2010 Summer Seminar in Urbino

The city of Raffaello and Federico da Montefeltro will host its 52nd Summer Seminar of European Law in August 2010. Courses, most of which concerning European private international law, will be taught in French, Italian and English by professors coming from Italy (Tito Ballarino, Luigi Mari, Dante Storti, etc.), France (Bertrand Ancel, Horatia Muir Watt, Pierre Mayer, Dany Cohen, etc.), England (Robert Bray) and other European countries (Lesley Jane Smith).

Attendance to the Seminar is attested by a certificate, and passing the exams of the Seminar twice, whether two summers in a row or not, is sanctioned by a diploma granted by the prestigious five-centuries old Law Faculty of Urbino University.

Created in 1959, the Seminar has welcomed leading European professors of private international law, most of whom have also lectured at The Hague Academy of International Law: Riccardo Monaco (1949, 1960, 1968, 1977), Piero Ziccardi (1958, 1976), Henri Batiffol (1959, 1967, 1973), Yvon Loussouarn (1959, 1973), Mario Giuliano (1960, 1968, 1977), Phocion Francescakis (1964), Fritz Schwind (1966, 1984), Ignaz Seidl-Hohenveldern (1968, 1986), Edoardo Vitta (1969, 1979), Alessandro Migliazza (1972), René Rodière (1972), Georges Droz (1974, 1991, 1999), Pierre Gothot (1981), Erik Jayme (1982, 1995, 2000), Bernard Audit (1984, 2003), Michel Pélichet (1987), Pierre Bourel (1989), Pierre Mayer (1989, 2007), Tito Ballarino (1990), Hélène Gaudemet-Tallon (1991, 2005), Alegría Borrás (1994, 2005), Bertrand Ancel (1995), Giorgio Sacerdoti (1997), José Carlos Fernández Rozas (2001), Horatia Muir Watt (2004), Andrea Bonomi (2007).

The program of the 2010 Seminar can be found here. I was myself a student at the Seminar and I have to say that I really enjoyed my time there and can only recommend it!

MPI Comments on the Proposal for a Regulation in Succession Matters

The Max Planck Institute for Comparative and International Private Law (Hamburg) has published its comments on the European Commission's 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.

The comprehensive statement has been prepared by a working group of the institute coordinated by *Jürgen Basedow* and *Anatol Dutta*.

The full text of the statement can be found here and will be published in issue No. 3 (2010) of the "Rabels Zeitschrift".

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (1/2010)

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

It contains the following **articles/case notes (including the reviewed decisions)**:

- ***Heinz-Peter Mansel/Karsten Thorn/Rolf Wagner***: "Europäisches Kollisionsrecht 2009: Hoffnungen durch den Vertrag von Lissabon" – the English abstract reads as follows:

This article provides an overview on the developments in Brussels concerning the judicial cooperation in civil and commercial matters from November 2008 until November 2009. It summarizes the current projects in the EC legislation and presents some new instruments. Furthermore, it refers to the national German laws as a consequence of the new European instruments. This article also shows the areas of law where the EU has made use of its external competence. With regard to the ECJ, important decisions and some pending cases are presented. In addition, the article deals with important changes as to judicial cooperation resulting from the Treaty of Lisbon. It is widely criticised that the Hague Conference on Private International Law and the European Community should improve their cooperation. An important basis for the enhancement of this cooperation is the exchange of information among all parties involved. Therefore, the present article turns to the current projects of the Hague Conference as well.

- ***Ulrich Magnus***: "Die Rom I-Verordnung" – the English abstract reads as follows:

December 17, 2009 is a marked day for international contract law in Europe. From that day on, the court of the EU Member States (except Denmark) have to apply the conflicts rules of the Rome I Regulation to all transborder contracts concluded on or after that day. Fortunately, the Rome I Regulation builds very much on the fundaments of its predecessor, the Rome Convention of 1980, and amends that Convention only moderately. Though progress is limited, the amendments should not be underestimated. First, the communitarisation of international contract law will secure a stricter uniform interpretation of the Rome I Regulation through the European Court of Justice. Secondly, the changes strengthen legal certainty and reduce to some extent the courts' discretion, however without sacrificing the necessary flexibility. This is the case in particular with the requirements for an implicit chance of law, which now must be clearly demonstrated; with the escape clauses, which come into play when a manifestly closer connection points to another law or with the definition of overriding mandatory provisions, which apply irrespective of the law otherwise applicable (Art. 9 par. 1). Legal certainty is also strengthened by a number of clarifying provisions, among them that the franchisee's and distributor's law governs their contracts, that set-off follows the law of the claim against which set-off is asserted or that the redress claim of one joint

debtor against another is governed by the law that applies to the claiming debtor's obligation forwards the creditor. Thirdly, the protection of the weaker party through conflicts rules has been considerably extended and aligned to the Brussels I Regulation. Yet, some weaknesses have survived. These are the continuity of the confusing coexistence of the Rome I conflicts rules and further special conflicts rules in a number of EU Directives on consumer protection, the hardly convincing system of differing conflicts rules on insurance contracts and still open questions us to the rules applicable to assignments and their scope. It is to be welcomed that the Rome I Regulation itself (Art. 27) has already set these problems on the agenda for further amendment.

