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 Konzern-finanzierung (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.

ASIL Private International Law Prize

The Private International Law Interest Group of the American Society of International Law has launched its third annual prize competition.

> *Competitors may be citizens of any nation but must be 35 years old or younger on December 31, 2011. They need not be members of the American Society of International Law.*

This year, the prize will consist of a $500 stipend to participate in the inaugural Interest Group conference on "What is Private International Law" to be held on October 5-6, 2012. Essays should address the subject matter as articulated in the call for papers for the conference, which can be found here.

The prize will be awarded by the Private International Law Interest Group based upon the recommendation of a Prize Committee. Decisions of the Prize Committee on the winning essay and on any conditions relating to this prize are final.

Submissions to the Prize Committee must be received no later than 5:00 pm ET, May 15, 2012. Entries must be written in English and should not exceed 10,000 words.

Entries must be submitted by email in Word or pdf format. They should contain two different documents: a) the essay itself, without any identifying information other than the title and b) a second document containing the title of the entry and the author's name, affiliation, and contact details.

Submissions and any queries should be addressed by email to Private International Law Interest Group Co-Chairs Rahim Moloo (rahim.moloo@nyu.edu) and Ralf Michaels (michaels@law.duke.edu).

All submissions will be acknowledged by e-mail.

Conference Announcement: Our Courts and the World

Our Courts and the World: Transnational Litigation and Civil Procedure

On Friday, February 3, 2012, Southwestern Law School in Los Angeles, California and the *Southwestern Journal of International Law* is hosting a symposium titled *Our Courts and the World: Transnational Litigation and Civil Procedure*. The

symposium is co-sponsored by the American Society of International Law, the Junior International Law Scholars Association (JILSA), the Los Angeles County Bar Association – International Law Section, and the State Bar of California – International Law Section.

This one-day symposium will bring together leading scholars from Canada and the United States to discuss the procedural issues that arise in transnational civil litigation cases. It will also assess how receptive courts are to transnational litigation and explore issues related to transnational class actions. The proceedings and papers from this symposium will be published in the *Southwestern Journal of International Law.*

Panelists include (in alphabetical order):

- *Samuel P. Baumgartner*, Professor of Law, University of Akron School of Law
- *Vaughan Black,* Professor of Law, Dalhousie University Schulich School of Law
- *Gary B. Born,* Partner, WilmerHale, Lecturer on Law, Harvard Law School
- *Stephen B. Burbank,* David Berger Professor for the Administration of Justice, University of Pennsylvania Law School
- *Montré D. Carodine,* Associate Professor of Law, University of Alabama School of Law
- *Donald Earl Childress III,* Associate Professor of Law, Pepperdine University School of Law
- *Paul R. Dubinsky,* Associate Professor of Law, Wayne State University Law School
- *Allan Ides,* Christopher N. May Professor of Law, Loyola Law School, Los Angeles
- *Thomas Orin Main,* Professor of Law, University of the Pacific, McGeorge School of Law
- *Erin O'Hara O'Connor*, Professor of Law and Director of Graduate Studies, Law & Economics PhD Program, Vanderbilt Law School
- *Cassandra Burke Robertson*, Associate Professor, Case Western Reserve University School of Law
- *Linda J. Silberman*, Martin Lipton Professor of Law, New York University School of Law
- *Linda Sandstrom Simard*, Professor of Law, Suffolk University Law School

- *Adam N. Steinman*, Professor of Law and Michael J. Zimmer Fellow, Seton Hall University School of Law
- *Janet Walker*, Professor of Law, Osgoode Hall Law School
- *Rhonda Wasserman*, Professor of Law, University of Pittsburgh School of Law

Moderators include:

- *William E. Thomson*, Partners, Gibson, Dunn & Crutcher LLP
- *James H. Broderick, Jr.,* Partner, Squire, Sanders & Dempsey LLP
- *Marcus S. Quintanilla*, Counsel, O'Melveny & Myers LLP
- *Ray D. Weston Jr.,* Vice President and General Counsel, Taco Bell Corp.

