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.

Latest Issue of RabelsZ: Vol. 76, No. 2 (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:

- *Holger Fleischer*, **The Optional Instrument in European Private Law ("28th Regime"),** pp. 235-252

This paper explores the "optional instrument" as a regulatory tool in European private law. The term "optional instrument" or "28th Regime" refers to supranational corporate forms, legal titles or legal instruments which provide an alternative model for doing business throughout the European Union while leaving national laws untouched. After distinguishing different modes of optional law, the paper provides an overview of optional instruments that already exist or are proposed in European company law, intellectual property law, insurance contract law and sales law. It then identifies common features and problems of the 28th Regime, from its appropriate legal basis and the need for an optional instrument, to its scope of application, its interface with national law and its relationship to private international law. Finally, the paper addresses the under-researched question of vertical regulatory competition triggered by optional instruments in European private law

- *Jörn Axel Kämmerer*, **Responsibility for Integration: A New Theme Made in Karlsruhe,** pp. 253-275

Integrationsverantwortung is a neologism that was coined by the German Federal Constitutional Court (Bundesverfassungsgericht – BVerfG) in its 2009

judgment on the Treaty of Lisbon. The term translated as "responsibility for integration" but does in fact mean the constitutional limits that the German Basic Law (Grundgesetz – GG) imposes on the Treaty, especially compliance with democratic principles enshrined therein, and which are specified in the judgment. According to the Court, the national laws accompanying ratification of the Treaty deviated from these principles and were therefore declared void. The German legislature took account of the Court's findings in the Responsibility for Integration Act (Integrationsverantwortungsgesetz-IntVG). Its numerous and detailed rules on participation of parliaments, responding to the extension of European Union (EU) competencies in the Lisbon Treaty, are likely to complicate future attempts to create a Union-wide (optional or mandatory) private law, especially if the legislation of other Member States is used as a catalyst. In most cases covered by the IntVG, the Bundestag must formally authorise the German member of the Council of Ministers to vote in favour of the proposal or to abstain; otherwise the German member of the Council would be obliged to reject the European legal act. The European act would then fail, as its adoption must be unanimous. Among the EU competencies that require neither this kind of empowerment nor unanimity in the Council, none provides a suitable basis for a pan-European private law. Article 81(2) of the Treaty on the Functioning of the European Union (TFEU), confined to " judicial cooperation in civil matters", does not allow for approximation of material law. While no such restriction is inherent in Art. 114 TFEU, the harmonisation of national private law that it admits must serve the functioning of the internal market, with only internal and non-commercial legal relations being excluded. Requiring the Union to act "within the framework of the policies defined in the Treaty", even Art. 352 TFEU cannot provide the basis for a comprehensive private law regime where the Treaty remains otherwise silent on the matter. Even insofar as the provision serves as a basis for (optional) rules, the Council must decide unanimously and its German member must have been previously empowered by the Bundestag (§ 8 IntVG).

In introducing the barriers, the Federal Constitutional Court underestimated the democratic achievements of the EU and adhered to nationState-based concepts of legitimacy that have been criticised as backwardlooking. Its assumption that Art. 352 TFEU would come into conflict with the interdiction of "blanket empowerments" contrasts with its former position on Art. 308 EC; involvement of national parliaments had never been considered necessary in this respect, even though the scope of its successor provision is not palpably

broader. Confining § 8 IntVG to legal acts not related to the internal market may appear politically desirable but would sidestep the will of the contracting States, which was to abolish this criterion. Positive effects of the IntVG on integration should be mentioned, despite their potential to hamper standardisation of private law in Europe. Ultra vires control of Union acts by the German Constitutional Court is unlikely to be exercised where Parliament has positively assented to EU legislation whose compatibility with the principle of conferral is disputed. If attempted, standardisation, or harmonisation, of private law in Europe might evidence the true significance of Art. 352 TFEU for European integration. In summary, the IntVG makes European law-making less predictable but might help parliaments to become involved in debates on projects such as the "28th model" that have until now largely remained in the domain of legal scholars. The likelihood of its materialisation, however, decreases with the proliferation of legal caveats, and even the European Court of Justice could be induced to applying a stricter ultra vires control.

