# Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2011)

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

Here is the contents:

- ***Catrin Behnen***: "Die Haftung des falsus procurator im IPR – nach Geltung der Rom I- und Rom II-Verordnungen" – the English abstract reads as follows:

*The extensive reform of the international law of obligations by the Rome I and Rome II-Regulations raises the question of the future classification of the liability of the falsus procurator under international private law. Since the new regulations entered into force, the problem of classification has not only arisen at national law level, but also at the level of European Union Law. Most importantly, it must be questioned, whether the new Regulations contain overriding specifications regarding the classification of the liability of the falsus procurator that are binding for the Member States. This article discusses the applicable law on the liability of an unauthorised agent and thereby addresses the issue of whether normative requirements under European Union law are extant. Furthermore, the Article illustrates how the proposed introduction of a separate conflict of laws rule on the law of agency in the Draft Rome I-Regulation impinges on this question, even though this rule was eventually not adopted.*

- ***Ansgar Staudinger:*** "Geschädigte im Sinne von Art. 11 Abs. 2 EuGVVO" – the English abstract reads as follows:

*The present essay discusses the decision of the European Court of Justice in the case of Voralberger Gebietskrankenkasse/WGV-Schwäbische Allgemeine – C-347/08. In this case, the court was concerned with the question whether, under Article 11 Paragraph 2 of the Council Regulation (EC) No. 44/2001 of 22*

*December 2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters a social insurance agency acting as the statutory assignee of the rights of the directly injured party has the right to bring an action directly against the insurer in the courts of its own Member State. The ECJ denies such a privilege, which is the correct decision in the author's opinion, who, after having reviewed the ECJ's judgement, also discusses the assignability of the decision to other conventions. Afterwards he raises the question to what extent legal entities, heirs or persons who claim compensation for immaterial damages, damages resulting of shock or alimony are allowed to sue the injuring party's insurer at their own local forum.*

- ***Maximilian Seibl***: "Verbrauchergerichtsstände, vorprozessuale Dispositionen und Zuständigkeitsprobleme bei Ansprüchen aus c.i.c." – the English abstract reads as follows:

*The article firstly deals with the question as to whether and to what extent international jurisdiction can be affected by pre-trial dispositions regarding the asserted claim by the parties to a lawsuit. Secondly, it examines the consequences resulting from the new EC Regulations Rome I and Rome II to the classification of claims out of culpa in contrahendo in terms of international jurisdiction. The background of the article consists of two decisions, one by the OLG (Higher Regional Court) Frankfurt/Main and one by the OLG München. The former concerned a case in which the defendant had pursued commercial resp. professional activities in the Member State of the consumer's domicile in accordance with Art. 15 sec. 1 lit. c) of the Brussels I Regulation at the time he concluded a contract with a consumer, but had ceased to do so before he was sued for damages in connection with the very contract. The latter – against which an appeal has meanwhile been dismissed by the BGH (German Federal High Court of Justice), cf. BGH, 10.2.2010, IV ZR 36/09 – concerned a case in which the party of a consumer contract had assigned his claim based on culpa in contrahendo to the plaintiff, so that the plaintiff could file a lawsuit against the other party of the contract. Here the question arose as to whether or not the jurisdiction norm of § 29a ZPO (German Code of Civil Procedure) – which provides a special forum for cases concerning consumer contracts negotiated away from business premises – was also applicable, if the plaintiff was not the person who had concluded the contract. The OLG München negated this question. Apart from that the court decided that jurisdiction in this case could*

*not be based on § 29 ZPO which provides a special forum at the place of the performance of the contract, either. This part of the decision gives reason to the examination as to whether or not all claims based on culpa in contrahendo can still be subsumed under § 29 ZPO. Since these claims are now subject to Art. 12 of the Rome II Regulation, it appears to be doubtful whether the traditional German classification of culpa in contrahendo as a contractual claim in terms of jurisdiction can be upheld.*

- ***Ivo Bach: "***Die Art und Weise der Zustellung in Art. 34 Nr. 2 EuGVVO: autonomer Maßstab versus nationales Zustellungsrecht" – the English abstract reads as follows:

*Article 34 (2) Brussels I in principle allows courts to deny recognition and enforcement of a foreign (default) judgment when the defendant was not served with the document which instituted the proceedings "in a sufficient time and in such way as to enable him to arrange for his defence". As an exception to this principle, courts must not deny recognition and enforcement if the defendant failed to challenge the judgment in the country of origin. In its decision of 21 January 2010, the German Bundesgerichtshof (BGH) dealt with both aspects of Art. 34 (2) Brussels I. Regarding the defendant's obligation to challenge the judgment, the BGH – rightfully – clarified that the obligation exists even when the defendant does not gain knowledge of the judgment before the enforcement proceedings. In such a case the defendant may request a stay of the enforcement proceedings while challenging the judgment in the country of origin. Regarding the time and manner of the service, the BGH relied on the formal service requirements as provided in the German code of civil procedure (ZPO) – Germany being the country where service was effected. The latter part of the decision calls for criticism. In this author's opinion, in interpreting Art. 34 (2) Brussels I courts should not rely on national rules, but rather should look to autonomous criteria. As regards the manner of service, such autonomous criteria may be taken from the minimum standards-catalogue in Arts. 13 and 14 EEO.*

