PILAGG Website

The Private International Law as Global Governance project (PILAGG) of Sciences Po Law School has now its own website where the programme of the workshops and the papers can be found.

Tick Tock: CJEU rules on temporal application of the Rome II Regulation

On 17 November 2011, the Court of Justice of the European Union delivered its ruling in Case C-412/10, *Homawoo v GMF Assurances* on the temporal effect of the Rome II Regulation (Regulation (EC) No 864/2007) . In line with the earlier opinion (if not all of the reasoning) of Advocate General Mengozzi, the Court rules that the date of application of the Rome II Regulation is fixed by Art. 32 of the Regulation at 11 January 2009, with the consequence that the Regulation will apply only to events giving rise to damage occurring from that date (Art. 31).

The terms of the Court's ruling are as follows:

> *Articles 31 and 32 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II'), read in conjunction with Article 297 TFEU, must be interpreted as requiring a national court to apply the Regulation only to events giving rise to damage occurring after 11 January 2009 and that the date on which the proceedings seeking compensation for damage were brought or the date on which the applicable law was determined by the court seised have no bearing on determining the scope ratione temporis of the Regulation.*

Although differing from my own view, influenced by the legislative history of Arts 31 and 32, the Court's reasoning is quite convincing. The swift and decisive

settlement of this point of controversy, just over a year after the reference, is to be welcomed.

Special leave granted in PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission

The High Court has recently granted special leave to appeal from the decision of the Full Court of Federal Court in *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* [2011] FCAFC 52; (2011) 192 FCR 393; 277 ALR 67, on which James McComish has previously posted. The case concerns the applicability of foreign state immunity to government-owned airlines in the context of civil proceedings for breach of competition laws.

ECJ Rules on Jurisdiction over Defendants whose Domicile is Unknown

In a judgment of November 17, 2011, the first chamber of the European Court of Justice ruled in *Hypotecní banka a.s. v Lindner* (case C-327/10) that defendants with unknown domicile are domiciled at their last known domicile for the purpose of the Brussels I Regulation.

The case was concerned with a consumer (Lindner) who had borrowed money from a Czech bank (Hypotecní banka a.s.). The consumer was a German national living in the Czech Republic. The loan contract contained a jurisdiction clause in favour of "the local court of the bank", ie Prague courts. Lindner lived 150 km away from Prague. Yet, it seems that when the bank initiated proceedings against Lindner, it brought them before the court of its former domicile. Lindner, however, had changed addresses, and the court was unable to assess where he had moved to.

This of course raised great difficulties. The applicability of the Brussels I Regulation is conditional upon the defendant being domiciled in the European Union (art. 2). Consumers must be sued at the place of their domicile (art. 16).

Last Known Domicile

The Court held that the last known domicile had to be used for the purpose of each provision of the Regulation. It explained that it struck a fair balance between the rights of the plaintiff, who must be able to identify easily the competent court, and of the consumer.

> *44 It is, above all, in accordance with the objective, pursued by Regulation No 44/2001, of strengthening the legal protection of persons established in the European Union, by enabling the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may be sued (see, inter alia, Joined Cases C-509/09 and C-161/10 eDate Advertising and Others [2011] ECR I-0000, paragraph 50).*
>
> *45 (…)*
>
> *46 Lastly, for the purpose of applying Article 16(2) of Regulation No 44/2001, the criterion of the consumer's last known domicile ensures a fair balance between the rights of the applicant and those of the defendant precisely in a case such as that in the main proceedings, in which the defendant was under an obligation to inform the other party to the contract of any change of address occurring after the long-term mortgage loan contract had been signed.*

The court, however, insisted to an embarassing degree on some particular facts , and thus casted a doubt on the scope of the rule it was laying down. Its final

holding is:

> *2. Regulation No 44/2001 must be interpreted as meaning that:*
>
> *– in a situation such as that in the main proceedings, in which a consumer who is a party to a long-term mortgage loan contract, which includes the obligation to inform the other party to the contract of any change of address, renounces his domicile before proceedings against him for breach of his contractual obligations are brought, the courts of the Member State in which the consumer had his last known domicile have jurisdiction, pursuant to Article 16(2) of that regulation, to deal with proceedings in the case where they have been unable to determine, pursuant to Article 59 of that regulation, the defendant's current domicile and also have no firm evidence allowing them to conclude that the defendant is in fact domiciled outside the European Union;*
>
> *– that regulation does not preclude the application of a provision of national procedural law of a Member State which, with a view to avoiding situations of denial of justice, enables proceedings to be brought against, and in the absence of, a person whose domicile is unknown, if the court seised of the matter is satisfied, before giving a ruling in those proceedings, that all investigations required by the principles of diligence and good faith have been undertaken with a view to tracing the defendant.*

So, is the last known domicile rule applicable to, say, consumer sale contracts? in cases where the defendant has not "renounced his domicile"? Indeed, what does renouncing one's domicile mean in this case? Changing addresses? Subscribing to a jurisdiction clause (irrespective of its validity)?

International Jurisdiction

The court also addressed the issue of the application of the Regulation to a case which was only international because of the nationality of the consumer. It held:

> *1. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that the application of the rules of jurisdiction laid down by that regulation requires that the situation at issue in the proceedings of which the court of a Member State is seised is such as to*

> *raise questions relating to determination of the international jurisdiction of that court. Such a situation arises in a case such as that in the main proceedings, in which an action is brought before a court of a Member State against a national of another Member State whose domicile is unknown to that court.*

Many thanks to Maja Brkan for the tip-off

3rd International Moot Competition on Maritime Arbitration

The Center for International Law and Justice (Odessa, Ukraine) is pleased to invite law schools to compete in the 3rd International Moot Competition on Maritime Arbitration.

This year the moot case concerns number of issues at the forefront of economy affairs. Prominent Ukrainian Law Firm "International Law Offices" have kindly provided the Center with Moot Case which was developed as close to the real dispute as it is possible. The teams are challenged to present positions of Owners and Charterers according to the LMAA rules. The core problem lays in refusal to pay demurrage charges, arguing that the existing situation has been an exclusion from the GENCON charter uniform. Participants should analyze factual background, legal reasoning of both sides, documents (Notice of Readiness, Ukrainian Chamber of Commerce and Industry references, Charter, Arbitral Clause), correspondence, actual Rules of procedure, etc.

Deadline for registration is 31 of December. Participation fee is 200 euro per team and includes meals and lodging (from March 16 to 18, 2012), at the Ukrainian style wooden hotel "Kolyba".

For further information concerning the event please look at the web-site:

Sciences Po PILAGG Workshop Series, Spring 2012

The workshop on Private International Law as Global Governance (PILAGG) at the Law School of the Paris Institute of Political Science (*Sciences Po*) will take place on Thursdays or Fridays at 12:30 pm, at the Law School.

The speakers for the Spring 2012 will be:

• 20th January: Mads ANDENAS ("*External effects of national ECHR judgments*")
• 26th January (doctoral workshop): Shotaro HAMAMOTO
• 27th January: Ingo VENZKE ("*On words and deeds*")
• 9th February (doctoral workshop): Benoit FRYDMAN
• 10th and 11th February (Saturday, full-day doctoral workshop): David KENNEDY
• 16th February: Michael WEIBEL
• 8th March: Michael KARAYANNI
• 9th March: George A. BERMANN
• 22nd March: Jeremy HEYMANN
• 23rd March: Alex MILLS
• 12th April (doctoral workshop): Diego P. FERNÁNDEZ ARROYO
• 13th April: Michael HELLNER
• 11th May, Final Meeting (full day, see Program)

Where: unless otherwise announced, Law School, 13 rue de l'Université 75007 Paris, Room J210 (2nd floor).
When: 12:30 to 14:30 pm

More information is available here.

Aussie Analysis

The Commonwealth Attorney General's Department, joining with Monash University's Faculty of Law and the Supreme Court of Victoria, has organised a conference at Monash Law Chambers, Melbourne on 29 November 2011 (5-7pm) on the subject of "Tackling the legal challenges in cross-border transactions". The panel of five speakers includes Professor Marta Pertegás (Hague Conference on Private International Law), Professor Mary Keyes (Griffith University), Professor Richard Garnett (Melbourne University), Rosehana Amin (Lander & Rogers) and Thomas John of the A-G's Department. Justice Clyde Croft will chair, and topics for discussion include the Hague Conference's project on party autonomy in international contracts, and the application of mandatory rules by Australian courts.

