Fourth Issue of 2011's Belgian PIL E-Journal

The fourth issue of the Belgian bilingual (French/Dutch) e-journal on private international law *Tijdschrift@ipr.be / Revue@dipr.be* for 2011 was just released.

The journal essentially reports on European and Belgian cases addressing issues of private international law. This issue does not include articles.

Rühl on Choice of Law by the Parties in European PIL

Giesela Rühl (Jena University) has posted Choice of Law by the Parties in European Private International Law on SSRN.

> *The article provides an overview of choice of law in European Private International Law. It explores the function, the historical development as well as the current scope and design of party choice under the pertaining European Union provisions.*

The paper is forthcoming in the *Max Planck Encyclopedia of European Private Law*.

Rühl on Unilateralism in European Private International Law

Giesela Rühl (Jena University) has posted Unilateralism in European Private International Law on SSRN.

> *The articles deals with unilateralism and multilateralism in European Private International Law. It provides an overview of the historical development and looks at trends in current national and international legal systems. It argues that, in Europe, multilateralism has by and large prevailed both on the level of national and on the level of international (European) law. However, it also shows that unilateralism plays an important role in international economic law and secondary European Union law.*

The paper is forthcoming in the *Max Planck Encyclopedia of European Private Law*.

Boehm on Private Securities Fraud Litigation after Morrison

Joshua L. Boehm, who is a J.D. Candidate at Harvard Law School, has published Private Securities Fraud Litigation after *Morrison v. National Australia Bank*: Reconsidering a Reliance-Based Approach to Extraterritoriality in the last issue of the *Harvard International Law Journal*.

> *In June 2010, the U.S. Supreme Court issued a momentous decision in Morrison v. National Australia Bank, upending decades of federal appeals court precedent in transnational securities law. The Court established a bright line, transaction-based test for when Section 10(b) ("Sec. 10(b)") of the Securities Exchange Act of 1934 ("Exchange Act") can apply extraterritorially. Morrison essentially requires that the fraud-related transactions at issue be conducted in*

the United States to allow a claim for relief in U.S. courts. This has had a significant impact on securities litigation because Sec. 10(b) and its implementing regulation, Rule 10b-5, provide the most common cause of action for securities fraud in the United States.

This new test has resulted in a narrower field for private Sec. 10(b) litigation than that available under the dominant regime before Morrison, the Second Circuit's conducts and effects test ("conducts-effects"). Lower federal courts, principally the Southern District of New York ("SDNY"), have already cited Morrison to dismiss multiple Sec. 10(b) cases with a transnational element. But this effect may well be short-lived. In July 2010, with the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "DFA"), Congress restored conducts-effects for transnational securities fraud suits brought by the U.S. government, while also directing the Securities and Exchange Commission ("SEC") to conduct a study on whether and to what extent a private right of action should be extended beyond Morrison's transactional test.

For years before Morrison, the conducts-effects test was consistently criticized on the grounds that it was overly broad and unevenly applied. While Morrison answered those who called for predictability, the Dodd-Frank Act's partial overruling of the decision has, at least for the moment, infused this area of law with more ambiguity than it had pre-Morrison. Courts, shareholders, and companies will continue to operate in this uncertain state until at least early 2012, when Congress will receive the SEC's report on private rights of action and decide how to finalize the extraterritorial scope of that realm of law.

The financial, legal, and even diplomatic implications of these developments are immense. Yet all ultimately relate to a fundamental tension arising from the goal of ensuring that the United States is neither a "Barbary Coast" for "international securities pirates" nor a "Shangri-La of class-action litigation representing those allegedly cheated in foreign securities markets." Reconciling such aims requires consideration of the ever-internationalizing nature of corporate activity and securities markets, as well as class-action litigation trends, the availability of securities fraud remedies abroad, and coherence with other areas of law in which presumptions of extraterritoriality are made.

