German Compendium on English Commercial and Business Law

As part of a series of compendia on foreign commercial and business law in German language, a fully revised edition on English commercial and business law has just been released. The book is edited and authored (with two additional co-authors) by Volker Triebel, a German Rechtsanwalt and English barrister, Martin Illmer from the Max Planck Institute for Comparative and International Private Law in Hamburg and Wolf-Georg Ringe, Stefan Vogenauer as well as Katja Ziegler, all from the University of Oxford.

The book attempts to provide a comprehensive overview of English commercial and business law while at the same time explaining and analyzing the differences between German and English business law as well as the increasing interfaces between English and European law. For readers of this blog the chapters on international civil procedure, private international law, international insolvency law and international arbitration, all written by Martin Illmer, may be of particular interest. They present the autonomous common law rules in these fields as well as the interfaces of the European regimes (such as Brussels I, Rome I, Rome II and the Insolvency Regulation) with English law which are often are only rarely covered. Other areas explored by the treatise are the legal sources of English commercial law, contract law (with sale of goods in particular), company law, labour law, insolvency law and competition law.

More information is available on the publisher’s website.

Leuven Seminar on ADR and

Mediation in China

On Thursday **15 March 2012** the Hanenburg-Yntema Foundation convenes a **seminar on Alternative Dispute Resolution (ADR) and Mediation in China**, with a focus on "People's Mediation in China".

The "Hanenburg-Yntema Fonds" is Belgian foundation, based at the University of Leuven, whose key goal is to promote academic research on the law of the People's Republic of China or the Republic of China on Taiwan (further info on the Foundation is available at www.hanenburg-yntemafonds.be).

To this end, the foundation offers a yearly prize of EUR 2.500 for a dissertation at master's level on one of these topics. The prize is open to graduates of outstanding academic merit who are graduating from their initial master degree. At the occasion of the price award ceremony the foundation uses to organize an expert seminar where the prize winner presents his/her thesis and where some renowned experts shed light on the topic of the thesis from connected angles. The prize for 2011 was awarded to Selina Schmidt, a Swiss student, for her excellent thesis on arbitration and mediation in the PRC (*Die Rolle des Rechts in der Schlichtungspraxis in der VR China. Analyse einer Sammlung von 'Volksschlichtungsfällen'*). Accordingly the upcoming edition of the seminar will revolve around alternative dispute resolution.

The event will take place in Leuven; full **programme** is available at www.law.kuleuven.be/hyfonds/nl/mediation_2012.htm. The seminar starts at 16:00 and lasts until 19:15. The language will be English. Participation is free of charge, but previous registration is required at jacoba.hanenburg@law.kuleuven.be.

Many thanks to Dimitri Droshout for the tip.

Vacancy at the University of Trier

Professor Jan von Hein from the Faculty of Law at the University of Trier is seeking to fill the position of a Research Assistant at his Chair for Civil Law, Conflict of Laws and Comparative Law as of 1 May 2012. Candidates should be interested in the Chair's main research areas and should have a thorough knowledge of German civil as well as either conflict of laws and international procedural law or companies and securities law. The successful candidate will be expected to work on his or her doctorate (Ph.D.), to teach a few hours per week and to contribute to the Chair's research projects. The contract is for 2 years.

Trier is not only Germany's oldest city, a world cultural heritage and a favourite tourist destination, but also a hot spot for research in private international law: it is the seat of the Academy of European Law and very close to Luxembourg, the seat of both the Court of Justice of the European Union and the recently founded Max Planck Institute for International Procedural Law which will start its work in 2012.

More information is available on Professor von Hein's website. Deadline for application is 23 March 2012.

Quebec Court Refuses Jurisdiction on Forum of Necessity Basis

There has not been much to report from Canada for the past few months. The Supreme Court of Canada's jurisdiction decision in the Van Breda quartet of cases is still eagerly awaited. There was some thought these decisions would be released by the end of February but it now appears that will not happen. These cases were argued in March 2011.

Fortunately, Professor Genevieve Saumier of McGill University has written the following analysis of a recent Quebec Court of Appeal decision which might be of

interest in other parts of the world. The case is *ACCI v. Anvil Mining Ltd.*, 2012 QCCA 117 and it is available here (though only in French, so I appreciate my colleague's summary). I am grateful to Professor Saumier for allowing me to post her analysis.