- ***Peter Kindler***: "Vom Staatsangehörigkeits- zum Domizilprinzip: das künftige internationale Erbrecht der Europäischen Union" – the English abstract reads as follows:

On October 14, 2009 the Commission of the European Communities has adopted a "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" (COM [2009] 154 final 2009/0157 [COD] (SEC [2009] 410), (SEC [2009] 411). Its aim is to remove obstacles to the free movement of persons in the Union resulting from the diversity of both the rules under substantive law and the rules of international jurisdiction or of applicable law, the multitude of authorities to which international successions matters can be referred and the fragmentation of successions which can result from these divergent rules. According to the Proposal the competence lies with the Member state where the deceased had their last habitual residence, and this includes ruling on all elements of the succession, irrespective of whether adversarial or non-adversarial proceedings are involved (Article 4). The author welcomes this solution considering that the last habitual residence of the deceased will frequently coincide with the location of the deceased's property. As to the applicable law, the Proposal again uses the last habitual residence of the deceased as the principal connection factor (Article 16), but at the same time allows the testators to opt for their national law as that applying to their successions (Article 17). In this respect, the author is critical on the universal nature of the proposed Regulation (Article 25) and, inter alia, advocates the admission of referral in case the last habitual residence of the deceased is

located outside the European Union. Furthermore, the author is in favour of a wider range of choice-of-law-options for the testator as foreseen in the Hague Convention 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons.

- ***Wolfgang Hau***: "Doppelte Staatsangehörigkeit im europäischen Eheverfahrensrecht" – the English abstract reads as follows:

The question how multiple nationality is to be treated under the European rules on matrimonial matters was rather misleadingly answered by Alegría Borrás in her Official Report on the Brussels II Convention and it is still open in respect of the Regulation No 2201/2003. In the Hadadi case, the European Court of Justice has now pointed out that every nationality of a Member State held by both spouses is to be taken into account regardless of its effectivity. The Hadadi case directly concerns only the rather particular context of Article 64 (4) of the Regulation. In this case note it is argued that the considerations of the ECJ are convincing and also applicable to more common settings of the multiple-nationality problem within the Brussels II regime. On the occasion of the ongoing reform of the Regulation, it should however be carefully considered whether nationality of the spouses is an appropriate and indispensable basis of jurisdiction anyway.

- ***Jörg Dilger:*** "EuEheVO: Identische Doppelstaater und forum patriae (Art. 3 Abs. 1 lit. b)" – the English abstract reads as follows:

The essay reviews another judgment of the European Court of Justice relating to the Regulation (EC) No. 2201/2003 (Brussels IIA). Having to deal with spouses sharing the common nationality of two member states (Hungary and France), the ECJ – following the convincing AG's opinion – held that where the court of a member state addressed had to verify, pursuant to Article 64 (4), whether the court of a member state of origin of a judgment would have had jurisdiction under Article 3 (1) (b), the court had to take into account the fact that the spouses also held the nationality of the member state of origin and that therefore the courts of the latter could also have had jurisdiction under that provision. Since the spouses might seize a court of the member state of their choice, the evolving conflict of jurisdictions had to be solved by means of the lis

alibi pendens rule (Article 19 (1)). Given the special procedural situation, the author starts by analyzing the transitional rule in Article 64 (4) which empowers the courts of one member state to examine the jurisdiction of another member state's courts. He then examines the ECJ's reasoning and comes to the conclusion that de lege lata the ECJ's decision is correct. He finally shows that the ECJ's solution is not limited to transitional cases falling within the scope of Article 64, but applies to all the cases in which the court seized – which, not having jurisdiction pursuant Articles 3 to 5, considers having resort to jurisdiction according to its national law ("residual jurisdiction") – has to examine whether the courts of another member state have jurisdiction under the regulation (Article 17). Moreover, the solution elaborated by the ECJ also applies to spouses who share the common nationality of a member state and the common domicile pursuant to Article 3 (1) b, (2).

- ***Felipe Temming***: "Europäisches Arbeitsprozessrecht: Zum gewöhnlichen Arbeitsort bei grenzüberschreitend tätigen Außendienstmitarbeitern" – the English abstract reads as follows:

The Austrian High Court of Vienna has published a judgment on the topic of jurisdiction where an employee is relocated from Austria to Germany but the relocation never took effect. The employee was relocated pursuant to sections 99 and 95(3) Betriebsverfassungsgesetz, which raised the question of a change of jurisdiction according to Art. 19 No. 2 lit. a Regulation 44/2001/EC. The proceedings before the regional court of Innsbruck were brought by a sales representative against his Berlin-based employer in an action for payment. The employee was domiciled near Innsbruck from where he serviced customers in the area of Innsbruck and South-Germany and was transferred to Berlin however the employee became ill and the transfer never took effect. The case note first addresses issues regarding the personal scope of the Betriebsverfassungsgesetz in cross-border and external situations (part II.). It argues that the membership in an undertaking is the preferable criterion in order to establish the necessary link and only a consistent approach will lead to coherent and fair results. The case note then briefly revisits the long-standing jurisprudence of the European Court of Justice on matters of the habitual – usual – work place according to Art. 5 No. 1 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial

Matters, which was incorporated into Art. 19 of Regulation 44/2001/EC (part III.). The case note furthermore refers to section 48(1a) Arbeitsgerichtsgesetz which came into effect on 1 April 2008 and gives German labour courts jurisdiction at the habitual work place in matters solely internal to Germany. Art. 19 No. 2 lit. a of Regulation 44/2001/EC founds its counterpart in this new German law. The enactment of section 48(1a) Arbeitsgerichtsgesetz is consistent with Germany's Federal Labour Court which has set out in several cases the doctrine of the uniform place of performance of work as the criterion for jurisdiction in labour law cases and in so doing has followed the path laid down by the ECJ in the early Ivenel case. The legislation enacts the decisions which have been held by the Federal Labour Court and had not been supported by leading German scholars. The case note ends with concluding remarks (part IV.)