Brand on Access to Justice and Due Process

Ronald A. Brand, who is the Chancellor Mark A. Nordenberg University professor at the University of Pittsburgh School of Law, has posted Access-to-Justice Analysis on a Due Process Platform on SSRN. Here is the abstract:

In their article, ***Forum Non Conveniens and The Enforcement of Foreign Judgments****, Christopher Whytock and Cassandra Burke Robertson provide a wonderful ride through the landscape of the law of both forum non convenience and judgments recognition and enforcement. They explain doctrinal development and current case law clearly and efficiently, in a manner that educates, but does not overburden, the reader. Based upon that explanation, they then provide an analysis of both areas of the law and offer suggestions for change. Those suggestions, they tell us, are necessary to close the "transnational access-to-justice gap" that results from apparent differences between rules applied in a forum non conveniens analysis and rules applied to the question of recognition of foreign judgments. While the analysis is good, it ignores core differences among legal systems, particularly the due process core of U.S. jurisdictional jurisprudence and the "access to justice" approach to jurisdiction, particularly of European civil law systems (from which most other civil law systems draw their origins). This distinction involves a fundamental difference, with U.S. doctrine focusing on the rights of the defendant and the civil law doctrine focusing on the rights of the plaintiff. So long as this difference exists, it will not be possible to wrap the process of declining jurisdiction and the process of recognition of foreign judgments in the same cloak of doctrine in order to provide common or connected analysis.*

The paper is forthcoming in the *Columbia Law Review Sidebar*.

Vacancies at the BIICL

The British Institute of International and Comparative Law is one of the leading independent research centres for international and comparative law in the world. Its research, events and publications are based on deep scholarly knowledge and strong practical experience that can be applied to many situations. It seeks to make an impact around the world through the operation of international and comparative law and the rule of law. It has undertaken a number of recent innovative strategies that have led to the foundation of the Bingham Centre for the Rule of Law and the creation of new research positions.

The Institute is looking to appoint a **Deputy Director** to provide clear organisational leadership at a senior level and to support the Institute Director in the management of the Institute. This is a new post, which offers an exciting opportunity for an experienced senior administrator to create, enhance and implement key strategies of the Institute, and to make a difference to the work of an important research charity. The person appointed is expected to work well in partnership with highly talented and dedicated legal scholars and administrative staff, as well as legal practitioners.

Click here for further information.

Latest Issue of IPRax: No. 1, 2012

The latest issue of “Praxis des Internationalen Privat- und Verfahrensrecht (IPRax)” has just been released. The table of contents is available on the IPRax-Homepage and reads as follows:

***Articles**:*

H.-P. Mansel/K. Thorn/R. Wagner, **Europäisches Kollisionsrecht 2011: - Gegenläufige Entwicklungen,** p. 1:

> *The article gives an overview on the developments in Brussels in the judicial cooperation in civil and commercial matters from November 2010 until October 2011. It summarizes current projects and new instruments that are prevently making their way through the EU legislative process. It also refers to the laws enacted on a national level in Germany which are a consequence of the new European instruments. Furthermore, the article shows areas of law where the EU has made use of its external competence. The article discusses both important decisions and pending cases before the ECJ as well as important decisions from German courts touching the subject matter of the article. In addition, the present article turns to the current projects of the Hague Conference as well.*

C. F. Nordmeier, **Stand, Perspektiven und Grenzen der Rechtslagenanerkennung im europäischen Rechtsraum anhand Entscheidungen mitgliedstaatlicher Gerichte,** p. 31:

> *Current judgments of the ECJ – most recently in Runevi?-Vardyn – have given rise to the question if and under which circumstances a legal situation may be recognised, based on the rights of EU citizenship, in the European judicial area. The present article analyses the reception of the ECJ cases by courts of the member states. Based hereon, it is possible to demonstrate that the recognition of legal situations is not a new phenomenon. Some national courts resort to Art. 8 ECHR in order to generalize the ECJ decisions which does not convince without further differentiation. Regarding the conditions of application of rights derived from citizenship of the Union, the necessity of a cross-border element and the development of a substantial effect criteria are discussed. The analysed cases lead to the conclusion that it does not seem recommendable to replace classic private international law by a principle of recognition.*

