European Parliament's Workshop on the Brussels I Proposal (20 September 2011) – Study on the Interpretation of the Public Policy Exception in EU PIL

On Tuesday, 20 September 2011, the EP Committee on Legal Affairs (JURI) will host in Brussels a workshop on the review of the Brussels I regulation. The round table, chaired by *Tadeusz Zwiefka* (EP rapporteur on the Brussels I proposal), will be followed by the presentation of the study "Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law", prepared by *Prof. Burkhard Hess* and *Prof. Thomas Pfeiffer* (Ruprecht-Karls-Universität Heidelberg) on behalf of the Commission. Here's the programme:

[UPDATE: the live video streaming of the workshop will be broadcasted on this page. The recorded session will be later available in the EP's Multimedia Library]

9:00 – 9:10 Welcome and opening remarks by *Tadeusz Zwiefka*, Rapporteur.

9:10 – 10:20 Analysis of the main elements of reform of Brussels I Regulation – Round Table:

- *Professor Burkhard Hess*, Institut für ausländisches und internationales Privat- und Wirtschaftsrecht der Ruprecht-Karls-Universität
- Heidelberg;
- *Professor Marie-Laure Niboyet*, Université Paris X-Nanterre;
- *Professor Horatia Muir-Watt*, Sciences-Po Law School, Paris;
- *Professor Ilaria Pretelli*, Università degli Studi di Urbino "Carlo Bo";
- *Alexander Layton QC* of the Bar of England and Wales;
- *Professor Andrew Dickinson*, University of Sydney, solicitor advocate (England and Wales), consultant to Clifford Chance LLP;
- *Florian Horn*, partner and attorney at law, Brauneis Klauser Prändl law

firm.

10:20 – 11:00 Questions and answers.

11:00 – 11:10 Presentation of the Study on the "Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law" by Professor Burkhard Hess and Professor Thomas Pfeiffer, Institut für ausländisches und internationales Privat- und Wirtschaftsrecht der Ruprecht-Karls-Universität Heidelberg.

11:10 – 11:20 Questions and answers.

11:20 – 11:30 Closing remarks by the Rapporteur.

(Many thanks to Prof. Koji Takahashi for providing the links to the video sessions)

Hague Academy Fifth Newsletter

The fifth Newsletter of the Hague Academy of International Law can be found here.

Knop, Michaels and Riles on Feminism, Culture and the Conflict of Laws

Karen Knop (University of Toronto), Ralf Michaels (Duke) and Annelise Riles (Cornell) have posted From Multiculturalism to Technique: Feminism, Culture and the Conflict of Laws Style on SSRN. The abstract reads:

The German chancellor, the French president and the British prime minister have each grabbed world headlines with pronouncements that their state's policy of multiculturalism has failed. As so often, domestic debates about multiculturalism, as well as foreign policy debates about human rights in non-Western countries, revolve around the treatment of women. Yet there is also a widely noted brain drain from feminism. Feminists are no longer even certain how to frame, let alone resolve, the issues raised by veiling, polygamy and other cultural practices oppressive to women by Western standards. Feminism has become perplexed by the very concept of "culture." This impasse is detrimental both to women's equality and to concerns for cultural autonomy.

We propose shifting gears. Our approach draws on what, at first glance, would seem to be an unpromising legal paradigm for feminism – the highly technical field of conflict of laws. Using the non-intuitive hypothetical of a dispute in California between a Japanese father and daughter over a transfer of shares, we demonstrate the contribution that conflicts can make. Whereas Western feminists are often criticized for dwelling on "exotic" cultural practices to the neglect of other important issues affecting the lives of women in those communities or states, our choice of hypothetical not only joins the correctives, but also shows how economic issues, in fact, take us back to the same impasse. Even mundane issues of corporate law prove to be dazzlingly indeterminate and complex in their feminist and cultural dimensions.

What makes conflict of laws a better way to recognize and do justice to the different dimensions of our hypothetical, surprisingly, is viewing conflicts as technique. More generally, conflicts can offer a new approach to the feminism/culture debate – if we treat its technicalities not as mere means to an end but as an intellectual style. Trading the big picture typical of public law for the specificity and constraints of technical form provides a promising style of capturing, revealing and ultimately taking a stand on the complexities confronting feminists as multiculturalism is challenged here and abroad.