Symposium Co-Chairs:

- *Austen Parrish*, Professor of Law and Vice Dean, Southwestern Law School
- *Christopher A. Whytock*, Acting Professor of Law and Political Science, University of California, Irvine

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Latest Issue of RabelsZ: Vol. 76, No. 1 (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 – among others – articles on the recent Chinese and Japanese Codifications on Private International Law. The table of contents reads as follows:

Articles:

Knut Benjamin Pissler, **The New Private International Law of the People's Republic of China: Cross the River by Feeling the Stones,** pp. 1-46

Abstract:

On October 28, 2010, the "Law of the Application of Law for Foreign-related Civil Relations" was promulgated in the People's Republic of China. The law aims to consolidate the Chinese conflict of laws regime and signals a new step towards a comprehensive codification of civil law in China. Drafting of the law started in the early 1990s and produced an academic model law in the year 2000. The Chinese legislator was reviewing a first draft in 2002. However, due to other priorities, it has only been since the beginning of 2010 that conflict of laws has been at the top of the legislative agenda. It comes, therefore, with little surprise that the law has some deficiencies and has been welcomed with mixed feelings by Chinese academics, who had only limited influence in the last stage of the drafting process.

The promulgated law emphasizes party autonomy and the closest connection as general principles. The law furthermore replaces nationality with habitual residence as the principal connecting factor for personal matters in Chinese private international law. However, some lacunas remain and new questions arise from the law. The legislative gaps concern the form of legal acts, the maintenance duties after divorce as well as the assignment and transfer of rights and duties in general. New questions arise from the provisions in the law establishing alternative connecting factors. In some cases the law requires application of the law which favours a particular party (in parent-child relationships, maintenance and guardianship). Chinese courts will therefore be confronted with the demanding task of comparing the legal regimes of different states in this respect. In other cases the law does not stipulate how to choose between the alternative connecting factors and it remains to be seen on which principles courts will render their decisions. Regarding the free choice of law with regard to rights in movable property provided by the law, it is additionally questionable how the rights of third parties are protected where they are not aware of such a choice of law. The decision of the legislator to exclude renvoi will force Chinese courts to apply foreign law even if the foreign private international law refers back to Chinese law.

Some of the particular provisions in the law are also a source for further problems: This concerns the application of the lex fori in divorce cases, the conflict of laws rule on trusts and arbitration clauses as well as on agency. Another point of uncertainty stems from older provisions of private

international law that can still be found in several laws such as the Maritime Commercial Law, the Civil Aviation Law or the Contract Law. Those norms are still in force formally, but their relation to the new law is not sufficiently clarified. This uncertainty is particularly pronounced given that the relation of the new law to several provisions in the General Principles of Civil Law and the Inheritance Law is expressly regulated whereas the others are not even mentioned. Relating to international contract law and tort law, the Supreme People's Court had issued some judicial interpretations in the past to solve certain questions, but it also remains uncertain whether these interpretations still apply after the enactment of the new law. It is expected that the Supreme People's Court will issue a further judicial interpretation on private international law in the near future to help Chinese courts applying the new law.

Qisheng He, **The EU Conflict of Laws Communitarization and the Modernization of Chinese Private International Law,** pp. 47-85

Abstract:

Since 2007 the EU has adopted the Rome I, Rome II and Rome III Council Regulations codifying and unifying the respective conflict of laws rules in contract, tort and divorce and legal separation. The EU conflict of laws communitarization has attained great achievements. In 2010, China also adopted a self-contained statute – the Law of the People's Republic of China on the Application of Law to Civil Relationships Involving Foreign Interests – which marks a significant step forward in the codification of Chinese private international law (PIL). However, the sources of Chinese PIL are still scattered and diverse because the PIL rules in existing commercial statutes have not been incorporated into this separate PIL statute. In contrast with the EU PIL, there are three issues on which China should devote special attention in further developing its PIL: Firstly, because of a mixed mode of legislation and the scattered sources of Chinese PIL, maintaining harmony between the new statute and the other sources still remains an important task. It remains very important for China to enact PIL provisions in future commercial law legislation. Secondly, the draft of the new statute includes no documents or materials which suggest that the Chinese legislative authority appreciated the tension and need for equilibrium between certainty and flexibility. Thus, the

new statute manifests some problems in this regard. Lastly, current Chinese PIL is mainly focused on jurisdiction-selection rules, meaning that the formulation of reasonable content-preference rules is still an important task necessary for the modernization of Chinese PIL.

