the main proceedings, the application of Article 31 of that regulation.*

Belgian Book on International and European Procedural Law

A new book has been published dealing with European procedural law. Entitled '*Droit judiciaire européen et international*', it offers a compilation of the most important case law dealing with the European Regulations in the field.

This book provides an overview of the case law dealing with the European Regulations in the field of civil procedure. For each provision of the annotated Regulations, a summary is given of the case law of the ECJ. Reference is also made to the relevant case law of the various Member States, with a focus on the decisions of the highest courts. A summary of the main findings of each case is presented, together with critical comments and reference to literature.

This is a useful companion to other in-depth commentaries of the Regulations. The book, which has been written in French by a team of ten authors, will be updated every three years. It has been edited by Professor van Drooghenbroeck and is published in a series devoted to the practice of civil procedure in Belgium. Interested readers will find an extract on the publisher's website.

Commentary on the Common European Sales Law

The first commentary on the (Proposal for a) Common European Sales has just been released. Edited by Reiner Schulze from the University of Munster it provides an article by article-analysis of the envisioned optional instrument. More information is available on the publisher's website. The official announcement reads as follows.

> *The landscape of European Contract Law is rapidly taking shape. In October 2011, the European Commission proposed a Common European Sales Law*

(CESL) to facilitate cross-border transactions between businesses and between businesses and consumers. It contains a complete sales law and provisions for the supply of digital content and purchase of related services.

The Commentary analyses all 202 articles of the CESL, explains their function and doctrinal context and indicates the possible problems of their application. In doing so it offers a critical contribution to the legislative procedure and prepares practising lawyers, legal scholars and students for the use of the new European case law. Each article is dealt with in the same structure:

- *Function and underlying principles*
- *Systematical context*
- *Analysis and interpretation, including references to potential problems in practice*
- *Criticism and possible improvements*
- *The authors are renowned jurists from numerous European countries and with great experience in European and international contract law*

Zaremby on the Restatements (First and Second) of Conflict of Laws

Justin Zaremby has posted "Restating the Restatement of Conflicts: Approaching the Legitimacy Question in Choice-of-Law Theory" on SSRN. The paper can be downloaded here. The abstract reads as follows:

Since the so-called conflicts revolution, choice-of-law theory continues to reject the vested rights approach of the First Restatement of Conflicts without fully criticizing the failures of the governmental interest theory in the Second Restatement of Conflicts. At the same time, neither approach adequately examines the question of what constitutes a legitimate resolution to

a conflict between states. This Article suggests that the choice between the rights language of the First Restatement and the governmental interest language of the Second Restatement is actually a debate between legal formalism and legal realism. Both choices lead to a legitimacy deficit for theorists and judges who attempt to resolve conflicts. This Article applies liberal and republican political theory to the debate between vested rights and governmental interest, suggesting an approach to resolving conflicts that is grounded in the legitimate exercise of judicial discretion.

Harvey and Schilling on the (Consequences of an Ineffective) Choice of the CESL

Caroline Harvey, University of Oxford, and Michael Schilling, King's College London, have published a paper dealing with the (consequences of an ineffective) choice of the Common European Sales Law (CESL). The paper can be downloaded here. The abstract reads as follows:

In order to opt in to the proposed Common European Sales Law, the parties must utilise the mechanism set out in the Regulation, in accordance with which they 'agree to use the CESL' and thus subject their contract to the CESL. This article examines an issue that has so far received little attention: the question of how the agreement to use CESL and the contract under CESL interact. Given the formal requirements that the agreement to use CESL is subject to, the agreement to use the CESL may easily suffer from a defect. The parties may then purport to conclude a contract governed by the CESL, but without a fully effective agreement that the CESL applies to it. In such circumstances the question arises whether that contract may still be effective under the CESL or under national law, in particular where the parties have performed their (perceived) obligations.

Second Issue of 2012's Belgian PIL E-Journal

The second issue of the Belgian bilingual (French/Dutch) e-journal on private international law *Tijdschrift@ipr.be / Revue@dipr.be* for 2012 was just released.