The paper is forthcoming is the *Stanford Law Review*.

2010 Yearbook of Private International Law

The 12th volume of the Yearbook of Private International Law (2010) will shortly be released.

It contains the following contributions:

Doctrine

- Katharina BOELE-WOELKI, For Better or for Worse: The Europeanization of International Divorce Law
- CHEN Weizuo, Chinese Private International Law Statute of 28 October 2010
- Talia EINHORN, The Recognition and Enforcement of Foreign Judgments on International Commercial Arbitral Awards
- Sixto SANCHEZ LORENZO, Choice of Law and Overriding Mandatory Rules in International Contracts after Rome I

Recent Developments in U.S. Conflicts of Laws

- Patrick J. BORCHERS, The Emergence of Quasi Rules in U.S. Conflicts Law
- Ronald A. BRAND, U.S. Implementation vel non of the 2005 Hague Convention on Choice of Court Agreements
- Linda J. SILBERMAN, *Morrison v. National Australia Bank*: Implications for Global Securities Class Actions
- Robert G. SPECTOR, A Guide to United States Case Law under the Hague Convention on the Civil Aspects of International Child Abduction
- David P. STEWART, Recognition and Enforcement of Foreign Judgments in the United States
- Symeon C. SYMEONIDES, Codifying Choice of Law for Tort Conflicts: The Oregon Experience in Comparative Perspective

The Revision of the Brussels I Regulation

- Andrew DICKINSON, Surveying the Proposed Brussels I bis Regulation: Solid Foundations but Renovation Needed

- Adrian BRIGGS, What Should Be Done about Jurisdiction Agreements?
- Alegría BORRÁS, Application of the Brussels I Regulation to External Situations – From Studies Carried Out by the European Group for Private International Law (EGPIL/GEDIP) to the Proposal for the Revision of the Regulation
- Rafael ARENAS GARCÍA, Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgments: Too Many Words in the Sea
- Sara SÁNCHEZ FERNÁNDEZ, Choice-of-Court Agreements: Breach and Damages Within the Brussels I Regime
- Diana SANCHO VILLA, Jurisdiction over Jurisdiction and Choice of Court Agreements: Views on the Hague Convention of 2005 and Implications for the European Regime

News from the Hague

- Hans VAN LOON, The Hague Conference on Private International Law: Work in Progress (2008-2010)

National Reports

- Rodrigo RODRIGUEZ / Alexander R. MARKUS, The Implementation of the Revised Lugano Convention in Swiss Procedural Law
- Mohamed S. ABDEL WAHAB, The Law Applicable to Technology Transfer Contracts and Egyptian Conflict of Laws: A Triumph of Nationalism over Internationalism?
- Torstein FRANTZEN, Party Autonomy in Norwegian International Matrimonial Property Law and Succession Law
- Tiong Min YEO, Common Law Innovations in Proving Foreign Law
- Seyed N. EBRAHIMI, An Overview of the Private International Law of Iran: Theory and Practice
- Adi CHEN, Conflict of Laws, Conflict of Mores and External Public Policy in Israel: Registration and Recognition of Foreign Divorce Decrees – A Modern Critique

Court Decisions

- Michael BOGDAN, Website Accessibility as a Basis for Jurisdiction under Art. 15(1)(C) of the Brussels I Regulation – Case Note on the ECJ

Judgments *Pammer* and *Alpenhof*
- Eva LEIN, Modern Art – The ECJ's Latest Sketches of Art. 5 No. 1 lit. b Brussels I Regulation
- Zeno CRESPI REGHIZZI, Reservation of Title in Insolvency Proceedings: Some Remarks in Light of the *German Graphics* Judgment of the ECJ
- Gilles CUNIBERTI, Resisting American Class Actions at Home: Vivendi's Crusade against U.S. Imperialism
- Patricia OREJUDO PRIETO DE LOS MOZOS, Recognition in Spain of Parentage Created by Surrogate Motherhood

Forum

- Carmen AZCÁRRAGA MONZONÍS, An Old Issue from a Current Perspective: American and European Private International Law

More information can be found here.