- ***Rolf A. Schütze:*** "Der gewöhnliche Aufenthaltsort juristischer Personen und die Verpflichtung zur Stellung einer Prozesskostensicherheit nach § 110 ZPO" – the English abstract reads as follows:

*Under § 110 ZPO (German Code of Civil Procedure) the court – on application of the defendant – has to make an order for security for costs if the claimant is resident abroad but not resident in an EU or EWR Member State. The ratio of this provision is that the defendant who successfully defends a baseless claim should be able to enforce a cost order against the claimant. Residence means the place where a person habitually and normally resides. The decision of the Oberlandesgericht Munich rules that a company (or other legal entity) is ordinarily resident in a place if its centre of management is at that place. Whilst the former Reichsgericht and the Bundesgerichtshof rule that the amount of the security must cover the possible claim of the defendant for recompensation of costs for all possible instances, the Oberlandesgericht Munich states that only the costs for the current instance and the appeal up to the time when the defendant can file a new application for security can be included in the calculation. The decision in both of its aspects is in accordance with the ratio of § 110 ZPO.*

- ***Peter Mankowski/Friederike Höffmann***: "Scheidung ausländischer gleichgeschlechtlicher Ehen in Deutschland?" – the English abstract reads as follows:

*Same-sex marriages are on the rise if seen from a comparative perspective. In contrast, German constitutional law strictly reserves the notion of "marriage" to a marriage celebrated between man and woman. This must also have its impact in German PIL. Same-sex marriages are treated like registered partnerships and subjected to the special conflicts rule in Arts. 17b EGBGB, not to the conflicts rules governing proper marriage as contained in Art. 13–17 EGBGB. Hence, a proper divorce of a same-sex marriage can as such not be obtained in Germany but ought to be substituted with the dissolution of the registered partnership inherent in the so-called "marriage". Although theoretically a principle of recognition might be an opportunity (if one succumbs to the notion of such principle at all), the limits of such recognition would be rather strict in Germany nonetheless.*

- ***Alexander R. Markus/Lucas Arnet***: "Gerichtsstandsvereinbarung in einem Konnossement" – the English abstract reads as follows:

*In its decision 7 Ob 18/09m of 8 July 2009 the Austrian Supreme Court of*

*Justice (Oberster Gerichtshof, OGH), judged as substance of the case, the validity of an agreement conferring jurisdiction incorporated in a bill of lading, its character as well as its applicability to a civil claim for damages resulting from a breach of the contract of carriage on which the bill of lading was based. Aside from that, questions concerning the relation between the Lugano-Convention (LC) and the Brussels I Regulation arise in this judgement. An agreement conferring jurisdiction included in a bill of lading issued unilaterally by the carrier fulfils the requirements established in art. 17 par. 1 lit. c LC since in the international maritime trade the incorporation of agreements conferring jurisdiction in bills of lading can clearly be considered to be a generally known and consolidated commercial practice. Concerning the (non-)exclusivity of the agreement conferring jurisdiction (art. 17 par. 1/par. 4 LC) the OGH makes a distinction from its earlier case law and bases the decision on the European Court of Justices judgement of 24 June 1986, case 22/85, Rudolf Anterist ./. Credit Lyonnais. According to the in casu applicable Swiss Law the prorogatio fori in the bill of lading covers the contract of carriage as well, although in principle the contract does not depend on the bill of lading. Lastly, to identify the relation between the LC and the Brussels I Regulation, the analogous application of art. 54b par. 1 LC is decisive.*

- ***Götz Schulze:*** "Vorlagebeschluss zur intertemporalen Anwendung der Rom II-VO" – the English abstract reads as follows:

*The Engl. High Court in Homawoo v. GMF has referred the question concerning the interpretation of Art. 31 and 32 of the Rome II-Regulation to the European Court of Justice for ay Preliminary Ruling according to Art. 267 TFEU. Judge Slade recommends to specify Art. 31 Rome II-Regulation (entry into force) by the date of application on 11 January 2009 set out in Art. 32 Rome II-Regulation. Judge Tomlinson in Bacon v. Nacional Suiza prefers a strict literal interpretation with an entry into force on 20 August 2007 and a procedural understanding of Art. 32 Rome II-Regulation.*