Yoshiaki Sakurada & *Eva Schwittek*, **The Reform of Japanese Private International Law,** pp. 86-130

Abstract:

Japan has reformed its Act on the Application of Laws. On 1 January 2007, the Hô no tekiyô ni kansuru tsûsoku-hô came into effect, a revised and renamed version of the Hôrei that dates from 1898. This article traces the legislative process and analyses the changes in the law, referring to the way they have been implemented in the court rulings rendered so far.

In sessions dating from May 2003 to July 2005, the Subcommittee for the Modernisation of the Act on the Application of Laws (part of the Legislative Commission of the Ministry of Justice) worked out fundamental innovations that were approved by the Legislative Commission of the Ministry of Justice on 6 September 2005. Based on this report, the Ministry of Justice, in cooperation with the Legislative Department of the Cabinet, drafted a bill that passed the Upper House on 19 April 2006 and the House of Representatives on 15 June 2006.

The reform is comprehensive. The only parts of the law that were exempt from amendment were international family and inheritance law, those already having been reformed in 1989. The present renewal focuses on the provisions concerning international contract law (Arts. 7-12) and the international law of torts (Arts. 17-22). Both sets of rules were further differentiated in their basic principles and complemented by special rules.

As for international contract law, the basic connecting factor is still the parties' choice of law (Art. 7). A fundamental change in determining the law applicable to contracts was implemented by introducing a new subsidiary objective connecting factor in Art. 8. It provides that in the absence of a choice of law by

the parties, the law of the place with which the contract was most closely connected should apply, and it specifies criteria for determining the closest connection. The newly created rules on consumer and labour contracts in Arts. 11 and 12 contain major innovations aiming at the protection of the weaker party. However, they impose upon the weaker party the burden of stipulating the effect of the protective provision in question, an aspect which was much criticised as it limits such protective effects.

The lex loci delicti, as the basic connecting factor for the law of torts, formerly stipulated in Art. 11(1) Hôrei, is maintained in Art. 17. Multilocal torts are governed by the law of the place where the results of the infringing act are produced (Art. 17 sentence 1). However, if it was not foreseeable under normal circumstances that the results would be produced at that place, the law of the place where the infringing act occurred shall apply (Art. 17 sentence 2). Special rules on product liability and on infringements of personality rights were added to the law in Arts. 18 and 19. The lex loci delicti as connecting factor can be deviated from in cases where a manifestly more closely connected place exists (Art. 20) or where the governing law is changed by the parties (Art. 21). The principle of double actionability, stating that Japanese law should be applied cumulatively to the applicable law regarding the grounds of and the compensation for damages incurred by a tort, was upheld in Art. 22 against severe criticism.

Apart from the points of critique addressed above, the new law provides for a differentiated set of rules that keep pace with the latest international developments.

Anne Röthel, **Family and Property in English Law: Developments and Explanations**, pp. 131-160(30)

Abstract:

In continental jurisdictions, there is still a strong link between family and property. Intestate succession, imperative inheritance rights as well as the concepts of matrimonial property regimes and in some aspects also tax law are designed to attribute property rights along personal relationships. The position

of English law is often described as a contrasting concept, especially due to the deeply rooted reservations against fixed shares. However, continental lawyers often may be surprised with the actual outcome, especially in divorce cases. The article therefore explores the present state of English law concerning family and property. Is there a convergence in concepts as well? Is English law nowadays more favourable towards general normative models for the attribution of property within family relationships? Or is the 2010 decision of Radmacher v. Granatino another turning-point? The author argues that the inner explanation of these – at first glance – diverging steps lies in the recognition of equality in horizontal relationships. The outcome of cases like White v. White or Stack v. Dowden is only partly the effect of a generally altered view on family and property in English Law. Nonetheless, they reflect a different understanding of how and how much the state should regulate the family. Although all European legislations experience broadly similar demographic trends and social challenges, there remain decisive differences in legal concepts. The distance between English Law and the continent may be somewhat reduced – but it is far from disappearing.

Material:

Volksrepublik China: Erlass des Präsidenten der Volksrepublik China Nr. 36: Gesetz der Volksrepublik China zur Anwendung des Rechts auf zivilrechtliche Beziehungen mit Aussenberührung vom 28. 10. 2010, pp. 161-169 *(Peoples Republic of China: Order of the President of the People's Republic of China No. 36: The Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China, 28/10/2010)*

Japan: Gesetz Nr. 78 über die allgemeinen Regeln über die Anwendung von Gesetzen (Rechtsanwendungsgesetz) vom 21. 6. 2006, pp. 170-184 (*Japan: Act No. 78* of 2006 about General Rules for Application of Laws, 21/06/2006)

Hague International Financial Tribunal

PRIME Finance, an international tribunal specialising in resolving financial disputes has launched its services today in the Hague.