New ICC Rules in 2012

The International Chamber of Commerce (ICC) has launched a revised version of its Rules of arbitration. The new Rules will come into force on 1 January 2012.

See the announcement of the ICC here.

Latest Issue of "Praxis des

Internationalen Privat- und Verfahrensrechts" (5/2011)

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

Here is the contents:

- ***Marc-Philippe Weller***: "Anknüpfungsprinzipien im Europäischen Kollisionsrecht: Abschied von der „klassischen" IPR-Dogmatik?" – the English abstract reads as follows:

Friedrich Carl v. Savigny has influenced modern private international law. His method is known as the "classic" private international law doctrine. Its principles are the international harmony of decisions and the neutrality of private international law, embodied in the principle of the most significant relationship.

However, in European private international law a slight paradigm change concerning the structure of the conflict of law rules can be detected from a classic point of view. The conflict of law rules of the Rome I and Rome II Regulation are prevalently oriented according to the material principles of the European Union such as the promotion of the internal market, the increase of legal security and the protection of the weaker party (e.g. consumer protection).

Nevertheless, in the event of a future codification of private international law at European level, the classic connecting principles of private international law deserve greater attention in the law making process. The Lisbon Treaty would allow such a "renaissance" of the classic private international law doctrine.

- ***Dieter Martiny***: "Die Kommissionsvorschläge für das internationale Ehegüterrecht sowie für das internationale Güterrecht eingetragener Partnerschaften" – the English abstract reads as follows:

On 16 March 2011 the European Commission proposed two separate Regulations, one for married couples on matrimonial property regimes and

another on the property consequences of registered partnerships. A Communication of the Commission explains the approach of the proposals. While it is in principle to be welcomed that the Proposals are gender neutral and neutral regarding sexual orientation, the relationship between the intended overarching European rules with the (existent) divergent national rules for different types of marriages and partnerships raises some doubts. It is regrettable that, whereas spouses may themselves expressly choose the applicable law to a certain extent, the assets of registered partnerships are, as a rule, subject to the law of the country where the partnership was registered. In the absence of a choice of law by the spouses, similar to the Rome III Regulation – but following the immutability doctrine – the law of their common habitual residence applies in the first instance. The scope of the Proposals as to "matrimonial property" is not totally clear, nor is the role of overriding mandatory rules. Rules on jurisdiction and recognition are broadly in line with the Brussels II bis Regulation and the Succession Proposal. Many details of the recent Proposals need more clarification. However, despite a number of flaws the Proposals seem basically to be acceptable – at least for the civil law Member States.

- ***Andreas Engert*/Gunnar Groh**: "Internationaler Kapitalanlegerschutz vor dem Bundesgerichtshof" – the English abstract reads as follows:

In 2010, the German Federal Court handed down a number of judgments on the liability of investment service providers in an international setting. The Court faced two specific fact patterns: On the one hand, broker-dealers from the U.S. and Britain participated in a fraudulent investment scheme operated by a German asset manager through investment accounts located abroad. The question arose whether German courts had jurisdiction over the foreign defendants for aiding and abetting, and if so, which tort law governed the case. On the other hand, an investment fund from Turkey and a Swiss asset manager offered their services to investors in Germany without being licensed by the German financial services supervisor.

As regards the jurisdiction issue vis-à-vis defendants from the U.S. and Turkey, the Court concluded that foreign aiders and abettors to a tort committed in Germany can be sued in Germany. The tortfeasor's acts were imputed to them under § 32 Zivilprozessordnung (German Code of Civil Procedure). In relation

to European defendants, the Federal Court claimed jurisdiction under art. 5 no. 3 Brussels I Regulation/Lugano Convention based on the place where the damage occurred. Because investors were almost certain to lose money on the

fraudulent scheme, the damage occurred in Germany when investors transferred their funds to a foreign account. In one case, the Court relied on its jurisdiction over consumer contracts for adjudicating a torts claim, which allowed the Court to dismiss a jurisdiction clause.