T. Rauscher, **Von prosaischen Synonymen und anderen Schäden – Zum Umgang mit der Rechtssprache im EuZPR/EuIPR**, p. 40:

EC/EU-Regulations on Conflict Law (Brussel I Regulation, Rome Regulations etc.) are suffering from significant linguistic problems. This article analyses different types of such defects including imprecisely used legal terms (like "damage" when used in the context of the concept of unjust enrichment), meaningless tautologies (like the use of "Schriftstück" and "Dokument" for what the English version consistently calls a "document"), redundancies in different Regulations featuring unclear variations of the respective wording or merely improper translations into other official languages of the EU of what originally had been developed in one of the EU's working languages.
The author does not suggest at all to replace the system of multiple official languages with a system of only one legal lingua franca. However, the quality of the rule making and translation process should be given greater attention including the co-operation of lawyers and interpreters in this process and a mechanism of control in comparative networks. Last but not least, in order to improve the consistency of the entire system of Regulations, a systematic codification of European Conflict Law should be taken into consideration.

M. Günes/K. Freidinger, **Gerichtsstand und anwendbares Recht bei - Konsignationslagern,** p. 48:

Consignment stocks are one of several techniques to ensure that goods reach the intended market. In particular consignment agreements are used as a method of commercial transactions for oversea markets. Despite the fact that such agreements are regularly bedded in an international context the applicable law and the place of jurisdiction for any disputes have not been discussed scientifically in German law yet. After assessing the possible legal nature(s) of contracts in the context of a consignment stock, the paper establishes that in most cases – if contractual provisions do not stipulate otherwise –, German law would declare the Law of the storage location applicable and the Court of the storage location competent if it had to assess a legal question concerning the storage contract (the master agreement) itself. In a case concerning an individual sale agreement to this master agreement, a German court should – in most cases – hold the law of the place of residence of the seller applicable and determine the place of jurisdiction in the exact same manner as it does in case of an ordinary sale agreement. Nevertheless, these findings are not the only possible ones. Therefore, it is recommendable to conclude consignment agreements with paying special attention to the

questions of the applicable law and the place of jurisdiction. The parties and in particular the seller must hereby consider that any agreed legal system may not be applied to the questions of title and the retention of the title in the goods.

C. Luttermann/S. Geißler, **Haftungsfragen transnationaler Konzernfinanzierung (cash pooling) und das Bilanzstatut der Gesellschaft,** p. 55:

We will enter a core domain of international legal practice and jurisprudence: Companies are globally organised as groups, consisting of numerous corporations (legal entities); as a rule, these are financed within the framework of common cash management in the affiliate relations (cash pooling). Under the dominion of the separate legal entity doctrine, this is problematic, for the individual corporation has only limited "assets". These have to be determined on the basis of accounting law. This means that transnationally, it is a matter of central questions of liability and in general, for an adequate asset order, a change of perspective regarding conflict of law rules, as will be shown: Instead of dealing with the classic company statute regarding organisational law (lex societatis), the material issue is rather which accounting law is valid for the individual company and its valuation (accounting statute of the company). This is the necessary basis on which a sustainable legal order can be developed. The fact that this is still lacking is illustrated by the ongoing worldwide "financial crisis" with largely ailing balance sheets (financial reporting).

Case Notes

D.-C. Bittmann, **Ordnungsgeldbeschlüsse nach § 890 ZPO als Europäische Vollstreckungstitel? (BGH, S. 72),** p. 62:

In the decision reviewed in this article the German Federal Supreme Court held that penalty payments according to § 890 ZPO cannot be issued as European Enforcement Orders. The Court is reasoning that a decision imposing a penalty payment does not comply with the procedural minimum standards set in force by Regulation (EU) 805/2004. Decisions according to § 890 ZPO especially do not inform the debtor about how to contest the claim and what the consequences of not contesting are (art. 17).
The following article agrees with this result. It looks, however, critically at the way of reasoning of the Federal Supreme Court. The central point of the

decision is the question, who is entitled to enforce a penalty payment. Different from the French system, according to which a penalty payment (astreinte) goes to the claimant of the injunctive relief, which shall be enforced, penalty payments according to § 890 ZPO flow into the treasury. As a consequence, in Germany the claimant of an injunctive relief cannot apply for a penalty payment issued as European Enforcement Order.