> *In April 2011, a Quebec court concluded that it had jurisdiction to hear a civil liability claim against Anvil Mining Ltd. for faults committed and damages inflicted in the Democratic Republic of Congo where the defendant exploits a copper mine.*
>
> *The facts behind the claim related to actions alleged to have been taken by the defendant mining company in the course of a violent uprising in Kilwa in the Democratic Republic of Congo in October 2004 that caused the deaths of several Congolese (the number is disputed). In essence, the plaintiff alleges that the defendant collaborated with the army by providing them with trucks and logistical assistance.*
>
> *The defendant, Anvil Mining Ltd, is a Canadian company with its head office in Perth, Australia. Its principal if not its only activity is the extraction of copper and silver from a mine in Congo. Since 2005, the company has rented office space in Montreal for its VP (Corporate Affairs) and his secretary. It is on the basis of this connection to the province of Quebec that the plaintiff launched the suit there. The plaintiff is an NGO that was constituted for the very purpose of instituting a class action against the defendant, for the benefit of the victims of the 2004 insurgency in Congo.*
>
> *The defendant contested both the Quebec court's jurisdiction and, in the alternative, invoked forum non conveniens to avoid the exercise of jurisdiction. At first instance, the court held that it had jurisdiction over the defendant on the basis of its establishment in Quebec (the office in Montreal) and that the claim was related to the activities of the defendant in Montreal (the two conditions for jurisdiction under 3148(2) Civil Code of Quebec given the foreign domicile of the defendant). Interpreting this second conditions broadly, the court held that the VP's frequent visits to Congo and his activities to attract investors in Quebec were linked to the defendant's activities in Congo and therefore to the claims based on those activities.*
>
> *In rejecting the alternative forum non conveniens defense to the exercise of*

jurisdiction, the court considered the other fora allegedly available to the plaintiffs, namely Congo and Australia. A claim had already been made before a Congolese military court but it had been rejected. The plaintiff claimed that the process before the Congolese court, competent to hear the claim, was in breach of fundamental justice for a number of reasons. As to the Australian court, the plaintiff claimed that an attempt to secure legal representation in that country had failed because of threats made by the Congolese regime against both the victims and the lawyers they were seeking to hire in Australia. The Quebec court accepted this evidence and held that the defendants had failed to show that another forum was more appropriate to hear the case, a requirement under art. 3135 C.C.Q. It appears that the plaintiffs had also presented an argument based on art. 3136 C.C.Q. ("forum of necessity"), but since jurisdiction was established under art. 3148 and forum non conveniens was denied, the court decided not to respond to the argument based on forum of necessity. Still, the court did state that "at this stage of the proceedings, it does appear that if the tribunal declined jurisdiction on the basis of art. 3135 C.C.Q., there would be no other forum available to the victims," suggesting that Quebec may well be a "forum of necessity" in this case.

Leave to appeal was granted and the Quebec Court of Appeal reversed, in a judgment published on 24 January 2012. The Court of Appeal held that the conditions to establish jurisdiction under art. 3148(2) C.C.Q. had not been met. As a result of that conclusion, it did not need to deal with the forum non conveniens aspect of the first instance decision. This made it necessary to deal with the "forum of necessity" option, available under art. 3136 C.C.Q. The Court found that the plaintiff had failed to show that it was impossible to pursue the claim elsewhere and that there existed a sufficient connection to Quebec to meet the requirements of article 3136 C.C.Q. In other words, the plaintiff had the burden to prove that Quebec was a forum of necessity and was unable to meet that burden.

The reasons for denying the Quebec court's jurisdiction under art. 3148(2) C.C.Q. are interesting from the perspective of judicial interpretation of that provision but are not particular to human rights litigation. Essentially the Court of Appeal found that the provision did not apply because the defendant's Montreal office was open after the events forming the basis of the claim. This holding on the timing component was sufficient to deny jurisdiction under

3148(2) C.C.Q. The Court also held that even if the timing had been different, it did not accept that there was a sufficient connection between the activities of the vice president in Montreal and the actions underlying the claim to satisfy the requirements of the provision.