With regard to the conflicts rules on tort law, the cases were still governed by German conflicts law leading to similar issues. As a result, investors were able to rely on German tort law. Under the new Rome II Regulation, future tort claims may well qualify as culpa in contrahendo. The applicable law then depends on the law applicable to the contract itself. In this case, the special conflict rule for consumer contracts (Art. 6 Rome I Regulation) ensures that retail investors can invoke their home country's tort law.

- ***Jürgen Samtleben:*** "Schiedsgerichtsbarkeit und Finanztermingeschäfte – Der Schutz der Anleger vor der Schiedsgerichtsbarkeit durch § 37h WpHG" – the English abstract reads as follows:

The present article discusses the disputed provision of § 37h of the German Securities Trading Act (WpHG), according to which non-merchants are not able to enter into a valid advance arbitration agreement as regards financial services transactions. The decision of the Federal Court of Justice (BGH) at issue addressed a damages claim brought against a US broker who had, through the use of independent German financial intermediaries, secured clients for the purchase of financially risky futures. As in other cases, the BGH found the business practice of the financial intermediaries to be contrary to public policy and concluded that the broker is subject to liability for his participation in an unlawful commercial practice. The central issue, however, was the defendant's contention that the court was bound to refer the matter to arbitration in light of an arbitration clause included in the original account agreement. Although signed only by the client, the clause arguably comported with US law, notwithstanding its failure to meet the formal requirements of Art. II of the New York Convention. As it was not clear whether the claimant could be labeled a merchant, the BGH could not make a final determination on the

applicability of § 37h WpHG. Equally left open was the question whether the claimant had engaged in the financial activities in question for private purposes and thus as a consumer; in such a case the account agreement would fail to satisfy the formal requirements of § 1031(5) of the German Code of Civil Procedure (ZPO). The article makes clear that the formal requirements of § 1031(5) ZPO can be overridden by a written arbitration agreement that otherwise satisfies the New York Convention. In contrast, § 37h WpHG constitutes a matter of (missing) subjective arbitrability which, according to the Convention, is to be determined under national law. Whereas § 37h WpHG in its current version only protects non-merchants, this limitation is overly narrow and should be abandoned so that all investors acting in a private capacity are protected from the application of an arbitration clause.

- ***Astrid Stadler***: "Prozesskostensicherheit bei Widerklage und Vermögenslosigkeit" – the English abstract reads as follows:

The key issue in the proceedings before the Court of Appeal in Munich was the question whether an insolvent US corporation – with its center of main interest being located in Great Britain – was exempt from its obligation to provide security for legal expenses of a counterclaim after the principal cause of action had been dismissed. The author agrees with the court's judgment, stating that the counterclaimant legally was exempt but disagrees with the reasons given by the court. In her opinion, an exemption would have been possible according to Sec. 110 para. 1 German Code of Civil Procedure, which imposes the obligation to provide security only upon claimants domiciled outside the EU. With the (counter-)claimants insolvency estate being located in Great Britain, the companies statutory head office in the US (Delaware) was irrelevant. The article furthermore raises the question whether an exemption to the obligation of providing security for legal expenses should be granted whenever the foreign (counter-)claimant is penniless. The article objects to such a rule considering the ratio legis of Sec. 110 German Code of Civil Procedure, which simply tries to compensate the difficulties being linked to an execution outside the EU or the EEA. The defendants risk of being sued by an insolvent plaintiff not being able to reimburse the defendant's legal costs in case of a dismissal of his action exists as well with respect to plaintiffs domiciled in the forum state. Thus a general rule applicable to all insolvent plaintiffs would be necessary, which

however runs contrary to a tendency in European countries of generally abolishing the obligation of foreign plaintiffs to provide security for legal expenses in order to make their court more attractive.

