First Issue of 2012's Journal of Private International Law

The last issue of the *Journal of Private International Law* was just released. It includes the following articles:

Review of the Brussels I Regulation: A Comment from the Perspectives of Non-Member States (Third States), by Koji Takahashi

> *The review of the Brussels I Regulation is in progress. Quite naturally, the discussions have been centred on the viewpoints of the Member States. Yet, both the current Regulation and the Commission's proposal have significant implications for non-Member States. In fact, stakes for non-Member States are higher in Brussels I than in Rome I or II. This analysis evaluates the current regime and the proposed reform from an angle of non-Member States, focusing on three issues of particular relevance to the interests or positions of such States. They are (1) recognition and enforcement of judgments founded on exorbitant bases of jurisdiction (2) denial of "effet réflexe" and (3) lis pendens between the courts of a Member State and a non-Member State. The analysis reveals that views from inside and outside the Union do not necessarily diverge on the desirable contents of reform but may differ on the priorities of reform. While the EU is entitled to construct its internal legal regime in whatever manner it sees fit, to the extent there are implications for the outside world, it is hoped that due consideration will be given to views from outside.*

Recognition and Enforcement of Judgments in Carriage of Goods by Road Matters in the European Union, by Paolo Mariani

> *This article discusses the relationship between Brussels I Regulation and The Convention on the Contract for the International Carriage of goods by road (CMR). The Court of Justice in TNT Express Nederland decision (case C-533/08) confirms the international specialised conventions' primacy on the Regulation, provided the respect of the principles underlying judicial cooperation in civil and commercial matters in the European Union. The Court also acknowledges its lack of jurisdiction to interpret the CMR.*

TNT Express Nederland contributes in the elaboration of the EU principles underlying judicial cooperation. Unfortunately, this contribution risks being useless for national courts since the decision fails to answer the question as to how CMR provisions should be applied lacking the compliance with the European standard.

The article concludes by supporting the Court of Justice power to provide the interpretation of the Brussels I Regulation in the context of the application of Article 31 CMR in order to enable the national court to assess whether the CMR can be applied in the European Union.

Avoid the Statutist Trap: The International Scope of the Consumer Credit Act 1974, by Christopher Bisping

This article takes a fresh look at the role statutes play within the conflict of laws. The author argues that statutes can only ever apply within the framework of conflict-of-laws rules. Parliament's intention must be taken to subject legislation to the conflict-of-laws system. The opposing view would commit the mistake of falling into the 'statutist trap' and overload statutes with meaning, which they do not have. The author uses the Consumer Credit Act 1974 and the House of Lord's decision in OFT v Lloyds to illustrate the argument.

Preliminary Questions in EU Private International Law, by Susanne Goessl

Whenever a rule contains a legal concept, such as "matrimony", rarely are the legal requirements for the concept clarified in the same rule. Determining the meaning of such a concept (preliminary question) is often necessary to resolve the principal question. In an international context, one can apply the lex fori's or the lex causae's PIL to determine the law applicable to the preliminary question. This article analyses which of those two approaches is preferable in the PIL of the EU.

Traditional advantages of the lex causae approach loose its cogency in the European context, esp. the deterrence of forum shopping, the presumption of the closer connection and the international harmony. On the other hand, many traditional and new reasons support the lex fori approach, eg national harmony, foreseeability, practicability and further integration.

The article comes to the conclusion that, no matter whether the concept occurs in a PIL or a substantive rule the lex fori approach is the better solution. Only in limited cases with an urgent need of international harmony the lex causae approach should prevail.

Statutory Restrictions on Party Autonomy in China's Private International Law of Contract: How Far Does the 2010 Codification Go?, by Liang Jieying

The "Law on the Application of Laws to Foreign-Related Civil Relationships of the People's Republic of China" became effective on 1 April 2011. This is the first statute in China that specifically addresses private international law issues. The party autonomy principle is positioned in the first chapter as one of the "General Provisions". This article provides a critical commentary on the relevant rules in the new law concerning the restrictions on party autonomy in contractual choice of law. The author investigates how the new Codification responds to the problems existing in the previous legal rules and judicial practice, and argues that, although the Codification has provided several rules to resolve some previously unclear questions, it fails to address comprehensively the more critical issues relating to the operation of the party autonomy principle.