D. Schefold, **Anerkennung von Banksanierungsmaßnahmen im EWR-Bereich (LG Frankfurt a.M., S. 75)**, p. 66:

On appeal against a preliminary seizure order, the district court in Frankfurt on Main held that such an order by a German court against a German branch of an Icelandic credit institution violates the European directive 2001/24/EC, adopted for the entire European Economic Area (EEA), on the reorganisation and winding up of credit institutions when the credit institution undergoes reorganisation in its home state and the reorganization procedure entails a suspension of enforcement. In line with art. 3 of directive 2001/24/EC, the district court held that the administrative or judicial authorities of the home member state of a credit institution are alone competent to decide on implementation measures for a credit institution, including branches established in other member states. Such measures are fully effective according to the law of the home member state, including against third parties in other member states, and subject to mutual recognition throughout the EEA without any further formalities.

Overview over Recent Case Law

OLG München 19.10.2010 31 Wx 51/10, **Noterbrecht nach griechischem Recht des einzigen Sohnes eines in Deutschland?1. ansässigen und verstorbenen Auslandsgriechen. Die Rückkehr nach Griechenland zur Ableistung des Wehrdienstes?2. stellt jedenfalls dann eine Aufgabe des Wohnsitzes in Deutschland dar, wenn der Wehrpflichtige seinen Hausstand auflöst und die gesamte Familie nach Griechenland umzieht. [E. J.],** p. 76

no abstract

View abroad

M. Pazdan, **Das neue polnische Gesetz über das internationale Privatrecht**, p. 77:

> *On 16th of May, 2011, the new act on private international that was enacted on the 4th February, came into force. The new law replaces the old act from 1965. It is harmonized with European private international law. The act governs matters excluded from the scope of regulations Rome I and Rome II and supplements the Hague Convention of 19th October, 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children with respect to issues not regulated therein.*
> *The act of 2011 fills out many of the gaps that existed previously. For example, it determines the law applicable to power of attorney, personal rights, name and surname of a person, as well as to arbitration agreement and intellectual property. It also alters some of the rules adopted under the law of 1965. It permits, inter alia, a choice of law for matrimonial property regimes, marriage contract and succession. Moreover, the obligations arising out of unilateral legal acts have been treated differently than in the law of 1965. As with respect to the formal validity of legal acts related to the dispositions of immovable property or corporate matters (such as creation, transformation or liquidation of a legal entity), the new law gives up the rule according to which it was sufficient to satisfy the requirements of the form of lex loci actus.*
>
> *Finally, the act establishes a general rule in article 67, which applies in the circumstances where the act itself or other provisions of Polish law fail to indicate governing law. The provision is based on the concept of the closest connection.*

M. Melcher, **Das neue österreichische Partnerschaftskollisionsrecht**, p. 82:

> *Due to the introduction of the registered partnership ("eingetragene Partnerschaft") as a legal institution for same-sex couples in Austria in January 2010, several provisions were added to the Austrian Private International Law Act (IPRG), which determine the law applicable to the establishment (§ 27a IPRG), the personal effects (§ 27b IPRG), the property regime (§ 27c IPRG) and the dissolution (§ 27d IPRG) of registered partnerships. The article analyzes the*

personal and temporal scope of application and describes the new conflict rules. Besides, a thorough assessment of the applied connecting system and its impact on registered partnerships is included, which identifies the inconsistency of connecting factors regarding the establishment and the dissolution of registered partnerships and the non-adaptation of conflict rules on inheritance, surnames and adoption to the particularities of registered partnerships as main areas of concern.