The services that it offers are arbitration and mediation, so it is, in effect, an arbitration institution rather than the "latest of six international courts in the Netherlands". The dispute resolution experts of Prime Finance are indeed specialists of international arbitration rather than international criminal law scholars, and the good air of the Hague seems unlikely to change the legal nature of this newcomer.

The press has reported that it is to be financed by the Dutch government and the city of the Hague for its first two years. The Netherlands has certainly a lot to gain if it can effectively compete with London and New York City as an international center for the resolution of financial disputes. For that purpose, one suspects that the founders of the institution have put more effort into attracting Lord Collins of Mapesbury and the Honourable Charles N. Brower than Luis Moreno-Ocampo.

Well, let's the competition begin, then.

Licari & Janke on Punitive Damages

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A new article on punitive damages and the Fountaine Pajot ruling (see related entries following this) has just been published on SRRN, entitled "Enforcing Punitive Damages Awards in France after Fountaine Pajot"; it will

also be included in the *American Journal of Comparative Law* in summer. Here is the abstract:

> In a landmark ruling, the Cour de cassation held that 'an award of punitive damages is not, per se, contrary to public policy,' but that 'it is otherwise when the amount awarded is disproportionate with regard to the damage sustained and the debtor's breach of his contractual obligation.' Schlenzka & Langhorne v. Fountaine Pajot, S.A. involved the failed attempt by American judgment creditors to enforce their California judgment against a French defendant in France. At the same time that the judgment creditors were taking their case through the French legal system, the Cour de cassation, in a different line of cases, liberalized the conditions under which a foreign judgment could be enforced in France. But when the Court opened one door for the American plaintiffs, it closed another by refusing to enforce the judgment because it included disproportionate punitive damages. The Court's reasons were inconsistent with prior interpretations of proportionality and disingenuous to the court's modern approach to the enforcement of foreign judgments. In just a few words, the Court echoed prevailing French and European sentiments about American punitive damage awards. Unfortunately, the prevailing attitudes are dominated more by prejudice than by fact and reason.

Click here to access the whole text.

López de Tejada on the Abolition of Exequatur

María López de Tejada holds a PhD in law from the University of Paris II with a thesis on the abolition of the exequatur procedure. She has recently published an article on the topic in the Spanish journal La Ley (Diario La Ley, Nº 7766, Sección Tribuna, 30 Dic. 2011). Here is a summary of the contents.

The execution of foreign judgments has traditionally been subject to an enforcement procedure in the European judicial area. However, the Community lawgiver wants to get rid of that process so that any judicial decision could deploy its effects and be enforced throughout the community, without prior declaration of enforceability or control in the executing Member State. Several regulations of limited material scope have already achieved that objective, but the idea is to go further and abolish the exequatur procedure for all civil and commercial matters. Such an objective looks like praiseworthy at first sight, because it tends to break with a traditional legal lack of openness and to restore the continuity of the right to enforcement of anyone who has obtained a favorable judgment. But a deeper analysis of the issue shows that right now, the abolition of exequatur would be a hasty, even dangerous step for both the citizens and the harmony of the juridical systems of the Member States. The suppression of the exequatur procedure is based on the assumption that foreign court rulings, delivered under common jurisdictional criteria, provide similar guarantees and should be regarded as national decision. The truth is that until a higher level of integration has been reached such presumption, which implies the perfect equivalence of all national decisions, is simply excessive and unrealistic. On the one hand, the European system of jurisdiction set in regulations is still far from perfect; and the practical application of the rules leads too often to unpredictable consequences. On the other hand, the judicial area is characterized by a profound heterogeneity in as far as procedural law is concerned; and unfortunately both the ECHR and the ECJ case law still show scenarios of violations of fundamental rights by the States -in particular of Article 6 of the ECHR.

The suppression of all kind of control (meaning, public order clause included) of foreign rulings opens the door to the community space of judgments contrary to the fundamental rights enshrined in the ECHR and in the European Charter of Fundamental Rights, notwithstanding the Member States commitment to abide by both them.