- *Lars Klöhn*, **Supranational Legal Entities and Vertical Regulatory Competition in European Corporate Law. The Case for Market-Mimicking EU Corporate Forms,** pp. 276-315

This article states the case for market-mimicking supranational corporate forms in Europe. It argues that the form and substance of European Union (EU) incorporation options, such as the Societas Europaea or the Societas Privata Europaea, depend on the extent to which there can be regulatory competition between the European Union Member States (horizontal competition), and between the EU and its Member States (vertical competition). At present, there is some passive horizontal competition, but there can be no proactive vertical regulatory competition in Europe. However, as the Canadian experience shows us, there might be temporary passive vertical competition causing Member States to copy certain features of supranational corporate forms which are perceived as better matching the preferences of those facing a decision on where to incorporate. Therefore, when offering corporate forms, the EU should mimic a functioning European corporate law market. It should adopt those rules which would prevail under such conditions. The concept of market-mimicking corporate forms adds a third, "diagonal" dimension to regulatory competition in European company law. It confronts Member States' regulators with the result of hypothetical proactive horizontal regulatory competition. If

this result better matches the preferences of entrepreneurs, mere incentives to enter into passive competition will suffice for this result to prevail in national company laws. When drafting such rules European regulators can seek guidance from over 35 years of economic analysis of corporate law. Examples of such analysis can be found in respect of Delaware's General Corporation Law.

- *Helmut Heiss,* **An Optional Instrument for European Insurance Contract Law**, pp. 316-338

In its first chapter, the article explains why a European insurance contract law in the form of an optional instrument is needed to complete the internal insurance market. Essentially, this is due to the existence of a large number of mandatory rules in conflict of laws as well as the substantive law of insurance, both of which form a serious barrier to the functioning of the internal insurance market. The "Principles of European Insurance Contract Law (PEICL)" are presented as a model optional instrument in the second chapter, where the basic features of the model law, in particular its regulatory approach, are set out. The optional character of a European instrument is discussed in the third chapter. It applies, but is not restricted to insurance contract law. In essence, an argument is advanced in favour of a "2nd regime" model. This model has since been adopted by the Commission Proposal on a Common European Sales Law (COM(2011) 635 final).

- *Reto M. Hilty*, **An Optional European Contract Law Instrument ("28th Model"): "Intellectual Property",** pp. 339-373

In the search for the "28th model", a glance at the European acquis communautaire could lead us to assume that intellectual property is in the vanguard and that the establishment of an optional instrument has proven to be a model of success. All that was actually created, however, were two supranational legal systems, namely in trade mark law and in design law. The terrain for these two regulations, from 1993 and 2002, respectively, was certainly well-cleared, for the corresponding national regimes had for the most part already been harmonised via directives in 1988 and 1998. These two EU regulations thus did not compete with the national legal systems so much in terms of content as with respect to their geographic scope. A registrant primarily chooses EU legal title when he or she intends to do business in the EU

and not strictly within national boundaries. The European Patent Convention (1973), on the contrary, is not only not a legal entity of the EU, but it also is based on an independent supranational construct, the European Patent Organisation. Furthermore, the Convention's intended purpose is limited to centralising the procedures leading up to the grant of patents for the participating, currently 38, member states. Once granted, however, the so-called bundle patents are for the most part on a par with the nationally granted patents. A true supranational patent-law title has not been achieved yet, despite decades-long efforts. The "enhanced cooperation" between 25 member states (Spain and Italy not included) that is currently being discussed will likewise not be able to stand in for an EU patent – not to mention the open question of whether business and industry would even accept such a construct. In the area of copyright, again, certain vague ideas have recently been brought into play that point towards an EU right, though without any concrete details, and such a thing as an EU copyright – assuming discussion on this topic does not soon fade away on its own – certainly lies far in the future. It is especially striking that agreements on intellectual property rights – which practically speaking are incredibly important – have never played a part in the previous initiatives for a unifi ed European contract law. It is in relation to just these types of contracts that an optional "28 th model" seems the most obvious choice for markedly increasing legal certainty in the outcome of court disputes. Indeed, more innovation and competitiveness cannot be gained through the abstract reinforcement of legal protection alone; what is further necessary is a knowledge transfer as comprehensive as possible. First and foremost, this requires an appropriate contract law that is capable of providing for the particularities of each contractual subject.