P. F. Schlosser, **Aus Frankreich Neues zum transnationalen einstweiligen - Rechtsschutz in der EU (Cour de cassation, 8.3.2011 – 09-13830 und Cour de cassation, 4.5.2011 – 10-13712)**, p. 88:

The author informs the readers of two decision of the French Cour de cassation (8 March 2011 09-13830 and 4 May 2011 10-13712) which according to him should be supported.
In the later decision the Cour de cassation is confirming its prior ruling that the rules of the Brussels I Regulation on provisional, including protective, measures cover measures for obtaining evidence. The German doctrine is spit on that issue. The Cour de cassation should, however, be encouraged to continue emphasizing that the Brussels I Regulation covers only evidentiary measures to be granted in a case of urgency.
In the first decision the issue was the binding character of a Greek court decision refusing, after opposition of the debtor, to order the arrest of a seagoing vessel anchoring in a Greek port. When subsequently the vessel was anchoring in the port of Rouen the creditor tried again to obtain an arrest invoking the more creditor-friendly rules of French law. But he was again unsuccessful The Cour de cassation decided that pursuant to Art 32 Brussels I Regulation foreign decisions refusing to grant provisional measures must be recognized. The innovative nature of the decision is due to the fact that for the first time the issue of the binding force of a decision refusing to grant provisional protection was discussed. There is no trace of such a discussion in previous case law or legal doctrine.

H. Wais, **Zwischenstaatliche Zuständigkeitsverweisung im Anwendungsbereich der EuGVVO sowie Zuständigkeit nach Art. 24 S. 1 EuGVVO bei rechtsmissbräuchlicher Rüge der Unzuständigkeit (Hoge**

Raad, 7.5.2010 – 09/01115), p. 91:

In this decision of the Dutch Hoge Raad, which deals with an alimony dispute between Dutch citizens domiciled in Belgium, three main issues arise: first, the applicability of the Brussels I-Regulation in cases where both parties are domiciled in the same member state; second, the observation of a cross-border transfer of a case on the grounds of a bilateral treaty when the Brussels I-Regulation is applicable; and third, the possibility of taking into account in its scope the abuse of process of one party. This article examines these questions, before presenting some thoughts on a possible alternative approach.

C. Aulepp, **Ein Ende der extraterritorialen Anwendung US-amerikanischen - Kapitalmarkthaftungsrechts auf Auslandstransaktionen? (US Supreme Court, 24.6.2010 – No. 08-1191 – Morrison v. National Australia Bank Ltd.),** p.95:

U.S. law provides for a broad issuer liability for securities fraud, especially under § 10(b) Securities Exchange Act of 1933 in connection with SEC Rule 10b-5. Together with the availability of opt-out class actions, this sets the United States apart from most other jurisdictions. In the past, the U.S. Federal Courts of Appeal have held that § 10(b) applies extraterritorially if there are significant effects on American investors or the American market; or if significant conduct in the US contributed to the fraud scheme. In a landmark decision, the U.S. Supreme Court held in Morrison v. National Australia Bank, Ltd., 130 S. Ct. 2869 (U.S. 2010) that § 10(b) of the Exchange Act and Rule 10b-5 possess no extraterritorial reach. It adopted a bright-line rule that these provisions only apply to transactions in securities listed on domestic exchanges, and domestic transactions in other securities. The author argues that the Morrison decision constitutes a step in the right direction, as it provides a certain degree of legal certainty for transnational issuers in a previously convoluted area of international securities law. It is submitted that Morrison might provide valuable impulses for resolving conflicts of law in securities disputes within the European Union as well, as a transaction-base rule like the one articulated in Morrison can well be integrated within the framework of the Rome I and Rome II Regulations.

Announcements

H.-P. Mansel, **Werner Lorenz zum 90. Geburtstag,** p. 102

no abstract

E. Jayme, **Zur Kodifikation des Allgemeines Teils des Europäischen - Internationalen Privatrechts – 20 Jahre GEDIP (Europäische Gruppe für Internationales Privatrecht) – Tagung in Brüssel,** p. 103

no abstract

Second Circuits Denies Chevron's Motion to Reconsider

On January 19th, 2012, the Second Circuit has denied Chevron's motion to reconsider its previous decision to vacate the anti-enforcement injunction of Judge Kaplan.