The Law Applicable to Intra-Family Torts, by Elena Pineau

Courts increasingly face at the domestic level cases of intra-family torts. Two kinds of answers are provided to the question whether there is a right to reparation and, if so, to what extent: either the answer is given by the same family law rules which are infringed; or resort is had to the general system of tort law as a default solution. At the conflict rules' level, European judges dealing with intra-family torts are confronted with an interesting problem since the Rome II Regulation expressly excludes damages arising out of family relationships out of its scope of application. This being so, the case is posed which are the possible solutions. Two options have been considered: either applying the same law which governs the 'family duty' allegedly infringed, ie, the underlying lex causae; or considering whether it would be reasonable to extend the application of the Rome II Regulation to these cases. It is contended that the first option is to be preferred.

Unmarried Fathers and Child Abduction in European Union Law, by Pilar Blanco

> *The treatment that the laws of some Member States of the European Union give to the custody rights of unmarried fathers should be regarded as contrary to the European Convention of Human Rights and the Charter of Fundamental Rights, insofar as the unmarried father who is responsible for the child cannot prevent the removal of said child to another State because of the absence of automatic acquisition of rights of custody under national law. Although the Charter only applies to Member States expressly when they are implementing European Union law, this paper has argued for a broad construction of a uniform EU law meaning of "custody rights" under Brussels IIa, including the inchoate custody rights of unmarried fathers, influenced by a desire to avoid unnecessary and disproportionate restrictions on the right to non-discrimination on the grounds of sex in the application of the right to object to a child abduction by fathers compared to mothers.*

Save the Date – Journal of Private International Law Conference 2013

The 5th Journal of Private International Law Conference will take place in Madrid from 12th – 13th September 2013.

A call for papers as well as the conference programme will be published later this year.

First Issue of 2012's Belgian PIL E-Journal

The first 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 an article by Patrick Wautelet (Liège University) presenting three recent developments in choice of law in matrimonial property matters (*Les règimes matrimoniaux en droit international privé – Autour de trois questions d'actualité*).

June at the Academy of European Law (ERA)

June is going to be quite charged at the Academy of European Law (ERA). The program starts with the seminar on **Rome I and Rome II** (31 May-1 June, see here. Update: there are still some places left; fees include two nights at a hotel).

Then, a five-day course will provide training on cross-border civil litigation (18-22 June 2012). Key topics of this **summer course** are:

- Challenges for cross-border litigation
- Specific procedures that help to obtain a judgment abroad faster and more easily
- Law applicable to contracts and torts

There will be conferences as well as workshops, led by Angelika Fuchs, Ivana Kunda, Jens Haubold, Jan von Hein, Xandra Kramer, John Ahern, Raquel Ferreira Correia and Brian Hutchinson.

Another five days (25-29 June) will be devoted to European labour law, PIL included (for those interested also on social security law, the Annual conference on the topic will be held also at the ERA on June, 4-5. The conference will address the new EU social security coordination rules in force since May 2010; problems in terms of implementation at national and local level for the new regulations; and the challenge of Administrative cooperation between social security institutions.)

Key issues of the labour law summer course are

- Free movement of workers
- Applicable law to employment contracts
- Posting of workers
- Transfer of undertakings
- Information and consultation rights
- Equality and non-discrimination
- Part-time, fixed-term and temporary agency work
- Working time

And the list of speakers: Ronald M. Beltzer; Nicola Braganza, Guy Castegnaro, Stefan Clauwaert, Szymon Kubiak, Jean-Philippe Lhernould, Nicolas Moizard, Filip Van Overmeiren, Nuria Elena Ramos Martin, Corinne Sachs-Durand, and Claudia Schmidt.

The summer program goes on at the very beginning of July with a five-days summer course on European intellectual property law (2-6 July). Key topics, this time

- Legal and institutional framework
- Trade marks and designs
- Geographical indications
- Copyright and related rights
- Protection of databases
- Patents
- Intellectual/industrial property and the internal market (competition law and free movement of goods)
- Jurisdiction and dispute resolution
- Enforcement

Expected speakers are Philippe de Jong, Stefan Enchelmaier, Elisabeth Fink, Irina

Kireeva, Anne MacGregor, David Por, Marius Schneider, Martin Senftleben, Paul L.C. Torremans and Guido Westkamp.