- ***Marianne Andrae/Steffen Schreiber***: "Zum Ausschluss der Restzuständigkeit nach Art. 7 EuEheVO über Art. 6 EuEheVO" – the English abstract reads as follows:

The article deals with a decision of the Austrian Supreme Court of Justice concerning the exclusion of residual jurisdiction according to art. 7 Brussels IIa Regulation in case there is no jurisdiction under art. 3–5 Brussels IIa Regulation but the defendant spouse is a national of a Member State. The authors agree with the decision. Only if no member state has jurisdiction on the lawsuit and if the rules of jurisdiction in art. 3–5 are not exclusive for any action against the defendant spouse, does art. 7 allow to determine the jurisdiction according to the law of the relative Member State. According to art. 6, the rules of jurisdiction in art. 3–5 are exclusive if the defendant spouse has his/her habitual residence in a Member State or if he/she is a national of a Member State. However, it is not necessary for the exclusion of residual jurisdiction under art. 6 that any member state actually has jurisdiction under art. 3–5. Even though the abatement of art. 6 and the introduction of new rules of residual jurisdiction may be desirable, this effect must not be achieved by simply interpreting the current art. 6 this way.

- ***Katharina Jank-Domdey/Anna-Dorothea Polzer: "***Ausländische Eheverträge auf dem Prüfstand der Common Law Gerichte" – the English

abstract reads as follows:

> *Courts in a number of important common law jurisdictions until recently gave little or no weight to prenuptial contracts entered into in civil law jurisdictions such as France or Germany. These contracts typically contain provisions as to the spouses' marital property regime or their maintenance after divorce. Recent decisions, however, show a clear trend towards the enforceability of such agreements. The paper discusses the judgments of the Court of Appeals of New York in Van Kipnis v. Van Kipnis (11 NY3d 573) involving a French separation of property agreement and of the Court of Appeal of England and Wales in Radmacher v. Granatino ([2009] EWCA Civ 649), involving a German contract providing for the separation of property and the exclusion of spousal maintenance in case of divorce, and looks at their precedents. While none of the courts concludes that the foreign law under which the contracts were made must be applied they in fact enforce the spouses' agreements as to the financial consequences of their divorce. According to the English court, however, giving due weight to a foreign prenuptial agreement is subject to the principle of fairness and must safeguard the interests of the couple's children.*

- ***Sven Klaiber*** on the new Algerian international civil procedural law as well as arbitration law: "Neues internationales Zivilprozess- und Schiedsrecht in Algerien"
- ***Erik Jayme*** on the third Heidelberg conference on art law: "Kunst im Markt – Kunst im Streit Internationale Bezüge und weltweiter Kampf um Urheberrechte – III. Heidelberger Kunstrechtstag"

ERA conference on cross-border successions in the EU

The forthcoming ERA conference on cross-border successions is designed to cover the recent developments in the drafting and negotiating 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. There are interesting topics which arise out of the differences between the national legal conceptions, such as the issues of clawback and the international competence of courts or non-judicial authorities, including notaries. The automatic recognition of the proposed European Certificate of Succession seems to be equally worthy of debate.

The speakers at the conference are:

Ms Mari Aalto, Legal Officer, DG Justice, Freedom and Security, European Commission, Brussels
Professor Andrea Bonomi, University of Lausanne
Dr Anatol Dutta, Max Planck Institute for Comparative and International Private Law, Hamburg
Professor Sjef van Erp, University of Maastricht
Mr Rafael Gil Nievas, Permanent Representation of Spain to the EU, Brussels
Professor Jonathan Harris, Barrister, Serle Court, London; University of Birmingham
Mr Christian Hertel, Notary, Weilheim
Dr Marius Kohler, Director, Federal Chamber of German Civil Notaries, Brussels
Mr Kurt Lechner, MEP, European Parliament, Brussels/Strasbourg
Mr Hugues Letellier, Managing Partner, Hohl & Associés, Paris
Professor Paul Matthews, Consultant, Withers LLP; King's College, London
Ms Michaela Navrátilová, JUDr Zden?k Hromádka Law Firm, Zlín
Ms Salla Saastamoinen, Head of Unit, Civil Justice, DG Justice, Freedom and Security, European Commission, Brussels.

The conference is scheduled for 18 and 19 February 2010 and will take place at the ERA Congress Centre in Trier, Germany. Detailed information on the conference is available here, and the registration details here.

Prize Established for Best Essay on Conflict of Laws

The following announcement will be of interest to many of our readers.

The Private International Law Interest Group of the American Society of International Law has established a prize for the best essay on any topic of conflict of laws. The terms and conditions for the call of papers for the prize are as follows:

"Private International Law Prize

Terms and conditions

A prize has been established by the Private International Law Interest Group of the American Society of International Law for the best essay submitted on any topic in the field of private international law.

Competitors may be citizens of any nation but must be 35 years old or younger on December 31, 2009. They need not be members of the American Society of International Law.

The prize consists of $500 and a certificate of recognition. The prize will be awarded by the Private International Law Interest Group on the recommendation of a Prize Committee. Decisions of the Prize Committee on the winning essay and on any conditions relating to this prize are final.

The winner of the Private International Law Prize will be announced at the American Society of International Law's Annual Meeting in March 2010.

Submission: Submissions must be received by January 15, 2010. Entries must be written in English and should not exceed 8,000 words, including footnotes.

Entries must be submitted by email in Word or Pdf format with a cover sheet containing the title of the entry, name and contact details. The essay itself must contain no identifying information other than the title.