Pre-registration by e-mail (pil@ag.gov.au) is required, but free. Further details are available here.

Rain or shine (or both), an excellent way to pass a couple of hours in Melbourne.

Baude on Choice of State Law in U.S. Federal Statutes

William Baude, who is a fellow at Stanford Law School, has posted Beyond DOMA: Choice of State Law in Federal Statutes on SSRN. The abstract reads:

> *The Defense of Marriage Act has been abandoned by the executive and held unconstitutional by courts, so it is time to think about what will be left in its place. Federal law frequently asks whether a couple is married. But marriage is primarily a creature of state law, and states differ as to who may marry. The*

federal government has no system for deciding what state's law governs a marriage, though more than a thousand legal provisions look to marital status, more than a hundred thousand same-sex couples report being married, and many of those marriages ultimately cross state lines. Unless a federal choice of law system is designed, DOMA's demise will lead to chaos.

This paper argues that such a system can and should be designed: Because the underlying choice-of-law problem is ultimately a problem of statutory interpretation, Congress can and should replace it with a clear choice-of-law rule. Failing that, federal courts can and should develop a common law rule of their own – they are not (and should not be) bound by the Supreme Court's decision in Klaxon v. Stentor Electric. The paper further argues that different institutions should solve the problem differently: If Congress acts, it should recognize all marriages that were valid in the state where they took place. If, instead, the courts create a common-law rule, they should recognize all marriages that are valid in the couple's domicile.

The implications of this argument run far beyond the demise of DOMA. In all areas of what is here called "interstitial law," federal interpretive institutions can and should devise a set of choice-of-law rules for federal law that draws upon state law, and what set of rules is proper may well depend on who adopts them.

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

BP Wins Case in Siberian Court

Last Friday was November 11th, 2011. Quite a few readers may have wondered whether something extraordinary would happen on such a remarkable date.

It has. On Friday, a foreigner won a case against a Russian party in a Russian court.

Several newspapers have reported that a Siberian court ruled in favour of BP in a

dispute against a Russian party on Friday. The proceedings had been initiated by Andrei Prokhorov, a minority shareholder in the Russian joint venture of BP, TNK-BP. Among other claims, Mr Prokhorov sought USD 13 billion in damages against BP. He argued that a failed deal between BP and another Russian company, Rosneft, would cost the joint venture billions in profit.

After the Siberian court had authorized the search of BP's offices at the end of August by Russian commandos armed with assault rifles, BP might have been pessimistic about the outcome of the case. But it seems it was nothing else than the local way of conducting pre-trial discovery.

The Russian party has announced that it will appeal the judgment. If the court of appeal rules in December next year, BP may well win again.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2011)

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

Here is the contents:

- ***Christoph M. Giebel***: "Fünf Jahre Europäischer Vollstreckungstitel in der deutschen Gerichtspraxis – Zwischenbilanz und fortbestehender Klärungsbedarf" – the English abstract reads as follows:

> *The regulation (EC) No. 805/2004 creating a European Enforcement Order for uncontested claims has been applicable for more than five years now. During this time, German courts, including the Federal Supreme Court, have rendered substantial case law on this subject matter. Whilst awaiting further clarifications through the European Court of Justice, legal practice has thus been provided with valuable indications on the procedural requirements to be*

observed when applying for a European Enforcement Order in Germany. Despite the abundance of case law rendered by German Courts, a need for general clarification persists in certain areas. The article analyses this case law and proposes solutions for some material problems still to be solved. As the most serious deficit of the current German legal situation relating to European Enforcement Orders the author identifies the lack of clear-cut provisions on due information requirements under German law as to certain decisions that fall within the scope of application of the regulation. This particularly relates to resolutions determining costs or expenses (Kostenfestsetzungsbeschlüsse) and contempt fines (Zwangsgeld-/Ordnungsgeldbeschlüsse). The author suggests that the German legislator should introduce the relevant due information requirements in the German Code of Civil Procedure. In the meanwhile, the lack of such provisions does not hinder German judgement creditors from providing due information to the debtors themselves.