Participants in summer courses are given the opportunity to visit the European Court of Justice in Luxembourg (though the number of places is limited by the Court for practical reasons to 35).

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

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

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

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

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

The advancing integration of European civil procedure means that the criteria under which European insolvency judgments can be refused recognition on grounds of public policy are constantly modified. The European Insolvency Regulation is not excluded from such a development. Public policy is not something which is solely derived from national law. More and more, a European concept of public policy is becoming the benchmark for interpreting

Art. 26. This article will focus on the analysis of the public policy clause in the light of international insolvency law principles – mainly the universal and immediate recognition of insolvency proceedings. Against this background, it will show why and to what extent the interpretation of Art. 26 of the Insolvency Regulation differs from that of Art. 34 n° 1 of the Brussels I Regulation, which is applied in the context of civil procedure. Due to the increasing harmonisation within the EU, the article will also shed light on the relation between the public policy exception and the need for a prior legal defence in the State in which the insolvency proceedings were opened.

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

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

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

The article reviews a decision of the Higher Social Court of North Rhine-Westphalia (3.12.2008 – L 8 R 239/07), dealing with the question whether a contempt fine (Ordnungsgeld) can be imposed on a party to a lawsuit who has been summoned to appear before a German consul posted abroad or before a

German judge acting on foreign soil, but who has failed to comply with the summons. The author analyses the relevant mechanisms of the Hague Evidence Convention of 1970 as well as German procedural law.

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

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

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

Under German law, shareholder loans are subordinate to the claims of all other creditors in the case of the insolvency of a company whose members are not personally liable. In its "PIN Group" decision, the German Federal Supreme Court (BGH) held that this rule also applies to companies founded in another EU Member State for which insolvency proceedings have been opened in Germany. The Court stated that the rule is to be characterised as a matter of insolvency law – not company law – and based this ruling on Art. 4(2)(g) and (i) of the European Regulation on Insolvency Proceedings. The author agrees with the decision, but critically examines and refines its reasoning. She analyses in detail whether the application of the German rule to a foreign company is

compatible with the freedom of establishment (Art. 49, 54 TFEU). Furthermore she discusses the characterisation of other German rules concerning (1) the rescission of repayments of shareholder loans after the opening of insolvency proceedings or after the refusal to open such proceedings for lack of funds, (2) loans for which a shareholder has provided a security, and (3) the relinquishment of items or rights for use or exercise by a shareholder to the company. She argues that all these rules are to be characterised as matters of insolvency law.

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

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

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

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

The agreement on nuptial money has not to be qualified contractually but as a question of engagement. The determination of the statute of engagement is controversial, in the present case, however, German law is decisive according to all opinions. Pursuant to § 138 BGB the agreement on nuptial money is void as it violates public policy. A claim for repayment on grounds of unjustified

enrichment fails due to § 817 sent. 2 BGB, because the violation of public policy is not only caused by the money receiving party but also the paying claimant.

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

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

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

On 28 October 2010, China promulgated the Act of the People's Republic of China on Application of Law in Civil Relations with Foreign Contacts, which came into force in China's Mainland on 1 April 2011. The Act is remarkable for its brevity and lack of concrete solutions. The legislators have opted for

generality, while leaving specific issues to the courts and in particular, to the Supreme People's Court. Thus, the legislature has merely set the stage for the judiciary by providing a preliminary framework for future Chinese private international law. Pending interpretive instruments by the Supreme People's Court, this Note stays with an overview of the Act. It first introduces the legal background to Chinese private international law, followed by a brief retrospect of the legislative history of the Act. It then discusses the general features of the Act, viz., the residual role of the closest connection rule, the liberal attitude towards party autonomy, the free-spirited approach to forum mandatory rules, enhanced (possibilities of) content-orientation, and adoption of the habitual-residence principle. Finally, it concludes by observing that Chinese private international law is moving towards a regime with greater flexibility, and that this move is inspired by the demands for substantial justice and the wish to promote national interests.