The journal essentially reports on European and Belgian cases addressing issues of private international law. It includes one article written in French by Hélène Englert and Fabienne Collienne which offers a survey of a new procedure recently introduced by the Belgian lawmaker for the purpose of recognizing foreign adoptions (*Du nouveau dans les adoptions internationales : une procédure de régularisation*).

This issue also includes a casenote on a Belgian case by Jinske Verhellen, written in Dutch: *Ontbrekende huwelijksakte in het kader van een echtscheidingsprocedure: uiteenlopende standpunten in de rechtspraak*.

Latest Issue of RabelsZ: Vol. 76, No. 3 (2012)

The latest issue of "Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabel Journal of Comparative and International Private Law" (RabelsZ) has just been released. It contains the following articles:

- *Reinhard Zimmermann*, **Testamentsformen: »Willkür« oder Ausdruck einer Rechtskultur? (Testamentary Form Requirements: Arbitrary or Expression of Legal Culture?),** pp. 471-508

In the history of European private law the law of succession used to play a central role. This is different today. In most modern legal systems, comparatively little scholarly attention is devoted to it; in some of them it is not even a mandatory subject of legal training in the universities. Widely, the law of succession is regarded as static and somewhat boring. In addition, it is taken to be deeply rooted in fundamental cultural values of a society and, therefore, not suitable for comparative study or even legal harmonization. The present article challenges these views, as far as the law of testamentary formalities is concerned. It traces the comparative history of the three main types of form requirements: writing in the testator's own hand, reliance on witnesses, and involvement of a court of law or notary. It is argued that the differences between the legal systems found today do not reflect cultural differences and can, indeed, often be regarded as rather accidental; that the comparative study of a large variety of issues concerning testamentary formalities can indeed be meaningful and enlightening; that in a number of legal systems the law relating to testamentary formalities has been changed more often than many parts of the supposedly much more dynamic law of obligations; that the international will constitutes an unhappy compromise between the will-types found in the various national legal systems and that it is, therefore, not surprising that the Washington Convention has been so remarkably unsuccessful. Attention is also drawn to the purposes served by the form requirements for wills and to the fact that, in the modern world, the holograph will (traditionally regarded as the simplest and most convenient way to make a will) is rapidly acquiring a much more solemn character. This paper is based on the Savigny lecture, delivered in Marburg on 24 October 2011, to mark the 150th anniversary of Savigny's death. It therefore concludes by asking why Savigny does not appear to have devoted much attention to the law of succession, what Savigny thought of testamentary formalities, and whether that may have any significance for us today.This paper explores the "optional instrument" as a regulatory tool inEuropean private law.

- *Dethloff, Nina,* **Der deutsch-französische Wahlgüterstand – Wegbereiter für eine Angleichung des Familienrechts? (The Franco-German Optional Matrimonial Property Regime – A Trailblazer for the Alignment of Family Law?)** pp. 509-539

The Franco-German Convention signed on the 4th of February 2010 creates a

new optional matrimonial property regime that can be elected by spouses and that is subject to the same provisions in both countries. With regard to its content, the property regime is not a fundamentally new concept, instead joining elements of the German default property regime and the French optional property regime of a community of accrued gains in a quite successful manner. The implementation of elements of the French legal system, which generally places a stronger emphasis on rights in rem, improves the just participation of the spouses compared to the German regime that is rather focused on practicability and legal certainty. On the other hand, the new optional property regime seems more suitable for application in practice than the French property regime, which – due to its lumbering regulation – has not to date been commonly used. The level of protection that is attributed to the family home by the new optional community of accrued gains is not only consistent with the European common core, but from a German point of view it also establishes a clear advantage that cannot be reached by a contractual agreement.