- ***Thomas Rauscher:*** "Ehegüterrechtlicher Vertrag und Verbraucherausnahme? – Zum Anwendungsbereich der EuVTVO" – the English abstract reads as follows:

The contribution discusses several decisions rendered by the Berlin Court of Appeal (Kammergericht) concerning the qualification of a right in property as arising out of a matrimonial relationship in the sense of Art 2 (a) of the EC-Enforcement-Order-Regulation (Regulation (EC) No 805/2004) as well as the application of the EC-Enforcement-Order-Regulation towards consumer cases. The meaning of matrimonial property rights under the EC-Enforcement-Order-Regulation should be interpreted with regard to the ECJ's DeCavel-decisions given under the Brussels Convention. The primary claim will be decisive for the interpretation of this exemption from the Regulation's scope of application; secondary claims are exempted from the scope of application as well. The protection of consumers under Art 6 (1)(d) EC-Enforcement-Order-Regulation should not only apply in B2C-cases as under Art 15 Brussels I-Regulation but also in C2C-cases; the consumer being the defendant needs protection against certification of a title as European Enforcement Order without regard to the plaintiff's qualification as a consumer or professional. Finally it is questionable that the court did not ask the ECJ to render a preliminary decision concerning those remarkable questions.

- ***Martin Illmer***: "Englische anti-suit injunctions in Drittstaatensachverhalten: zum kombinierten Effekt der Entscheidungen des EuGH in Owusu, Turner und West Tankers" – the English abstract reads as follows:

Due to the territorial limits of the ECJ's judgments in Turner and West Tankers, English courts are still granting anti-suit injunctions in relation to non-EU Member States. However, even this practice may be contrary to EU law due to the combined effect of the ECJ's judgments in Turner, West Tankers and Owusu. This line of argument which was lurking in the dark for some time now came only recently before the English High Court. Based on the assumption

that forum non conveniens (which was the critical issue in Owusu) and anti-suit injunctions (which were the critical issue in Turner and West Tankers) are two related issues with overlapping preconditions, anti-suit injunctions might have been buried altogether. The High Court, however, rejected such an assumption without further discussion of the issue and granted the anti-suit injunction.

- ***Ghada Qaisi Audi***: DIFC Courts-ratified Arbitral Award Approved for Execution by Dubai Courts; First DIFC-LCIA Award pursuant to Dubai Courts-DIFC Courts Protocol of Enforcement

The enforcement of arbitral awards made by the Dubai International Financial Centre-London Court of International Arbitration (DIFC-LCIA) can only be achieved by a ratification Order of the Dubai International Financial Centre Courts (DIFC Courts). The first DIFC Courts-ratified arbitral award was recently approved for execution by the Dubai Courts under the 2009 Protocol of Enforcement that sets out the procedures for mutual enforcement of court judgments, orders and arbitral awards without a review on the merits, thus providing further uniformity and certainty in this arena.

- ***Christel Mindach***: Russland: Novellierter Arbitrageprozesskodex führt Sammelklagen ein
- ***Carl Friedrich Nordmeier***: Beschleunigung durch Vertrauen: Vereinfachung der grenzüberschreitenden Forderungsbeitreibung im Europäischen Rechtsraum – Tagung am 23./24.9.2010 in Maribor
- ***Mathäus Mogendorf***.: 16. Würzburger Europarechtstage am 29./30.10.2010

Clarkson & Hill, The Conflict of Laws (4th edn OUP, 2011)

Those who teach or study in private international law will be interested to know that Chris Clarkson and Jonathan Hill have published the 4th edition of their excellent student text on *The Conflict of Laws*. From the blurb:

- *Covers the basic principles of the conflict of laws in a succinct and approachable style making this an ideal introductory text*
- *Explains complex points of law and terminology clearly and without oversimplification, offering both an authoritative and accessible approach to a subject which has changed greatly in recent years*
- *Offers comprehensive coverage for undergraduate and postgraduate courses on the Conflict of Laws.*
- *Provides analysis of existing legislation in addition to considering reform proposals and theoretical issues.*

New to this edition

- *Restructured content better reflects the topic coverage of typical undergraduate courses in Conflict of Laws and allows for extended analysis of the most relevant topics*
- *Expanded introductory chapter discusses the major changes to the subject and the theoretical issues surrounding it*
- *Fully updated to reflect the emphasis on issues relating to jurisdiction and the recognition and enforcement of judgments in private international law*
- *Completely re-written chapter on choice of law relating to non-contractual obligations (Rome II Regulation)*
- *Substantially revised chapter on choice of law relating to contractual obligations in light of the Rome I Regulation*
- *Revised chapters on habitual residence and matrimonial causes taking account of increasing case-law (both domestic and European) on the Brussels II Revised Regulation.*

The fourth edition of this work provides a clear and up-to-date account of the

private international law topics covered in undergraduate courses. Theoretical issues are introduced in the first chapter and, where appropriate, considered in greater detail in later chapters. Basic principles of the conflict of laws are presented in an approachable style, offering clarity on complex points and terminology without over-simplification.