Submissions and any queries should be addressed by email to: Alejandro Carballo,

alex.carballo@cuatrecasas.com

All submissions will be acknowledged by e-mail.”

European Commission Presents Proposal on Succession and Wills

According to a press release by the DG Freedom, Security and Justice (IP/09/1508), **the long-awaited Proposal for a Regulation on succession and wills**, whose presentation, initially expected in last March, had been significantly delayed, **was finally released on 14 October 2009 by the European Commission**.

The official reference *should* be the following: 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, COM(2009)154 fin. of 14 October 2009.

The text of the proposed regulation, along with the Commission’s explanatory memorandum, is not yet available on the institutional websites. Interested readers may have a look at the press release and at a basic set of Q&A (MEMO/09/447) prepared by the Commission. References to the preparatory studies, the 2005 Green Paper and the subsequent public consultation can be found in our previous post here.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2009)

Recently, the September/October issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was released.

It contains the following **articles/case notes (including the reviewed decisions)**:

- ***Christoph Althammer***: "Verfahren mit Auslandsbezug nach dem neuen FamFG" – the English abstract reads as follows:

The new "Law on procedure in matters of familiy courts and non-litigious matters" (FamFG) contains a chapter that deals with international proceedings. The author welcomes this innovation for German law in non-litigious matters as there is an increase of cross-border disputes in this subject matter. He especially welcomes that the rules on international procedure are no longer fragmented but are part of one comprehensively codified regulation. The author then highlights these rules on international procedures. Subsection 97 establishes the supremacy of international law. The following subsections (98 to 106) regulate the international jurisdiction of German courts in international procedures. Finally, subsections 107 to 110 detail principles for the recognition and enforcement of a foreign judgement.

- ***Florian Eichel:*** "Die Revisibilität ausländischen Rechts nach der Neufassung von § 545 Abs. 1 ZPO" – the English abstract reads as follows:

So far, s. 545 (1) German Code of Civil Procedure (Zivilprozessordnung – ZPO) prevented foreign law from being the subject of Appeal to the German Federal Court of Justice (Bundesgerichtshof – BGH); s. 545 (1) ZPO stipulated that exclusively Federal Law and State Law of supra-regional importance can be subject of an appeal to the BGH. The BGH could review foreign law only indirectly, namely by examining whether the lower courts had determined the foreign law properly – as provided for in s. 293 ZPO. The new wording of

s. 545 (1) allows the BGH to examine foreign law: now every violation of the law can be subject of an appeal. However, this change in law was motivated by completely different reasons. Parliament did not even mention the foreign law dimension in its legislative documents although this would be a response to the old German legal scholars' call for enabling the BGH to review the application of foreign law. The essay methodically interprets the amendment and comes to the conclusion that the new s. 545 (1) ZPO indeed does allow the appeal to the BGH on aspects of foreign law.

- ***Stephan Harbarth/Carl Friedrich Nordmeier:*** "GmbH-Geschäftsführerverträge im Internationalen Privatrecht – Bestimmung des anwendbaren Rechts bei objektiver Anknüpfung nach EGBGB und Rom I-VO" – the English abstract reads as follows:

According to German substantive law, a contract for management services (Anstellungsvertrag) concluded between a German private limited company (Gesellschaft mit beschränkter Haftung) and its director (Geschäftsführer) is only partially subject to labour law. The ambiguous character of the contract is reflected on the level of private international law. The present contribution deals with the determination of the law applicable to such service contracts in the absence of a choice of law, i.e. under art. 28 EGBGB and art. 4 Rome I-Regulation. As the director normally does not establish a principal place of business, the closest connection principle of art. 28 sec. 1 EGBGB applies. Art. 4 sec. 1 lit. b Rome I-Regulation contains an explicit conflict of law rule regarding contracts for the provision of services. If the director's habitual residence is not situated in the country of the central administration of the company, the exemption clause, art. 4 sec. 3 Rome I-Regulation, may apply. Compared to the determination of the applicable law to individual employment contracts, art. 30 EGBGB and art. 8 Rome I-Regulation, there is no difference regarding the applicable law in the absence of a choice of law provision.

- ***Michael Slonina***: "Aufrechnung nur bei internationaler Zuständigkeit oder Liquidität?" – the English abstract reads as follows:

In 1995 the European Court of Justice stated that Article 6 No. 3 is not applicable to pure defences like set-off. Nevertheless, some German courts and authors still keep on postulating an unwritten prerequisite of jurisdiction for

set-off under German law which shall be fulfilled if the court would have jurisdiction for the defendant's claim under the Brussels Regulation or national law of international jurisdiction. The following article shows that there is neither room nor need for such a prerequisite of jurisdiction. To protect the claimant against delay in deciding on his claim because of "illiquidity" of the defendant's claim, German courts can only render a conditional judgment (Vorbehaltsurteil, §§ 145, 302 ZPO) on the claimants claim, and decide on the defendants claims and the set-off afterwards. As there is no prerequisite of liquidity under German substantial law, German courts can not simply decide on the claimant's claim (dismissing the defendants set-off because of lack of liquidity) and they can also not refer the defendant to other courts, competent for claims according to Art. 2 et seqq. Brussels Regulation.