The major significance of the new common matrimonial property regime, however, lies in the fact that for the first time ever, identical substantive family law will be applied in two European countries. Nonetheless, the potential benefits of this uniform law will only be realised to full extent if beyond the mere unification of the law, a consistent interpretation of the provisions can be reached in the member states. Whether the new property regime unveils a ground-breaking impact will primarily depend on its future development from a bilateral convention to a uniform optional European property regime. Analysing the model from a comparative point of view and in due consideration of the therein contained option for other countries to join the Convention, the stipulations seem at least generally suitable for affiliation. However, if in a second step the community of property, which is also very common in many European countries, were to be established as a further optional matrimonial property regime – be it at a binational, multinational or even European level – this should be based on the sound foundation of a detailed comparative law inquiry, taking into account in particular the evolving Principles of Matrimonial Property Law of the Commission of European Family Law. Moreover the Franco-German community of accrued gains could function as the initial spark for the creation of further uniform law. The choice of a uniform property regime facilitates the asset planning that is usually extremely complex in crossborder

situations. Nevertheless, due to the diverging stipulations of maintenance law in the participating countries as well as the varying compensation mechanisms and the different scope of judicial review or authorisation schemes, the economic consequences of a divorce can vary considerably. This could be countered by an optional uniform legal framework encompassing all aspects of marriage law. Spouses could choose this legal regime upon contracting marriage. Thus, the new Franco-German property regime could lead the way to a uniform European optional property regime and ultimately to a European marriage.

- *Helmut Koziol, Grabriele Koziol*, **Ansprüche des geschädigten Retters bei Selbstgefährdung eines Bergsteigers – Lösungsansätze im österreichischen, deutschen und japanischen Recht (Self-endangerment of an Alpinist – Claims of the Damaged Rescuer: Approaches under Austrian, German and Japanese Law)**, pp. 540-561

If an alpinist places himself in an emergency situation due to his own lack of care or boldness and another person in trying to rescue him suffers damage, the question arises on which basis and to which extent the rescuer is entitled to claim damages from the rescued alpinist. The present article surveys possible solutions under the doctrine of negotiorum gestio in case of necessity and tort law under Austrian, German and Japanese law. While all three legal systems provide for the compensation of expenses incurred by the negotiorum gestor, none of them has an explicit provision on the compensation of damage suffered by thenegotiorum gestor. For Austrian law, an analogous application on the liability of the principal in case of contractual agency which is based on the idea of assumption of risks is proposed. German and Japanese law, however, seek to solve the problem through a broad interpretation of the term "expenses". Japanese law offers still a further solution with statutory compensation schemes for rescuers in certain emergency situations. As for claims based on tort law, the problem arises that it cannot easily be argued that it is wrongful to put oneself at risk by going on a dangerous mountain hike. Thus, a careful balancing of the i

- *Kuipers, Jan-Jaap,* **Bridging the Gap – The Impact of the EU on the**

Law Applicable to Contractual Obligations, pp. 562-596

Despite the increasing activity of the European Union (EU) in private law, differences between the legal systems of the Member States are likely to remain. If differences in private law are liable to hinder the smooth functioning of the internal market, one would expect the European Union to have a major interest in Private International Law (PIL). However, for a long time, the opposite has proven to be true.1

Although EU law and PIL in essence both aim to resolve a conflict of laws, they underlie a different rationale. Mutual recognition combined with a country of origin principle does not do more than settle a claim of application between the laws of the host Member State and home Member State in favour of the latter. However, EU law revolves around the creation of an internal market, whereby it is perceived to be an obstacle to the functioning of the internal market when a producer would be subject to the laws of both the host and home Member State. European PIL tries to serve international trade and transnational relationships by bringing back a legal relation to its natural seat. It does not matter which law is found to be applicable. Although PIL is unfamiliar with the political nature that colours EU law, its ambitions are wider, in the sense that it tries to serve international trade as a whole and not just the needs of the internal market. The international harmony of decisions, where the outcome of a dispute is similar regardless before which court the proceedings are brought, is a goal in itself. For that purpose, a contract should be governed by the same law, regardless in which country proceedings are brought. Hence, EU law is concerned with whether the imposition of a rule constitutes a restriction to the internal market whereas PIL, in the European tradition, does not seek to neutralise the disadvantages that result from discrepancies of national laws but instead tries to locate the geographical centre of the legal relationship.