The reasoning on art. 3136 C.C.Q. and the forum of necessity, however, are directly relevant to human rights litigation in an international context. Indeed, one of the challenges of this type of litigation is precisely the difficulty of finding a forum willing to hear the claim and able to adjudicate it according to basic principles of fundamental justice. In the Anvil case, the victims had initially sought to bring a claim in the country where the injuries were inflicted and suffered. While the first instance court had accepted evidence from a public source according to which that process was tainted, the Court of Appeal appeared to give preference to the defendant's expert evidence (see para. 100).

The Court of Appeal does not quote from that expert's evidence whereas the trial judge's reasons contain a long extract of the affidavit. And while the extract does not include the statement referred to by the Court of Appeal, it does include a statement according to which an acquittal in a penal court is res judicata on the issue of fault in a civil proceeding based on the same facts.

The obvious alternative forum was in Perth, Australia, where the defendant company had its headquarters (and therefore its domicile under Quebec law). There too the victims had sought to bring a claim but were apparently unable to secure legal representation or pursue that avenue due to allegedly unlawful interference by the defendant and government parties in the Republic of Congo. While the first instance judge had accepted the plaintiff's evidence that Australia was not an available forum, the Court of Appeal quickly dismissed this finding, without much discussion.

Finally, the Court of Appeal returned to its initial findings regarding the interpretation of art. 3148 C.C.Q. to conclude that there was, in any event, an insufficient connection between Anvil and Quebec to meet that condition for the exercise of the forum on necessity jurisdiction. The court did not consider that under art. 3136 C.C.Q. it is unlikely that the timing of the connection should be the same as under 3148(2) C.C.Q. given the exceptional nature of the former basis for jurisdiction and the likelihood that the connections to the forum of necessity could arise after the facts giving rise to the claim.

The decision of the Court of Appeal in Quebec is disappointing in so far as its interpretation of the forum of necessity provision in the Civil Code of Quebec is quite narrow, particularly as regards the condition of a connection with Quebec; moreover, its application of the provision to the facts of the case deals rather summarily and dismissively with findings of fact made by the first instance judge without sufficient justification for its rejection of the evidence provided by the plaintiff and relied upon by the trial judge. Given the nature of the claims and of the jurisdictional basis invoked, it was incumbent on the Court of Appeal to provide better guidance for future plaintiffs as to what type of evidence will be required to support an article 3136 C.C.Q. jurisdictional claim and to what extent trial court findings in relation to such evidence will be deferred to in the absence of an error of law.

ICLQ at 60

International & Comparative Law Quarterly celebrates 60 years of international and comparative law scholarship.

The first issue for 2012 not only offers two articles exploring international private law issues, but also a susbtantial editorial reviewing 60 Years of Legal Scholarship in the International & Comparative Law Quarterly, with a special section on the Contribution to Private International Law by James Fawcett.

The first of the two PIL articles is one by Mihail Danov (Brunel University) on EU Competition Law Enforcement: Is Brussels I Suited To Dealing with All the Challenges?

There are arguments indicating that Brussels I could be applicable to cross-border competition law proceedings before a National Competition Authority located in one Member State and private EU competition law proceedings before another Member State court. However, an analysis of the current private international law framework appears to indicate that Brussels I is not well suited to deal with the difficulties that could arise in this context. Given the fact

that, in the new proposal for a regulation on jurisdiction and the recognition and enforcement of judgments there is no indication that special jurisdictional bases for competition law actions in the successor to Brussels I are on anyone's agenda, an option for a reform may be setting up a new and special regulation to be applicable with regard to EU competition law claims only.

The second article is authored by Uglješa Grušic (PhD Candidate, LSE) on Jurisdiction in Employment Matters under Brussels I: A Reassessment.

This article examines the rules of jurisdiction in employment matters of Brussels I. It focuses on a paradox in that these rules aim to protect employees jurisdictionally, but in fact fail to accord employees a more favourable treatment when they need it most, namely when they appear as claimants. The article argues that the current rules fail to achieve the objective of employee protection, examines the reasons for this, proposes certain amendments that would improve the existing rules, and thereby engages in the debate surrounding the forthcoming review of Brussels I.

Happy birthday !