- ***Sebastian Krebber***: "Einheitlicher Gerichtsstand für die Klage eines Arbeitnehmers gegen mehrere Arbeitgeber bei Beschäftigung in einem grenzüberschreitenden Konzern" – the English abstract reads as follows:

Case C-462/06 deals with the applicability of Art. 6 (1) Regulation (EC) No 44/2001 in disputes about individual employment contracts. The plaintiff in the main proceeding was first employed by Laboratoires Beecham Sévigné (now Laboratoires Glaxosmithkline), seated in France, and subsequently by another company of the group, Beecham Research UK (now Glaxosmithkline), registered in the United Kingdom. After his dismissal in 2001, the plaintiff brought an action in France against both employers. Art. 6 (1) would give French Courts jurisdiction also over the company registered in the United Kingdom. In Regulation (EC) No 44/2001 however, jurisdiction over individual employment contracts is regulated in a specific section (Art. 18–21), and this section does not refer to Art. 6 (1). GA Poiares Maduro nonetheless held Art. 6 (1) applicable in disputes concerning individual employment contracts. The European Court of Justice, relying upon a literal and strict interpretation of the Regulation as well as the necessity of legal certainty, took the opposite stand. The case note argues that, in the course of an employment within a group of companies, it is common for an employee to have employment relationships with more than one company belonging to the group. At the end of such an employment, the employee may have accumulated rights against more than one of his former employers, and it can be difficult to assess which one of the

former employers is liable. Thus, Art. 6 (1) should be applicable in disputes concerning individual employment contracts.

- ***Urs Peter Gruber*** on the ECJ's judgment in case C-195/08 PPU (Inga Rinau): "Effektive Antworten des EuGH auf Fragen zur Kindesentführung" – the English abstract reads as follows:

According to the Brussels IIa Regulation, the court of the Member State in which the child was habitually resident immediately before the unlawful removal or retention of a child (Member State of origin) may take a decision entailing the return of the child. Such a decision can also be issued if a court of another Member State has previously refused to order the return of the child on the basis of Art. 13 of the 1980 Hague Convention. Furthermore in this case, the decision of the Member State of origin is directly recognized and enforceable in the other Member States if the court of origin delivers the certificate mentioned in Art. 42 of the Brussels IIa Regulation. In a preliminary ruling, the ECJ has clarified that such a certificate may also be issued if the initial decision of non-return based on Art. 13 of the 1980 Hague Convention has not become res judicata or has been suspended, reversed or replaced by a decision of return. The ECJ has also made clear that the decision of return by the courts of the Member State of origin can by no means be opposed in the other Member States. The decision of the ECJ is in line with the underlying goal of the Brussels IIa Regulation. It leads to a prompt return of the child to his or her Member State of origin.

- ***Peter Schlosser***: "EuGVVO und einstweiliger Rechtsschutz betreffend schiedsbefangene Ansprüche".
  The author comments on a decision of the Federal Court of Justice (5 February 2009 – IX ZB 89/06) dealing with the exclusion of arbitration provided in Art. 1 (2) No. 4 Brussels Convention (now Art. 1 (2) lit. d Brussels I Regulation). The case concerns the declaration of enforceability of a Dutch decision on a claim which had been subject to arbitration proceedings before. The lower court had argued that the Brussels Convention was not applicable according to its Art. 1 (2) No.4 since the decision of the Dutch national court included the arbitral award. The Federal Court of Justice, however, held – taking into consideration that

the arbitration exclusion rule is in principle to be interpreted broadly and includes therefore also proceedings supporting arbitration – that the Brussels Convention is applicable in the present case since the provisional measures in question are aiming at the protection of the claim itself – not, however, at the implementation of arbitration proceedings. Thus, the exclusion rule does not apply with regard to provisional measures of national courts granting interim protection for a claim on civil matters even though this claim has been subject to an arbitral award before.

- ***Kurt Siehr*** on a decision of the Swiss Federal Tribunal (18 April 2007 – 4C.386/2006) dealing with PIL aspects of money laundering: "Geldwäsche im IPR – Ein Anknüpfungssystem für Vermögensdelikte nach der Rom II-VO"

- ***Brigitta Jud/Gabriel Kogler***: "Verjährungsunterbrechung durch Klage vor einem unzuständigen Gericht im Ausland" – the English abstract reads as follows:

It is in dispute whether an action that has been dismissed because of international non-competence causes interruption of the running of the period of limitation under § 1497 ABGB. So far this question was explicitly negated by the Austrian Supreme Court. In the decision at hand the court argues that the first dismissed action causes interruption of the running of the period of limitation if the first foreign court has not been "obviously non-competent" and the second action was taken immediately.

- ***Friedrich Niggemann*** on recent decisions of the French Cour de cassation on the French law on subcontracting of 31 December 1975 (Loi n. 75-1334 du 31 décembre 1975 – Loi relative à la sous-traitance version consolidée au 27 juillet 2005) in view of the Rome I Regulation: "Eingriffsnormen auf dem Vormarsch"

- ***Nadjma Yassari***: "Das Internationale Vertragsrecht des Irans" – the English abstract reads as follows:

Contrary to most regulations in Arab countries, Iranian international contract law does not recognise the principle of party autonomy in contractual obligations as a rule, but as an exception to the general rule of the applicability

of the lex loci contractus (Art. 968 Iranian Civil Code of 1935). Additionally, the parties of a contract concluded in Iran may only choose the applicable law if they are both foreigners. Whenever one of the parties is Iranian, the applicable law cannot be determined by choice, unless the contract is concluded outside Iran. However, in a globalised world with modern communication technologies, the determination of the place of the conclusion of the contract has become more and more difficult and the Iranian rule causes uncertainty as to the applicable law. Although these problems are seen in the Iranian doctrine and jurisprudence, the rule has not yet been challenged seriously. A way out of the impasse could be the Iranian Act on International Arbitration of Sept. 19, 1997. Art. 27 Sec. I of the Arbitration Act allows the parties to freely choose the applicable law of contractual obligations, without any restriction. However, the question whether and how Art. 968 CC restricts the scope of application of Art. 27 Arbitration Act has not been clarified and it remains to be seen how cases will be handled by Iranian courts in the future.