- *Stefan Leible*, **Private International Law and Vertical Competition Between Legal Systems,** pp. 374-400

Over the past decades, the European Union (EU) has influenced private law in two ways: first, by the "four freedoms" enshrined in primary law which are designed to promote the Internal Market and have a bearing on private relationships, and second by enacting acts of secondary law that address relationships between individuals. Today, we are facing a plethora of national laws and court decisions that live side by side with the many regulations, directives and decisions by the EU institutions. The coexistence of these

different legal sources is not very easy to manage, and suggestions how to disentangle the mess abound. While some authors plead for a full harmonization of private law, others highlight the benefits of competition between the national legal systems (horizontal dimension) and between the Member States and the EU (vertical dimension). The article stresses the advantages of a harmonization approach, but also points to unwelcome effects. The workings of horizontal and vertical competition are juxtaposed and the importance of comparative law is underlined. The new Optional Instrument on a Common Sales Law for the European Union is studied as an example of vertical competition. Drawing on the lessons of the past, the author pleads for extending the scope of the instrument in the future.

- *Matteo Fornasier*, **"28th" versus "2nd" Regime – An Optional European Contract Law from a Choice of Law Perspective,** pp. 401-442

Ten years after placing the idea of a European contract law on the political agenda, the European Commission has finally taken legislative action. On 11 October 2011, a proposal for a Regulation on a Common European Sales Law was published. The regulation would create a set of European contract rules which would exist alongside the various national regimes and could be chosen as the applicable law by the parties to a sales contract. Such an instrument raises a number of questions with regard to private international law in general and the Rome I Regulation in particular. Should the choice of the European contract law be subject to the general rules on party choice under Rome I or does the new instrument call for special rules? Also, should the European contract law be eligible only where the relevant choice of law rules refer the contract to the law of a Member State or should the parties also be allowed to opt for the European rules where private international law designates the law of a third state as the law applicable to the contract? The paper examines which solution is the best suited to achieve the primary goal of the optional instrument, i.e. to improve the functioning of the internal market. Moreover, it seeks to shed some light on the terms of »28th regime« and »2nd regime« that are often used to identify different possible approaches of how to fit the optional instrument into the system of private international law. Moreover, the paper deals with the relationship between the optional instrument and the CISG as well as other uniform law conventions. The article concludes by addressing a

number of specific issues such as the prerequisites for a valid choice of the instrument, the applicability of the pre-contractual information rules, gap-filling, and the relationship between the optional instrument and national overriding mandatory provisions (Eingriffsnormen).

ECJ Rules Again on Defendants with Unknown Domicile



On March 15th, the European Court of Justice ruled again on the defendants with unknown domicile in *G v. Cornelius de Visser*. The Court had already addressed the issue in its *Lindner* case last year.

Background

In *de Visser*, the plaintiff was a woman who had asked de Visser to take pictures of her, including one where she did not wear much cloth. De Visser later published the picture on his German website. The plaintiff argued that she had never agreed to this, and sued in Germany. But she was unable to determine where the domicile of de Visser might be.

Applicability of the Brussels I Regulation

The first issue that whether the Brussels I Regulation applied in a case where the domicile of the defendant was unknown. In *Lindner*, the court had issued a ruling with a very limited scope: consumers who had concluded long-term mortgage loan contracts, and who had agreed to inform the other party of any change of addresses. The *de Visser* court is courageaous enough to issue what seems to be a general ruling. The Brussels I Regulation applies when the domicile of the

defendant is unknown provided that he is a national from a Member state, and that no "firm evidence" of a domicile outside of the EU has been adduced. In other words, EU nationals are presumed to have their domicile in the EU.

> *40 Secondly, the expression 'is not domiciled in a Member State', used in Article 4(1) of Regulation No 44/2001, must be understood as meaning that application of the national rules rather than the uniform rules of jurisdiction is possible only if the court seised of the case holds firm evidence to support the conclusion that the defendant, a citizen of the European Union not domiciled in the Member State of that court, is in fact domiciled outside the European Union (see, to that effect, Hypote?ní banka, paragraph 42).*
>
> *41 In the absence of such firm evidence, the international jurisdiction of a court of a Member State is established, by virtue of Regulation No 44/2001, when the conditions for application of one of the rules of jurisdiction laid down by that regulation are met, including in particular that in Article 5(3) thereof, in matters relating to tort, delict or quasi-delict.*

Interestingly enough, the nationality of de Visser was only "probably" that of a Member state. The Court still concludes:

> ***1. In circumstances such as those in the main proceedings, Article 4(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 it does not preclude the application of Article 5(3) of that regulation to an action for liability arising from the operation of an Internet site against a defendant who is probably a European Union citizen but whose whereabouts are unknown if the court seised of the case does not hold firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union.***

Choice of Law

The lack of information on the domicile of de Visser also created problem from a choice of law perspective. Visser was a service provider. He thus enjoyed a European freedom to provide service outside of his Member state of

establishment. Thanks to the Directive on eCommerce, this meant that he might have been entitled to avoid the application of the lex loci delicti if that law were more restrictive than the law of the place of his establishment. But it was unclear where he was established. In such a case, could he argue in favour of the law of his nationality instead of the law of his unknown domicile?

No. The Court rules that in the absence of a proven establishment in the EU, European law simply does not apply. Well, domicile in the EU is also a requirement for applying the Brussels I Regulation, isn't it? The Court does not care to explain how these two outcomes can be reconciled.

> *70 In that regard, it is clearly apparent from the judgment in eDate Advertising and Others that the establishment of the provider in another Member State constitutes both the reason for and the condition for application of the mechanism laid down in Article 3 of Directive 2000/31. That mechanism seeks to ensure the free movement of information society services between Member States by making those services subject to the legal system of the Member State in which their providers are established (eDate Advertising and Others, paragraph 66).*
>
> *71 Since application of Article 3(1) and (2) of that directive is thus subject to the identification of the Member State in whose territory the information society service provider is actually established (eDate Advertising and Others, paragraph 68), it is for the national court to ascertain whether the defendant is actually established in the territory of a Member State. In the absence of such establishment, the mechanism laid down in Article 3(2) of Directive 2000/31 does not apply.*

The judgment also addresses two additional issues:

> ***2. European Union law must be interpreted as meaning that it does not preclude the issue of judgment by default against a defendant on whom, given that it is impossible to locate him, the document instituting proceedings has been served by public notice under national law, provided that the court seised of the matter has first satisfied itself that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant.***

3. European Union law must be interpreted as precluding certification as a European Enforcement Order, within the meaning of Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, of a judgment by default issued against a defendant whose address is unknown.

4. Article 3(1) and (2) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market does not apply to a situation where the place of establishment of the information society services provider is unknown, since application of that provision is subject to identification of the Member State in whose territory the service provider in question is actually established.

Photocredit: Velove Shieffa.

Conference: "The Making of European Private Law: Why, How, What, Who" (Rome, 9-11 May 2012)

On 9-11 May 2012 the University of "Roma Tre" will host an international conference on the current issues and perspectives of European Private Law, organized by the **Jean Monnet Centre of Excellence "Altiero Spinelli"** (CEAS): **"The Making of European Private Law: Why, How, What, Who"**. Here's the programme (available for download on the registration page):

Wednesday, 9 May 2012

(Venue: "Roma Tre" University – Aula Magna Rettorato, Via Ostiense 159)

Registration (16,00-16,30)

Opening session (16,30 – 16,45)

- *Guido Fabiani*, Rector, "Roma Tre" University
- *Savino Mazzamuto*, Secretary of State, Ministry of Justice, "Roma Tre" University

The Europeanisation of private law: problems and perspectives (16,45-18,30)

Chair: *Antonio Tizzano*, European Court of Justice

Panelists:

- *Ole Lando*, Copenaghen Business School
- *Bénédicte Fauvarque-Cosson*, "Panthéon-Assas" University (Paris II)
- *Guido Alpa*, "Sapienza" University of Rome
- *Pietro Rescigno*, "Sapienza" University of Rome

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Thursday, 10 May 2012

(Venue: "Roma Tre" University – Aula Magna Rettorato, Via Ostiense 159)

The 'legal basis' of European private law in the light of the EU constitutionalisation (09,30 – 11,30)

Chair: *Luigi Moccia*, "Roma Tre" University

Panelists:

- *Mads Andenas*, University of Oslo
- *Martijn Hesselink*, University of Amsterdam
- *Hans Micklitz*, European University Institute, Florence
- *Christiane Wendehorst*, University of Vienna

The 'instruments' for implementing European private law (11,45 – 13,30)

Chair: *Angelo Davì*, "Sapienza" University of Rome

Panelists:

- *Hugh Beale*, University of Warwick
- *Fabrizio Cafaggi*, European University Institute, Florence
- *Reiner Schulze*, University of Münster
- *Verica Trstenjak*, European Court of Justice

The relationship between European private law and the international unification of private law (15,30 – 17,30)

Chair: *Joachim Bonell*, "Sapienza" University of Rome

Panelists:

- *Fernando Gomez*, "Complutense" University of Madrid
- *Morten Fogt*, Aarhus University
- *Sergio Marchisio*, "Sapienza" University of Rome
- *Renaud Sorieul*, UNCITRAL

European consumer law and its consolidation (17,45 – 19,30)

Chair: *Diego Corapi*, "Sapienza" University of Rome

Panelists:

- *Luc Grymbaum*, "René Descartes" University (Paris V)
- *Hans Schulte-Nölke*, University of Osnabruck
- *Simon Whittaker*, Oxford University
- *Vincenzo Zeno-Zencovich*, "Roma Tre" University

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Friday, 11 May 2012

(Venue: Sala "Pio X", Via Borgo S. Spirito 80)

European property law: issues and projects (09,30 – 11,30)

Chair: *Adolfo Di Majo*, "Roma Tre" University

Panelists:

- *Ulrich Drobnig*, Max Planck Institute for Private Law, Hamburg
- *Brigitta Lurger*, University of Graz
- *Sjef van Erp*, University of Maastricht
- *Francesco Paolo Traisci*, University of Molise, Campobasso

European contract law: issues and projects (11,45 – 13,30)

Chair: *Guido Alpa*, "Sapienza" University of Rome

Panelists:

- *Eric Clive*, University of Edinburgh
- *Marco Loos*, University of Amsterdam
- *Jerzy Pisulinski*, University of Warsaw
- *Anna Veneziano*, University of Teramo

Common European Sales Law: the Commission proposal and the role of stakeholders

15,30-17,00

- *Andrea Zoppini*, Secretary of State, Ministry of Justice, University "Roma Tre"
- *Luigi Berlinguer*, Member of the European Parliament
- *Mihaela Carpus-Carcea*, European Commission, DG Justice

17,15-19,00

- *Ettore Battelli*, "Roma Tre" University, Unioncamere stakeholder
- *Oreste Calliano*, University of Torino, CEDIC director
- *Antonio Longo*, Consumers' representative, EESC member

Each session will be ended by discussion. Working language will be English (French allowed): no simultaneous translation will be provided. **Conference works will be video-recorded and made available on CeAS website.**

Hague Academy of International Law: Summer Programme

The Hague Academy of International Law has recently released the programme for this year's summer course in Private International Law:

30 July 2012: **Inaugural Conference**

Conflicts of Laws and Uniform Law In Contemporary Private International Law: Dilemma or Convergence?, *Didier OPERTTI BADÁN*, Professor at the Catholic University of Montevideo.

6 to 17 August 2012: **General Course**

The Law of the Open Society, *Jürgen BASEDOW*; Director of the Max Planck Institute for Comparative and International Private Law, Hamburg

30 July-17 August 2012: **Special Courses**

- **The Private International Law Dimension of the Security Council's Economic Sanctions** (30 July-3 August), *Nerina BOSCHIERO*; Professor at the University of Milan.
- **The New Codification of Chinese Private International Law** (30 July-3 August), *CHEN Weizuo*; Professor at Tsinghua University, Beijing.
- **Applying Foreign Public Law in Private International Law – A Comparative Approach** (30 July-3 August), *Andrey LISITSYN-SVETLANOV*, Professor at the Institute of State and Law, Russian Academy of Sciences, Moscow.
- **Party Autonomy in Private International Law: A Universal Principle between Liberalism and Statism** (6-10 August), *Christian KOHLER*; Honorary Director-General at the Court of Justice of the European Union, Luxembourg.
- **Applying the most Favourable Treaty or Domestic Rules to Facilitate Private International Law Co-operation** (6-10 August), *Maria Blanca NOODT TAQUELA*; Professor at the University of Buenos Aires.
- **Bioethics in Private International Law** (13-17 August), *Mathias*

AUDIT; Professor at the University of Paris Ouest Nanterre La Défense

- **Compétence-Compétence in the Face of Illegality in Contracts and Arbitration Agreements** (13-17 August), *Richard H. KREINDLER*; Professor at the University of Münster

More information is available on the Academy's website.