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

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

- ***Erik Jayme/Carl Friedrich Nordmeier*** on the conference of the German-Lusitanian Association in Cologne: "Anwendung und Rezeption lusophoner Rechte: Tagung der Deutsch-Lusitanischen Juristenvereinigung in Köln"

- ***Erik Jayme*** on art trade and PIL: “Kunsthandel und Internationales Privatrecht – Zugleich Rezension zu Michael Anton, Rechtshandbuch – Kulturgüterschutz und Kunstrestitutionsrecht”
- ***Marc-Philippe Weller*** on the PIL Session 2011 of the Hague Academy of International Law: “Les conflits de lois n’existent pas! Hague Academy of International Law – Ein Bericht über die IPR-Session 2011”

Kein Abstract

Report of European Parliament on Future Choice of Law Rule for Privacy and Personality Rights

On May 2nd, 2012, the Committee on Legal Affairs of the European Parliament has issued its final Report on with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) (the previous draft is available here). The Report includes a Motion for a European Parliament Resolution which advocates the following addition to the Regulation:

Recital 32a

> *This Regulation does not prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media. In particular, the application of a provision of the law designated by this Regulation which would have the effect of significantly restricting the scope of those constitutional rules may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (ordre public) of the forum.*

Article 5a

Privacy and rights relating to personality

1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, including defamation, shall be the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur.

2. However, the law applicable shall be the law of the country in which the defendant is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by paragraph 1.

3. Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors.

4. The law applicable to the right of reply or equivalent measures and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast and regarding the violation of privacy or of rights relating to the personality resulting from the handling of personal data shall be the law of the country in which the publisher, broadcaster or handler has its habitual residence.

Many thanks to Jan von Hein for the tip-off.

Wautelet on Cross-Border Same Sex Relationships

Patrick R. Wautelet, University of Liege, has posted "Cross-Border Same Sex Relationships – Private International Law Aspects" on SSRN. The paper can be downloaded here. The abstract reads as follows:

> *In this paper I attempt to give an overview of the private international law rules pertaining to same sex relationships (marriages and partnerships) in Europe, in order to examine whether there exists a consensus among the countries concerned, what are the difficulties arising out of the lack of consensus and how these difficulties can best be tackled. This paper has been presented at a conference (ERA-Trier) in 2011. It has been published in a book together with the other reports to the conference (Boele Woelki/Fuchs, Legal Recognition of Same-Sex Relationships in Europe – national, cross-border and European perspectives, Intersentia, 2012).*

Burbank on Judicial Cooperation with the United States

Stehen B. Burbank, University of Pennsylvania Law School, has posted "A Tea Party at the Hague" on SSRN. The article can be downloaded here. The abstract reads as follows:

> *In this article, I consider the prospects for and impediments to judicial cooperation with the United States. I do so by describing a personal journey that began more than twenty years ago when I first taught and wrote about international civil litigation. An important part of my journey has involved studying the role that the United States has played, and can usefully play, in fostering judicial cooperation, including through judgment recognition and*

enforcement. The journey continues but, today, finds me a weary traveler, more worried than ever about the politics and practice of international procedural lawmaking in the United States. Disputes about the proper roles of federal and state law and institutions in the implementation of the Hague Choice of Court Convention suggest that this little corner of American foreign policy is at risk of capture by forces that, manifesting some of the worst characteristics of domestic politics, would have us host a tea party at The Hague.

Hague Conference: Council on General Affairs and Policy Meeting

From 17 to 20 April 2012 the Council on General Affairs and Policy of the Hague Conference on Private International Law met in the Hague to discuss, among others, the Draft Hague Principles on Choice of Law in International Commercial Contracts as well as the practical operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention. The conclusions adopted are available here.

More information on the current activities of the Conference is available on the Conference's website.

The Questionable Basis of the Common European Sales Law: The

Role of an Optional Instrument in Jurisdictional Competition

Eric A. Posner, Kirkland & Ellis Professor of Law at the University of Chicago Law School, has posted “The Questionable Basis of the Common Euroepan Sales Law: The role of an Optional Instrument in Jurisdictional Competition” on SSRN. The paper can be downloaded here. The abstract reads as follows:

The Common European Sales Law is designed as an optional instrument that European parties engaged in cross-border transactions could choose for their transactions in preference to national law. The goal is to increase cross-border transactions and perhaps to enhance European identity. But the CESL is unlikely to achieve these goals. It raises transaction costs while producing few if any benefits; it is unlikely to spur beneficial jurisdictional competition; its consumer protection provisions will make it unattractive for businesses; and its impact on European identity is likely to be small.