Futher, this issue contains the following information:

- ***Erik Jayme*** on the conference of the German Society of International Law which has taken place in Munich from 15 – 18 April: "Moderne Konfliktsformen: Humanitäres Völkerrecht und privatrechtliche Folgen – Tagung der Deutschen Gesellschaft für Völkerrecht in München"
- ***Marc-Philippe Weller*** on a conference on the Rome I Regulation taken place in Verona: "The Rome I-Regulation – Internationale Tagung in Verona"

Publications on International Surrogate Motherhood

A paper of Prof. Anna Quiñones Escámez (Pompeu Fabra Univerity, Barcelona) has just been published in the Spanish electronic magazine InDret. The English

abstract reads as follows:

> *The following pages focus on Private International Law issues raised by the Resolution of the Spanish "Dirección General de los Registros y del Notariado" (DGRN) of last February the 18th. Reversing the previous decision of the Consular Register, the Resolution agrees to register in the Spanish Office of foreign birth certificates the double paternity of twins born by means of surrogate motherhood in California. Once submitted the main issue settled by the DGRN, we will examine the pending questions and the resolution methods available at Private International Law (mandatory rules, conflict of laws and recognition of official certificates, judicial decisions and legal situations). At this point we will take into account the relationship (cause-effect) between the judicial decision and the birth certificate as a title (artículo 83 RRC). Later on, we will review the limits provided by some domestic laws in order to avoid creating "limping situations" valid in the country of origin but illegal abroad. We will follow remarking the aspects of fraud in the jurisdiction (forum shopping) and the "fraud in the conflict of qualifications". Both aspects are relevant since the contract issue (surrogacy) is the one which attracts affiliation issues before the courts (and law) of the country where surrogacy is practised and where the children will be born. We will conclude with some remarks regarding the role of "the best interest of the Child clause" (supra-national rule of law) and the "best interest of the children" in this case.*

The article itself can be downloaded (see here).

Latest Issue of "Praxis des Internationalen Privat- und

Verfahrensrechts" (4/2009)

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

It contains the following **articles/case notes (including the reviewed decisions)**:

- ***Anatol Dutta***: "Das Statut der Haftung aus Vertrag mit Schutzwirkung für Dritte" – the English abstract reads as follows:

The autonomous characterisation of national legal institutions is one of the challenging tasks of European private international law. This article attempts to determine the boundaries between the Rome I and the Rome II Regulation with regard to damages of third parties not privy to the contract but closely connected to one of the parties. Notably, German and Austrian law vest contractual rights in such third parties, especially in order to close gaps in tort law. It is argued here that those third party rights, although based on contract according to national doctrine, are to be characterised as a non-contractual obligation and governed by the Rome II regime (infra III). Under Rome II, in principle, the general conflict rule for torts in Art. 4(1) applies; if the damage suffered by the third party is caused by a product, the liability towards the third party is subject to the special rule in Art. 5(1) (infra IV). Hence, the law governing the contract from which the third party rights are derived plays only a minor role (infra V): for those third party rights neither the special rule for culpa in contrahendo in Art. 12(1) – insofar as pre-contractual third party rights are concerned – nor the escape clauses in Art. 4(3) and Art. 5(2) lead to the law which governs the contract.

- ***Ivo Bach***: "Neuere Rechtsprechung zum UN-Kaufrecht" – the English abstract reads as follows:

The number of case law on the CISG increases exponentially. Thanks to online databases such as the one of Pace University or CISG-online a majority of cases are internationally available. The rapid increase of case law, however, complicates the task of staying up to date in this regard. This contribution shall be the first of a series that summarises the recent developments in case-law

and at the same time categorises the cases in regard to their topic and in regard to their importance. The series aligns with the date the respective decisions become available to the general public, i. e. the date they are published on the CISG-online database, rather than the date of the decision. This contribution covers the cases with CISG-online numbers 1600–1699.

- ***Alice Halsdorfer***: "Sollte Deutschland dem UNIDROIT-Kulturgutübereinkommen 1995 beitreten?" – the English abstract reads as follows:

The ratification of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 is the perfect occasion to raise the question whether or not Germany should strive for an additional ratification of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995. While many contracting states of the UNESCO Convention 1970 did not implement comprehensive return claims for illegally exported cultural objects, the self-executing UNIDROIT Convention 1995 provides such claims and in addition further claims for stolen cultural objects. One of the major difficulties is the absence of provisions on property rights. It may be argued an initial lack or intermediate loss of ownership should not affect return claims for cultural objects with the consequence that the last possessor has to be considered the rightful claimant. Further, it may be argued that the return of cultural objects includes necessarily a transfer of possession but not a transfer of property. However, the return of cultural objects to the state from which these cultural objects have been unlawfully removed may influence the applicable law and indirectly affect property rights. Since this effect is achieved only under the condition that the lex rei sitae is replaced by the lex originis, it might be advisable to extend the scope of the ss 5 (1), 9 of the German Law on the Return of Cultural Objects in the event of a future ratification of the UNIDROIT Convention 1995.