- ***Carl Friedrich Nordmeier***: New Yorker Heimfallrecht an erbenlosen Nachlassgegenständen und deutsches Staatserbrecht (§ 1936 BGB) – the English abstract reads as follows:

§ 3-5.1 of the New Yorker Estates, Powers and Trust Law (EPTL) determines as applicable for succession in immovables the lex rei sitae, for succession in movables the law of the state in which the decedent was domiciled at death. According to § 4-1.5 EPTL, heirless property situated in the State of New York escheats to the State. The present article shows, based on an analysis of § 4-1.5 EPTL, that the law of the State of New York generally calls for the application of the lex rei sitae if an estate is left without heir. § 4-1.5 EPTL is based on an "idea of power", according to which a state does not pass heirless property which is found on its territory to another state.

Regarding the EU Commission proposal for a Regulation on the law applicable in matters of succession, the present contribution suggests the application of the lex rei sitae for estates without a claimant (art. 24 of the Proposal) and the admission of renvoi (art. 26 of the Proposal) when the law of a third State is designated to be applicable by the Regulation.

- ***Christoph Thole***: "Die Reichweite des Art. 22 Nr. 2 EuGVVO bei Rechtsstreitigkeiten über Organbeschlüsse" – the English abstract reads

as follows:

In its decision, the ECJ held that Art. 22(2) of the Brussels I-Regulation is inapplicable in cases in which a company pleads that a contract cannot be relied upon against it because a decision of its organs which led to the conclusion of the contract is supposedly invalid on account of infringement of its statutes. Thus, exclusive jurisdiction is not conferred on the courts of the country in which the company has its seat in cases where the validity of a decision of the company's organs is put in issue merely as a preliminary question to the validity of a contract. The ECJ established, inter alia, that the ruling of the famous GAT case concerning Art. 22(4) is not to be applied to the construction of Art. 22(2). In conclusion, the Court significantly narrows the scope of Art. 22(2). The article shows that the judgment is both persuasive in its findings and in accordance with former decisions. However, the ECJ has not managed to completely resolve the obvious disparity between the GAT case and other decisions dealing with the matter of preliminary questions.

- ***Ansgar Staudinger:*** "Wer nicht rügt, der nicht gewinnt – Grenzen der stillschweigenden Prorogation nach Art. 24 EuGVVO" – the English abstract reads as follows:

The court correctly clarified that the second sentence in Art. 24 of the Brussels I Regulation constitutes an exceptional clause which is subject to a restrictive interpretation (this applies accordingly to the parallel agreement between the EU and Denmark, the Lugano Convention, as well as Council Regulation No 4/2009 on matters relating to maintenance obligations). As a form of tacit prorogation, Art. 24 Brussels I Regulation is the equivalent of Art. 23 Brussels I Regulation. As far as the elements of Art. 24 Brussels I Regulation are fulfilled, the court must have jurisdiction. To this extent, national courts do not have discretionary power.

Currently, the Brussels I Regulation does not provide an obligation to inform or instruct the defending party, prior to it entering an appearance without contesting the court's jurisdiction. Such an obligation may only be introduced by the European legislator. Thus, in the scope of the Brussels I Regulation, provisions such as § 39 sentence 2 and § 504 of the German Code of Civil Procedure (Zivilprozessordnung) infringe the regulation's precedence over

national law. However, the spirit and purpose of the protective clause in matters relating to insurance require that the court may ensure that the defending party is aware of the consequences of entering an appearance without contesting the court's jurisdiction, and that the decision to do so is therefore deliberate. This applies accordingly to matters relating to individual contracts of employment as well as consumer contracts. Only to this extent is a recourse to § 39 sentence 2 and § 504 of the German Code of Civil Procedure possible. The aforementioned principles may vary in light of the Council Directive on unfair terms in consumer contracts, as the judge's discretionary powers in this context may be reduced to such a degree that an obligation to instruct the defending party would be necessary as to not breach the directive. In any case, an instruction is not to be given to parties with legal representation by a lawyer. As far as legal policy is concerned, it seems preferable to specify an obligation of instruction in Art. 24 Brussels I Regulation, de lege ferenda. Therefore, the Commission's proposal for reform is welcome in its original intention. However, it is too far-reaching in its extent, since it neither differentiates between defendants with and those without legal representation by a lawyer, nor distinguishes initial cases from appeal procedures and lacks any distinction within matters relating to insurance.