The short order is available here (but without reasons). See also this short post over at *Letters Blogatory.*

Second Issue of International Journal of Procedural Law

The *International Journal of Procedural Law* was launched a year ago. It is a multiligual peer-reviewed journal, which

(…) provides an international research platform for scholars and practitioners

in the field of procedural law, especially in civil matters.

In addition to articles in five different languages examining current developments in judicial and alternative dispute resolution, the IJPL also publishes articles devoted to the theoretical foundations of procedural law. Contributions address legal issues from domestic, transnational or international perspectives, including comparative law and conflicts of law aspects. Consequently, the IJPL is not only of interest for scholars but also for practitioners in charge of cross-border cases.

The IJPL is published twice a year. Each issue consists of five parts: Studies, Practice, Debate, Legislation and Information (book reviews, interviews, conference summaries). Articles must be written in English, French, German, Italian or Spanish and will be published in the language in which they have been submitted. Preliminary abstracts in the other languages of the IJPL inform the reader about the central points of each article. The IJPL is the journal of the International Association of Procedural Law.

The second issue of the *Journal* focuses on issues of private international law. It includes the following articles or essays:

STUDIES

Cross-border enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure(XANDRA KRAMER)

L'incidence de la distinction per officium / per partes sur la circulation internationale des décisions provisoires (MARIE NIOCHE)

Vollstreckung von Zivilentscheidungen aus Europa und Drittstaaten in Deutschland – Ein Versuch der Systematisierung (THOMAS RAUSCHER)

U.S.-Style Discovery for Non-U.S. Proceedings: Judicial Assistance or Judicial Interference? (NICOLO TROCKER)

Internationale Gerichtsstandsvereinbarungen und positive internationale Kompetenzkonflikte – Ein Beitrag zum Änderungsentwurf der Brüssel I-Verordnung (KAROL WEITZ)

PRACTICE

Comparative Perspectives: A Year in the Life of Regulation (UE) No. 44 of 2001 (MICHELE ANGELO LUPOI)

DEBATE

Judicial Cooperation in Europe: is Exequatur still necessary? (PAOLO BIAVATI)

The Abolition of Exequatur Proceedings: Speeding up the Free Movement of Judgments while Preserving the Rights of the Defense (MARCO DE CRISTOFARO)

New Publication on Sovereign Debts

This book on state insolvency and sovereign debts (*Insolvabilité des Etats et dettes souveraines*) is the collection of the proceedings of a conference held in Paris in November 2010. It was edited by professor Mathias Audit (Université Paris Ouest La Défense). The table of contents is available here.

> *La dette souveraine constitue l'un des enjeux économiques, politiques et juridiques majeurs de l'époque. Pour assurer leur fonctionnement ou financer leur croissance, la plupart des États du monde ont en effet massivement eu recours à l'emprunt, à telle enseigne qu'ils font aujourd'hui l'objet d'un endettement souvent très important. Le phénomène n'est d'ailleurs pas du tout propre aux économies les moins avancées ; il affecte également les États parmi les plus développés de la planète.*
>
> *Mais qu'ils soient réputés riches ou pauvres, le service par ces États de leur dette souveraine représente une charge considérable pour leurs finances publiques. Plus encore, il expose certains d'entre eux à des cessations de paiement, c'est-à-dire à des situations d'insolvabilité.*

> *Sous un angle à la fois juridique et économique, l'ouvrage vise à présenter chacun des aspects les plus saillants de l'endettement étatique. Dans une logique plus prospective, il cherche également à identifier les solutions qui pourraient lui être apportées.*

Contributors include Mathias Audit, Jérôme Sgard, Michael Waibel, Jérôme Da Ros, Patrick Wautelet, Norbert Gaillard, Alain Bernard, Mathias Forteau, Francesco Martucci, and Horatia Muir Watt.

Most contributions are in French, but the paper of Patrick Wautelet on *Vulture funds, creditors and sovereign debtors: how to find a balance?* is written in English.

More details can be found here.