The area of conflict of laws has undergone a profound change in recent decades. Much of the subject is now dominated by legislation, both domestic and European, rather than by case law. In practical terms, issues relating to jurisdiction and the recognition and enforcement of judgments have taken centre stage and choice of law questions have become of less practical importance.

These changing emphases in private international law are fully reflected in this book. The authors provide detailed analyses of the most important commercial topics (civil jurisdiction, the recognition and enforcement of foreign judgements, and choice of law relating to contractual and non-contractual obligations) as well as the most central topics in family law (marriage, matrimonial causes and property law).

OUP has kindly offered a **15% discount** to all of our readers: purchase the text direct from OUP's website, then use promotional code **WEBXSTU15** when you add the book to your shopping basket. This takes the book from £34.99 to **£29.74**. Overwhelmingly recommended.

The "Conflicts Revolution"

With thanks to one of our readers, here is a decision that may be of interest. The New York Court of Appeals recently decided a case that adresses many of the basic tort fact patterns that that started the way to the "conflicts revolution" in the 1950s and
1960s. Interestingly, the court is split on how to decide some of these issues, even after all these years.

New Workshop on PIL as Global Governance at Sciences Po

Horatia Muir Watt and Diego Fernandez Arroyo are establishing a workshop on « Private International Law as Global Governance » at the Law School of the Paris Institute of Political Science (*Sciences Po*). The group will meet regularly over the year ; the first meeting is on October 21st.

Private International Law as Global Governance : from Closet to Planet

Despite the contemporary turn to law within the global governance debate, private international law remains remarkably silent before the increasingly unequal distribution of wealth and power in the world. By leaving such matters to its public international counterpart, it leaves largely untended the private causes of crisis and injustice affecting such areas as financial markets, levels of environmental pollution, the status of sovereign debt, the confiscation of natural resources, the use and misuse of development aid, the plight of migrating populations, and many more. This impotency to rise to the private challenges of economic globalisation, is all the more curious that public international law itself, on the tide of managerialism and fragmentation, is now increasingly confronted with conflicts articulated as collisions of jurisdiction and applicable law, among which private or hybrid authorities and regimes now occupy a significant place. The explanation seems to lie in the development, under the aegis of the liberal separation of law and politics and of the public and the private spheres, of an « epistemology of the closet », a refusal to see that to unleash powerful private interests in the name of individual autonomy and to allow them to accede to market authority was to construct the legal foundations of informal empire and establish gaping holes in global governance. It is now more than time to de-closet private international law and excavate the means with which, in its own right, it may impact on the balance of informal power in the global economy. Adopting a planetary perspective means reaching beyond the schism and connecting up with the politics of public international law, while contributing its own specific savoir-faire acquired over many

centuries in the recognition of alterity and the responsible management of pluralism.

Contact horatia.muirwatt@sciences-po.org or diego.fernandezarroyo@sciences-po.org if you wish to participate.

Recognition and proprietary consequences of a UK civil partnership in South Africa

The decision in AC v CS 2011 2 SA 360 (WCC) (Western Cape High Court, Cape Town) deals with the recognition in South Africa of a civil partnership registered in the United Kingdom under the Civil Partnership Act, 2004. Gamble J obiter referred to the proprietary consequences of such partnership in South Africa.

The South African Civil Union Act 17 of 2006 makes provision for civil unions between couples of the same or different sex. The parties may choose whether their civil union must be known as a marriage or a civil partnership (section 11 of the act). The UK Civil Partnership Act, 2004, makes provision for same-sex couples only and a civil partnership is not known as a marriage. Notwithstanding these differences, the court recognises the UK civil partnership as a civil union for the purposes of South African (private international) law. Although the court does not refer to the process of classification, the decision attests to an enlightened lex fori approach to characterisation. (On classification in South(ern) African private international law, see Forsyth Private International Law (2003) 68-81 and Neels "Falconbridge in Africa" 2008 Journal of Private International Law 167.)