- ***Jan D. Lüttringhaus***: "Vorboten des internationalen Arbeitsrechts unter Rom I: Das bei „mobilen Arbeitsplätzen" anwendbare Recht und der Auslegungszusammenhang zwischen IPR und IZVR" – the English abstract reads as follows:

For the first time since the adoption of the European regulations in the private international law of obligations, the Court of Justice has decided on the uniform interpretation of European jurisdiction and conflict of laws terminology. While the preliminary ruling primarily concerns Art. 6 (2)(a) Rome Convention, the Court holds also that the "habitual workplace" has to be interpreted consistently with Art. 8 (2) Rome I as well as with Brussels I. Thus, mobile employees like truck-drivers, flight and train attendants working in more than one state may actually have their habitual workplace not only in the country in which, but also from which they carry out their work.

- ***Urs Peter Gruber:*** "Unterhaltsvereinbarung und Statutenwechsel" –

the English abstract reads as follows:

Under Art. 18 par. 1 EGBGB, when the creditor changes his habitual residence, the law of the state of the new habitual residence becomes applicable as from the moment when the change occurs. This rule is convincing as long as the creditor bases his claims on the statutory law of the state of his new residence. If however the parties conclude a maintenance agreement, it seems questionable that a subsequent change of residence should have an influence on the law applicable to that maintenance agreement. If that were the case, the creditor would unilaterally influence the validity of the maintenance agreement by simply changing his habitual residence. This would clearly be in contradiction to the legitimate expectations of both parties. In a decision on legal aid, the OLG Jena has rightly come to the same conclusion.

The OLG Jena has also rightly pointed out that, although the validity of the maintenance agreement is as such not influenced by the subsequent change of residence, the parties might seek a modification on the agreement and base their petition on the fact that – due to the change of residence – the maintenance obligation is now governed by another law. Therefore, one has to differentiate between the validity of the agreement and the possibility to modify the agreement. Whether and to what extent the agreement can be modified is mainly determined by the law of the state of the creditor's new habitual residence.

- ***Markus Würdinger***: "Die Anerkennung ausländischer Entscheidungen im europäischen Insolvenzrecht" – the English abstract reads as follows:

Regulation No 1346/2000 on insolvency proceedings (European Insolvency Regulation) provides in Article 16, that the judgment opening insolvency proceedings is to be recognised automatically in all the other Member States, with no further formalities. The author analyses a judgement of the ECJ about the recognition of insolvency proceedings opened by a court of a Member State. The ECJ rules that the competent authorities of another Member State are not entitled to order enforcement measures relating to the assets of the debtor declared insolvent that are situated in its territory. The author agrees with the judgement, but he criticises, that the ECJ has checked the international jurisdiction. The article also clarifies the follow-up question, whether the

attachment effected by the German authorities is lawful.

- ***Susanne Deißner***: "Anerkennung gerichtlicher Entscheidungen im deutsch-chinesischen Rechtsverkehr und Wirksamkeit von Schiedsabreden nach chinesischem Recht" – the English abstract reads as follows:

The question whether Chinese court decisions are to be recognised by German courts was decided in the affirmative by the Higher Regional Court Berlin in a decision of 18 May 2006. With regard to Chinese law and its application by the courts in China it is, however, doubtful that the requirement of reciprocity under German civil procedure law is met by Chinese court decisions under three aspects: the requirement of "reciprocity in fact", the vague notion of public policy in Chinese law, and important differences in the concept of international lis pendens. Nevertheless, the decision by the Higher Regional Court Berlin has possibly – as proof of a positive German recognition practice with regard to Chinese court decisions – enhanced the chances for German judgments to be recognised in China. Dismissing the action, as the Higher Regional Court Berlin did, was, in any case, justified on other grounds mentioned obiter dictum by the court: According to the applicable Chinese law on arbitration, the arbitration agreement in question was invalid.