Latest Issue of ZEuP: No. 1, 2012

The latest issue of the "Zeitschrift für Europäisches Privatrecht (ZEuP)", No. 1, 2012, has been released. The table of contents reads as follows (in brackets: pages in the issue):

Leitartikel (Editorial)

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Vassilios Skouris

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russischen Zivilprozessrecht: Wechselwirkung verschiedener Bestandteile einer Transformationsrechtsordnung (7-22)
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Internationales Prospekthaftungsrecht – Kollisionsrechtlicher Anlegerschutz nach der Rom II-Verordnung (23-46)
Dorothee Einsele

Nutzungs- und Aufwendungsersatz nach Vertragsaufhebung wegen nachträglicher Erfüllungsstörungen: Die Regelungen des DCFR in rechtsvergleichender Perspektive (47-71)
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Entwicklungen (Developments)

Entwicklungslinien des italienischen Gesellschaftsrechts seit Beginn dieses Jahrhunderts (72-98)
Peter Kindler

Keine Effektivität einer Europäischen class action ohne "amerikanische Verhältnisse" bei deren Finanzierung (99-116)
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Bilingual legal education across cultural borders in Fribourg: A useful experience for Europe (117-127)
Pascal Pichonnaz

"Asset Partitioning" beyond corporate law – Eine Studie zur Handlungsform des Einzelunternehmers mit beschränkter Haftung (128-148),
Julien Dubarry & Johannes W. Flume

Entscheidungen (Case Notes)

Prozesskostensicherheit vor nationalen Gerichten: Auslegung des Artikel 4 EWRA (Diskriminierungsverbot), Entscheidung des EFTA-Gerichtshofs vom 17. Dezember 2010, (149-157)
Philipp Lennert & Daniel Heilmann

Anwendbares Recht auf Ansprüche gegen den britischen Entschädigungsfonds bei Auslandsunfällen, Entscheidung des Court of

Appeal vom 27. Oktober 2010 (158-170)
Christian Armbrüster

Zum Wegfall des Staatsangehörigkeitsvorbehalts für Notare, Entscheidungen des Europäischen Gerichtshofes vom 24. Mai 2011 (171-188)
Jürgen Bredthauer

Vorfragen begründen keine ausschliessliche Zuständigkeit, Entscheidungen des Europäisehen Gerichtshofs vom 12. Mai 2011 und des Court of Appeal vom 28. April 2010 (189 – 201)
Haimo Schack

Dokumentation (Documentation)

Vorschläge für Rechtsakte und sonstige Verlautbarungen der Europäischen Kommission mit privatrechtlichem Bezug (Juli 2009-Juli 2011) (202 – 207)

Tage des Europäischen Rechts 2011, Osnabrück: Das geplante Optionale Instrument auf dem Prüfstand (208-212)
Eike Götz Hosemann

Am Vorabend eines Europäischen Vertragsrechts? Wien, 28. und 29. Juni 2011 (213-215)
Stefan Perner

Ankündigung: 11th Annual Conference on European Tort Law (ACET) (216-217)

Bibliothek (Book Reviews)

Stefano Cherti: L'obbligazione alternativa: Nozione e realtà applicativa, G. Giappichelli Editore, Turin (217-218)
Jakob Fortunat Stagl

Sabine Corneloup/Natalie Joubert (Ed.): Le règlement communautaire Rome I et le choix de la loi dans les contrats internationaux. Paris (2011) (218-220)
Marc-Philippe Weller

Reiner Schulze/Jules Stuyck (Hg.): Towards a European Contract Law. München (2011) (221-222)
Christoph Busch

Zu guter Letzt (Closing Remarks)

Mit Klapprechner und Lederhose (223-224)
Jens Kleinschmidt

A Case of Renvoi (or Something Akin to Renvoi)

Last Thursday R. Alford (Opinio Iuris) published a very interesting post on choice-of-law rules as applied to torts in Iraq. The question to be decided in *McGee v. Arkel Int'l* was what substantive law governs when a National Guardsman is electrocuted in Iraq while cleaning a Humvee due to faulty wiring of an electric generator maintained by a Defense Department contractor. Applying Louisiana choice-of-law principles, the Fifth Circuit concluded that Iraqi substantive law applied: the wrongful conduct and resulting injury occurred in Iraq, therefore Iraqi law should apply. This outcome was reached notwithstanding and in perfect awareness of Iraqi law: Order 17, passed by the Coalition Provisional Authority, tries to avoid the application of Iraqi tort and contract law to contractors working in Iraq for the U.S. Defense Department.