In the past decade, the European Union has become increasingly active in the area of PIL. It will first be demonstrated that the Rome I Regulation2 does not have any specific orientation towards the objectives of the internal market. On the contrary, in particular with regard to consumer contracts, conflict of laws rules may sometimes even undermine the confidence of the consumer in the internal market. Despite the positive harmonisation, the precise relation between EU law and PIL has yet to be fully crystallised. Two major questions remain unresolved. The first addresses the role of Rome I in the international

arena. Should the international scope of application of secondary law be determined autonomously, on the basis of its aim and purpose, or should one fall back upon Rome I? The second question concerns the role of Rome I in the internal market. To what extent can the determination of the applicable law be left to the conflict of laws norm? Do fundamental freedoms, be it in the form of a favor offerentis or a country of origin principle, impact upon the applicable law? Finally, the article will conclude with some suggestions on how to enhance the coordination between EU law and PIL

- *Ulrich, Ernst,* **Das polnische IPR-Gesetz von 2011 – Mitgliedstaatliche Rekodifikation in Zeiten supranationaler Kompetenzwahrnehmung (The Polish Private International Law Act of 2011 – National Recodification in Times of Exercise of Supranational Competences**), pp. 597-638

The Private International Law Act of 2011 is the third instance of Polish legislation in this area, being preceded by regulations from 1926, when the country regained its independence, and 1965, after the introduction of the national Civil Code. The initiative for a reform had been formulated in 1998, even before the EU accession, stating that the country should enact provisions of the Rome Convention and that the statute from 1965 was not detailed enough. Opponents of the draft considered it an advantage that the Act from 1965 was both short and complete. They did not find it necessary to replace tried provisions given that the introduction of EU regulations seemed to be a matter of time. They also uttered doubts about the quality of the proposed innovations and underlined that no one had established the extent to which the new rules would answer problems courts faced under the old law.

The new statute is twice as long as its predecessor (even though essential issues are no longer ruled by internal law) but generally keeps its structure and style. On many detailed questions one finds special conflict rules. As new areas of regulation, consumer contracts, intellectual property and negotiable instruments have appeared. The new law also offers the possibility of a choice of law in matrimonial and succession matters. Another innovation is the introduction of habitual residence, used not only in the EU-unified legal areas, but also in the autonomous rules on family and succession law. Where it broadens the possibility of choice of law, it represents progress, but where it is

to be taken into account only subsidiarily next to traditional elements such as citizenship and residence, its impact is doubtful. Several changes might make the application of PIL easier, yet others will rather provoke doubts.

The new Act demonstrates that there is still a large amount of room for national regulation. Some space has been left for general provisions, too, but they lose their function of providing a general overview with every new piece of EU regulation. The introduction of an entirely new PIL cannot be seen as an answer to EU requirements, nor was it required on account of practical needs. Rather, it is the realisation of a vision of completing the shorter act previously in force.

Minne on Choice of Law Rules for Set-Off in the Financial Sector

Gregory Minne, who is a senior associate at Arendt & Medernach in Luxembourg, has posted Les Règles de Conflit de Lois en Matière de Compensation Dans le Secteur Financier (The Conflict-of-Law Rules Concerning Set-Off in the Financial Sector) on SSRN. The abstract reads:

La présente étude propose de revenir sur les règles de conflits susceptibles d'être rencontrées lorsque le mécanisme de la compensation opère. La perspective luxembourgeoise ainsi que les pratiques de la place apportent un éclairage intéressant à cette problématique.

The objective of this study is to reconsider the rules relating to conflicts likely to be encountered during the operation of the mechanism of set-off. The Luxembourg perspective as well as the practices of the financial centre shed an interesting light on this issue.

The paper was published in the *Bulletin Banque et Droit* last year.