- ***Matthias Weller:*** "Vollstreckungsimmunität für Kunstleihgaben ausländischer Staaten" – the English abstract reads as follows:

The Higher Regional Court of Berlin once more deals with the question whether loans of art by foreign states are immune from seizure in the host state under customary international law. The decision seems to support such rule of customary international law if the exhibition serves the purpose of cultural representation by the foreign state. The new element of this rule merely lies in the acknowledgment that the loan of works of art and cultural property constitutes one of other modes of cultural representation by a foreign state in the host state. Once this small step is taken, it is clear that property used for the purpose of cultural representation falls within the general rule of customary international law that property used for acta iure imperii of a state cannot be seized or attached while present on the territory of another state. The practical importance of this rule will continue to grow in the future.

- ***Daniel Girsberger*** on a new book by Kronke, Herbert/Nacimiento, Patricia/Otto, Dirk/Port, Nicola Christine (Hrsg.): Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention
- ***Jörn Griebel***: "Zuständigkeitsabgrenzung von Verwaltungs- und Justizgerichtsbarkeit in Frankreich" – the English abstract reads as follows:

In its decision of 17 May 2010 (no. 3754) the French Tribunal des conflits addresses the division of jurisdiction between the juridiction de l'ordre administratif and the juridiction de l'ordre judiciaire. Within the decision the Tribunal des conflits defines under which circumstances the juridiction de l'ordre administratif is mandatory, inter alia where state property or government procurement contracts are at stake. In the present case the jurisdiction fell, however, into the juridiction de l'ordre judiciaire because the contract in question was concluded by a public entity with a foreign person and comprised elements of international commercial law.

- ***Michael Stürner***: "Staatenimmunität bei Entschädigungsklagen wegen Kriegsverbrechen" – the English abstract reads as follows:

There has been an ongoing controversial discussion on State immunity, a long-standing principle of customary international law. While according to the traditional view the principle of State immunity extends to any act of State (acta iure imperii) a newly emerging opinion pleads in favour of exceptions in cases of grave violations of human rights. Both decisions discussed here reflect that debate. The Highest Court of the Republic of Poland, on the one hand, also considering the pending case Germany against Italy before the ICJ, does not see any ground for departing from the principle par in parem non habet iurisdictionem. Conversely, the Italian Corte di Cassazione follows its previous case law, according to which a restriction of State immunity in cases dealing with crimes against humanity is justified.

- ***Ruiting QIN***: "Eingriffsnormen im Recht der Volksrepublik China und das neue chinesische IPR-Gesetz" – the English abstract reads as follows:

There exist some provisions in the Chinese law, especially in the Chinese law

relating to foreign exchange administration, which are in nature overriding statutes of the law of the Mainland of China. However, the judicial practice of the Chinese people's courts up to now has dealt with these provisions incorrectly. These provisions should be applied to all foreign-related loan contracts as well as guarantee contracts directly, no matter which law governs the aforesaid contracts. The judicial practice of the Chinese people's courts which has applied the Chinese overriding statutes by a roundabout way through forbidding evasion of law not only runs against the Chinese private international law de lege data, but also is harmful to the development of the Chinese private international law. According to Article 4 of Law on the Application of Law for Foreign-related Civil Relations of the People's Republic of China, coming into force on April 1st, 2011, should the provisions relating to foreign exchange administration in the Chinese law be directly applied as overriding statutes of the law of the Mainland of China. Overriding statutes, choice of law and evasion of law are three kinds of private international law phenomena and need different legislative regulation. Article 4 of the new Chinese Private International Law is a great development of the Chinese private international law, but it still need improvement.

- ***Arkadiusz Wowerka***: Translation of the new Polish statute on PIL "Gesetz der Republik Polen vom 4.2.2011: Das Internationale Privatrecht"