- ***Martin Illmer***: "Anti-suit injunctions zur Durchsetzung von Schiedsvereinbarungen in Europa – der letzte Vorhang ist gefallen" – the English abstract reads as follows:

Yet another blow for the English: the final curtain for anti-suit injunctions to

enforce arbitration agreements within the European Union has fallen. As the augurs had predicted, the ECJ, following the AG's opinion, held that anti-suit injunctions enforcing arbitration agreements are incompatible with Regulation 44/2001. Considering the previous judgments in Marc Rich, van Uden and Turner as well as the civil law approach of the Regulation, the West Tankers judgment does not come as a surprise. It accords with the system and structure of the Regulation. De lege lata the decision is correct. Moaning about the admittedly thin reasoning and an alleged lack of convincing arguments does not render the decision less correct. Instead, the focus must shift to the already initiated legislative reform of Regulation 44/2001. Meanwhile, one may look for alternatives within the existing system to hold the parties to the arbitration (or jurisdiction) agreement, foreclosing abusive tactics by parties filing actions in certain Member States notorious for protracted court proceedings.

- ***Matthias Kilian***: "Die Rechtsstellung von Unternehmensjuristen im Europäischen Kartellverfahrensrecht"
  The article reviews the judgment given by the European Court of First Instance in the joined cases T-125/03 and T-253/03 (*Akzo Nobel Chemicals Ltd. and Akcras Chimcals Ltd. ./. Commission of the European Communities*) which can be found here.

- ***Rainer Hüßtege***: "Der Europäische Vollstreckungstitel in der Praxis"
  The article reviews a decision by the Higher Regional Court Stuttgart (23.10.2007 – 5 W 29/07) dealing with the requirements of a European Enforcement Order Certificate in terms of Art. 9 Regulation (EC) No. 805/2004 stating that the issue of the ceritificate requires according to Art. 6 No. 1 (c) inter alia that the court proceedings in the Member State of origin met the requirements as provided for the proceeding of uncontested claims. This requirement was not met in the present case since the summons was not served in accordance with Art. 13 (2) of the Regulation.

- ***Christoph M. Giebel***: "Die Vollstreckung von Ordnungsmittelbeschlüssen gemäß § 890 ZPO im EU-Ausland" – the English abstract reads as follows:

Under German law, the State is exclusively responsible for enforcing contempt fines issued by German courts. Thus, the State collects the contempt fine

through its own public authorities ex officio. This approach is in contrast to the legal situation in several other EU Member States that allow the judgment creditors not only to decide upon the enforcement of the contempt fine but also to keep the funds obtained through the enforcement. In terms of EU cross border enforcement, it is commonly accepted that for example a French "astreinte" may be enforced in Germany by invoking Art. 49 of the Regulation (EC) No. 44/2001. However, it is still doubtful whether or not German judgment creditors could similarly enforce a German contempt fine in another EU Member State. These doubts were recently intensified by a resolution rendered by the Higher Regional Court of Munich on 3rd December 2008 – 6 W 1956/08 – (not res judicata). The Higher Regional Court of Munich has refused to confirm a contempt fine issued by the Regional Court of Landshut as a European Enforcement Order under the Regulation (EC) No. 805/2004. The Higher Regional Court of Munich basically argues that the judgment creditor has no legitimate interest to apply for such confirmation due to the German legislator having attributed the responsibility for the enforcement exclusively to the State. The arguments put forward by the Higher Regional Court of Munich would also rule out any cross border enforcement of German contempt fines according to the rules of the Regulation (EC) No. 44/2001. This would lead to a considerable disadvantage of German judgment creditors within the Common Market. In the article, the author discusses in detail the arguments put forward by the Higher Regional Court of Munich both from a German and European Community law perspective. The author comes to the conclusion that prior-ranking European Community law demands that German contempt fines may also be enforced in other EU Member States both on the basis of the Regulations (EC) No. 44/2001 and No. 805/2004. In reconciling the requirements of European Community and German law, the author proposes that the judgment creditor shall be entitled to act on the basis of a representative action for the State. The funds obtained through the enforcement in the relevant EU Member State shall therefore invariably be paid to the relevant State treasury in Germany.

- ***Felipe Temming***: "Zur Unterbrechung eines Kündigungsschutzprozesses während des U.S.-amerikanischen Reorganisationsverfahrens nach Chapter 11 Bankruptcy Code"
  The article reviews a judgment of the German Federal Labour Court

(27.02.2007 – 3 AZR 618/06) dealing with the interruption of an action for protection against dismissal according to the reorganization proceedings under Chapter 11 U. S. Bankruptcy Code.

- ***Kurt Siehr:*** "Ehescheidung deutscher Juden"
  The article reviews a judgment of the German Federal Court of Justice (28.05.2008 – XII ZR 61/06) concerning in particular the question whether divorce proceedings before a Rabbinical Court in Israel lead to the result that the plea of lis alibi pendens has to be upheld in German divorce proceedings. As stated by the Federal Court of Justice this could only be the case if the Jewish divorce could be recognised in Germany. This was answered in the negative by the Federal Court of Justice under the given circumstances confirming its previous case law according to which a divorce before a Rabbinical Court constitutes an extra-judicial divorce – and not a sovereign act – which can, under German law, only be recognised if the requirements of the law applicable according to German PIL (Art. 17 EGBGB) are satisfied. Due to the fact that in the present case German law was applicable with regard to the divorce according to Art. 17 EGBGB, this was not the case.

- ***Frank Spoorenberg/Isabelle Fellrath***: "Offsetting losses and profits in case of breach of commercial sales/purchase agreements under Swiss law and the Vienna Convention on the International Sale of Goods"

This contribution analyses the computation of damages that may be awarded in order to compensate the buyer for the losses incurred on the substitution transactions as a result of the seller's default in a commercial sales/purchase agreement. It discusses more specifically the possible compensation of substitution and additional losses with any profits incurred on a single substitution transaction, and on successive substitution transactions, focusing on the articulation of the international and Swiss law provisions governing general losses and substitutions losses. Reference is made by ways of illustration to a recent unpublished ICC arbitration award addressing the issue from a set off perspective.