A couple of comments following the post are worth reading. C. Vanleenhove, PhD candidate from Belgium, has kindly sent me his own opinion, which reads as follows:

> *For me personally this decision is not so surprising. The Louisiana Court applies its own conflict of laws rules to determine the applicable law. It – in my view correctly – asserts that Iraqi law governs this tort. It then looks into Iraqi law to find an immunity rule but cannot find one for torts (there is only for contracts in section 4 of CPA Order 17). So it concludes that Iraqi*

law applies to this dispute. On a side note, the court also looks at the Iraqi conflict of laws rule in section 18 of CPA Order 17 which it interprets (literally) as referring to U.S. law as a whole (thus including the U.S. conflict of laws rules). This is in my opinion caused by the lack of a rule analog to art. 20 of the Rome I Regulation excluding a renvoi. The problem here is one of a lack of precision and conflict of laws knowledge on the part of the drafters.

What the majority in McGee seems to indicate is that if they would have been an Iraqi court interpreting the rule of section 18 of CPA Order 17, they would have read it as a reference to the law of the Sending State, including the conflict of laws rules. This is the U.S. court's opinion and there is no guarantee that an Iraqi court will take the same view if the case was brought before them. I think it's highly likely an Iraqi court would interpret it consistent with the intent to apply the (substantive) law of the sending state.

I agree with the dissenting opinion by chief judge Jones where she says: "To say that the tort claims shall be handled "consistent with the Sending State's laws" need not include the Sending State's conflict of laws reference back to Iraq. Such an interpretation preserves the evident intent to apply the domestic law of Sending States to their contractors operating in Iraq".

ERA Conference on New Legislative Proposals on Cross-Border Civil Litigation

On March 8-9, 2012, the Academy of European Law will host a conference on New Legislative Proposals on Cross-Border Litigation in Trier.

The conference will analyse the most important recent EU initiatives in the field

of civil procedure: Brussels I, ADR & ODR, Collective Redress and Freezing of Bank Accounts.

Brussels I

Recast of the Brussels I Regulation: state of play
European Commission: Karen Vandekerckhove
Danish EU Presidency: Jens Kruse Mikkelsen

Analysis of the most topical issues
Stefania Bariatti

Collective Redress

Brussels I and collective redress
Mihail Danov

Hands-on experience with mass claims
Alexander Layton

A coherent approach to European collective redress
Ianika Tzankova

ADR and ODR

What member states, consumers and business need to do to establish effective ADR systems
Christopher Hodges

What changes does the Directive on ADR bring? How will the new EU-wide ODR platform work in practice?
Sebastian Bohr

ADR & ODR: a win-win solution for consumers and business alike?
Fatma Sahin

ADR and the rule of law: a critical approach
Joachim Zekoll

EU Wide Freezing of Bank Accounts

The Draft Regulation Creating a European Account Preservation Order (EAPO)
Marieke van Hooijdonk

What protection does the debtor receive?
Gilles Cuniberti

Assessment of the proposal
Burkhard Hess

The Common Law Perspective
Helen McCarty

Panel discussion: Who pays the costs? What will be the next steps?
Introduction by Jérôme Carriat

The full programme can be found here.

Service of Process through Facebook or Twitter???

A curious piece of news published yesterday in Opinio Iuris by Julian Ku:

> ***Legal claims can now be served via Facebook in Britain, after a landmark ruling in the English High Court.***
>
> *Mr Justice Teare gave the go-ahead for the social networking site to be used in a commercial case where there were difficulties locating one of the parties.*
>
> *Facebook is routinely used to serve claims in Australia and New Zealand, and has been used a handful of times in Britain. However, this is the first time it has been approved at such a high level.*
>
> *Jenni Jenkins, a lawyer at Memery Crystal, which is representing one of the parties in the case said the ruling set a precedent and made it likely that*

service-via-Facebook would become routine.

> *"It's a fairly natural progression. A High Court judges has already ruled that an injunction can be served via Twitter, so it's a hop, skip and a jump away from that to allow claims to be served via Facebook," she said.*

In 2009, Mr Justice Lewison allowed an injunction to be served via Twitter in a case where the defendant was only known by his Twitter-handle and could not easily be identified another way.

Amendment of Annexes to Brussels I

Commission Regulation (EU) No 156/2012 of 22 February 2012 amending Annexes I to IV to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters has been published today (see OJ L 50).