In South African private international law, both the formal and the inherent validity of a marriage are governed by the law of the place of the conclusion of the marriage (the lex loci celebrationis). (See Forsyth 263-265.) This decision is the first in South Africa in which the same conflicts rule is applied in respect of the

inherent validity of a foreign civil partnership. As the partnership is inherently valid in terms of English law, it is valid for the purposes of South African (private international) law.

The court finds that the grounds for divorce and payment of maintenance inter partes are governed by the relevant provisions in the Civil Union Act, which refer to the arrangements in the Divorce Act 70 of 1979. This is not the position, at least not in the first place, because the word "marriage" in the Divorce Act may be interpreted to include foreign partnerships, as the court implies, but because these issues are governed by the lex fori (namely the Civil Union Act referring to the Divorce Act) (see Forsyth 286).

The parties were probably both domiciled in South Africa at the time that the partnership was registered in the UK (although one party was a UK citizen). As they did not conclude an ante-nuptial contract, the partnership/civil union would according to South African law have been concluded in community of property. It was unnecessary for the court to determine which law applied in respect of the proprietary consequences of the partnership/civil union as the parties concluded a deed of settlement in this regard.

The Roman-Dutch rule referred the proprietary consequences of a marriage to the law of the domicile of the husband at the time of the conclusion of the marriage (see Sperling v Sperling 1975 3 SA 707 (A)). This rule is today unconstitutional on the basis of the equality principle and also because it does not make provision for same-sex marriages/civil unions/civil partnerships. The court in casu comes to the same conclusion but does not refer to other case law where the same point was already made: see Fourie v Minister of Home Affairs 2005 1 All SA 273 (SCA) par 125 n 112; Sadiku v Sadiku case no 30498/06 (26 January 2007) (T) per www.saflii.org, discussed by Neels and Wethmar-Lemmer "Constitutional values and the proprietary consequences of marriage in private international law – introducing the lex causae proprietatis matrimonii" 2008 TSAR 587.

Gamble J suggests that the legislature address the position in respect of the patrimonial consequences of same-sex marriages/civil unions/partnerships. This does not seem to be necessary. The courts have the inherent power to develop the common law in conformity with constitutional values (sec 8(3)(a), 39(2) and 173 of the Constitution of the Republic of South Africa of 1996). In this regard they should take note of the relevant academic opinion: see Stoll and Visser "Aspects

of the reform of German (and South African) private international family law" 1989 De Jure 330; Schoeman "The connecting factor for proprietary consequences of marriage" 2001 TSAR 72; Schoeman "The South African conflict rule for proprietary consequences of marriage: learning from the German experience" 2004 TSAR 115; Schoeman "The South African conflict rule for proprietary consequences of marriages: the need for reform" 2004 IPRax 65; Neels "Revocation of wills in South African private international law" 2007 ICLQ 613; and Neels and Wethmar-Lemmer supra.

We have indicated before that we support the five-step model proposed by Stoll and Visser supra (Neels and Wethmar-Lemmer supra). The proposal ends the infringement of the equality principle and also provides a solution for same-sex marriages/civil unions/partnerships. Here it follows, adapted to make provision for civil unions and similar institutions:

> *In the absence of an express or tacit choice of law in an ante-nuptial contract, the proprietary consequences of a marriage, a civil union or similar institution (eg a civil partnership) must be governed by the law of the country of the common domicile of the parties at the time of the conclusion of the marriage, civil union or similar institution. If they did not have such a common domicile, the law of the country of the common habitual residence of the parties at the time of the conclusion of the marriage, civil union or similar institution must apply. If they did not have such a common habitual residence, the law of the country of the common nationality of the parties at the time of the conclusion of the marriage, civil union or similar institution must apply. If they did not have such a common nationality, the law of the country with which both spouses were most closely connected at the time of the marriage must apply.*