- ***Dirk Otto***: "Formalien bei der Vollstreckung ausländischer Schiedsgerichtsentscheidungen nach dem New Yorker Schiedsgerichtsabkommen" – the English abstract reads as follows:

The author criticises a decision of Austria's Supreme Court which required a party seeking to enforce a foreign arbitration award in Austria to submit a legalised original or certified/legalised copy of the arbitration award although the defendant never disputed that a submitted simple copy was authentic. The author submits the correct approach would have been to require compliance with the formalities of Art. IV of the New York Convention only if (i) defendant disputes the authenticity of a copy or (ii) the enforcing court has to pass default judgment as only in these situations there is a genuine need to prove the conformity of documents.

- ***Götz Schulze***: "Anerkennung von Drittlandscheidungen in Frankreich" – the English abstract reads as follows:

The author analyses two judgments of the French Court of Cassation pertaining to the incidental recognition of foreign divorce decrees under French law. In the first case, a Moroccan wife had filed for divorce in France. The conciliation hearings were opposed by the husband, who claimed that the marriage had already been dissolved by a final Moroccan divorce decree. The second case regarded a French married couple who had been resident in Texas. Upon separation, the husband returned to France, where he filed a petition for divorce. The admissibility of the latter was contested because divorce proceedings were already pending in Texas, which finally led to a final divorce decree. Since the cases did not fall within the scope of the Brussels II Regulation, French procedural law was applicable. In both cases, the question at stake was whether the courts had to take into account the foreign judgments when assessing the admissibility of the divorce petition. The Court of Cassation answered in the affirmative. It held that national courts have to determine the recognition of foreign divorce decrees in every stage of the procedure as an incidental question. It thereby overruled an earlier judgment, according to which the recognition of foreign judgments was reserved for the "juge de fond" and could not be determined in conciliation hearings or summary proceedings. It also held that recognition could not be denied for reasons beyond the three exhaustive grounds of non-recognition established under French law, which are lack of international jurisdiction, misuse of rights, and public policy. In the second case, the lower court had denied recognition because the divorce decree had not been registered with the register office. The reported judgments herald an important shift in French procedural law and were unanimously welcomed

by legal writers. Not only did the Court of Cassation interpret national civil procedural law in a manner as to align it with art. 21 (4) Brussels II Regulation. It also overcame the long criticised procedural privileges for French nationals. As the court made clear, art. 14 Code of Civil Procedure, which grants to every French national an international venue within the domestic territory, cannot be read as to inversely hinder the recognition of a foreign judgment.

Futher, this issue contains the following information:

- The new German choice of law rules as amended due to the adaptation to Regulation (EC) No. 593/2008 (Rome I) which are applicable from 17 December 2009: "Das EGBGB in der ab 17.12.2009 geltenden Fassung"
- ***Erik Jayme/Carl Friedrich Nordmeier*** report on two PIL conferences held in Lausanne: "Zwanzig Jahre schweizerisches IPR-Gesetz – Globale Vergleichung im Internationalen Privatrecht"
- ***Ralf Michaels/Catherine H. Gibson*** report on the conference held at Duke Law School on 9 February 2008 titled: "The New European Choice-of-Law Revolution: Lessons for the United States?"
- ***Hilmar Krüger*** reports on the wife's right of succession under Iranian law: "Neues zum Erbrecht der überlebenden Ehefrau nach iranischem Recht"
- ***Hilmar Krüger*** reports on the recognition of foreign decisions in the field of family law in Turkey: "Zur Anerkennung familienrechtlicher Entscheidungen in der Türkei"

French Court Denies Recognition to American Surrogacy Judgement

On 26 February 2009, the Paris Court of Appeal denied recognition to a couple of American judgments which had sanctioned a surrogacy. The Court held that it

was contrary to French international public order.

In this case, a French couple had found a surrogate mother in Minnesota who had accepted to carry their child. After Ben was born, the parties had obtained on 4 June 2001 two judgments from a Minnesota court, the first finding that that the child had been abandonned by the American surrogate mother, the second ruling that he was adopted by the French couple. A birth certificate had then been delivered by the relevant Minnesota authorities.

When the couple came back to France, they tried to have the child registered as theirs on the relevant French registry. The French public prosecutor initiated proceedings to have this registration cancelled.

Both the French first instance court and the Paris Court of Appeal ruled against the couple. The debate focused on whether the American judgments could be recognised in France (it does not seem that the issue of whether the birth certificate could be recognised was raised). The Paris Court of appeal noticed that there were no international convention between the U.S. and France on the recognition of foreign judgments, and that it followed that the French common law of judgments as laid down by the *Cour de cassation* in *Avianca* applied.

The Court only explored whether one of the conditions was fulfilled, namely whether the foreign judgments comported with French international public order. It simply held that it did not, as the Civil code provide that surrogacy is forbidden in France (Article 16-7 of the Civil Code), and that the rule is mandatory (*d'ordre public*: see Article 16-9 of the Civil Code). In truth, the Code certainly provides that the rule is mandatory in France, but it does not say whether the rule is also internationally mandatory. The Court rejected arguments to the effect that Article 8 ECHR or the superior interest of the child commanded a different outcome.

I had reported earlier about another judgment of the same Paris Court of Appeal (indeed, the same division of the court, which is specialized in private international law matters) which had accepted to recognize a Californian judgment. This decision had been overruled by the *Cour de cassation*, but on an issue of French civil procedure which was unrelated.