- ***Bettina Heiderhoff: "***Neues zum gleichen Streitgegenstand im Sinne des Art. 27 EuGVVO" – the English abstract reads as follows:

*The Austrian High Court (OGH) found that two actions do not involve the same cause of action when an identical claim is based on two different rules from*

*different national laws and these rules stipulate different requirements. The decision is in conformity with the Austrian dogma that identity of the actions and lis pendens do not apply where a party bases a second claim on new facts. In other words, the identity of the cause of action depends on the facts presented to the court, unlike in Germany where the identity depends on the objective factual situation, no matter whether the claimant has presented all facts to the court in the first action or not. This Austrian point of view threatens uniform jurisdiction in the EU. It allows repetitive actions in different member states and, consequently, may lead to contradicting judgements. It encourages forum shopping. Therefore, it is a pity that the OGH did not present the case to the ECJ under Art. 267 TFEU.*

- ***Carl Friedrich Nordmeier:*** "Divergenz von Delikts- und Unterhaltsstatut bei tödlich verlaufenden Straßenverkehrsunfällen: österreichischer Trauerschadensersatz und brasilianisches pretium doloris vor dem Hintergrund der Europäisierung des Kollisionsrechts" – the English abstract reads as follows:

*Claims for compensation based on the loss of a maintenance debtor in transborder cases demand the coordination of the law applicable to tort and the law applicable to maintenance obligations. In the present case of the Austrian Supreme Court (Oberster Gerichtshof), concerning a fatal traffic accident in Austria, whose victims were Brazilian nationals, Austrian tort law and Brazilian maintenance law had to be applied. From the Austrian perspective, the Hague Convention on the Law Applicable to Traffic Accidents has priority over the national conflict of law rules and over the Rome II Regulation. This raises questions relating to the possibility of a choice of law in cases that fall within the scope of application of the Convention. Austrian law does not provide a pension for the compensation of grief suffered by relatives of a victim of a fatal traffic accident. A pretium doloris of the Brazilian law is to be qualified as a question of tort and was rightly not awarded.*

- ***Arkadiusz Wowerka***: "Polnisches internationales Gesellschaftsrecht im Wandel" – the English abstract reads as follows:

*The Polish applicable international private law provides no specific regulations on the international private law of companies. Also the judicature has up till*

*now delivered no decisions in this matter. The essential principles of the international private law of the companies were developed by the doctrine. Within the frame of the planned reform of the international private law the government has presented the draft of a new regulation on the international private law which, with its provisions on the legal entities and organised entities, should fill the current gap in the subject area. The present article gives an overview on the autonomous international private law of the companies and its current evolution, dealing with the issues of the definition of the company, rules for determination of the law governing the companies, scope of the law governing the companies and finally the question of recognition of companies, in each case with references to the proposals of the government draft regulation.*

- ***Christel Mindach:*** "Anerkennung und Vollstreckung von Drittlandsschiedssprüchen in Handelssachen in den GUS-Mitgliedstaaten" – the English abstract reads as follows:

*After the collapse of the Soviet Union, the newly founded States, establishing the Commonwealth of Independent States (CIS), had to build a completely new legal system. Quite naturally the legislation of international commercial arbitration played a secondary role during the first years of transformation, apart from the CIS Members Russia, Ukraine and Belarus. In the course of legislation process the most CIS States couldn't base on own legal traditions or experiences in this field. This insufficient situation changed in principle only just, when these States decided about the accession to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. With the exemption of Tajikistan and Turkmenistan the New York Convention came in force for all CIS Members in the meantime. The following article describes in a concise manner some of the fundamental requirements for the recognition and enforcement of foreign arbitral awards in commercial matters rendered in the territory of a State other than a CIS State under the appropriate national laws of CIS States including the procedure of compulsory enforcement.*

- ***Erik Jayme*** on the conference on the Proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a

European Certificate of Succession, which took place in Vienna on 21 October 2010: "Der Verordnungsvorschlag für ein Europäisches Erbkollisionsrecht (2009) auf dem Prüfstand – Tagung in Wien"

- ***Stefan Arnold:*** "Vollharmonisierung im europäischen Verbraucherrecht – Tagung der Zeitschrift für Gemeinschaftsprivatrecht (GPR)" – the English abstract reads as follows:

*On the 4th and 5th of June 2010, the Zeitschrift für Gemeinschaftsprivatrecht (Journal for EU-Private Law, JETL) and the Frankfurter Institut für das Recht der Europäischen Union (Frankfurt Institute for the Law of the European Union, FIREU) hosted a conference on „Full Harmonisation in European Consumer Law" at the Europa-Universität in Frankfurt (Oder). Prof. Dr. Michael Stürner (Frankfurt/Oder) had invited to the conference. The speakers addressed not only the concept of full harmonisation but also the European framework for the harmonisation of Private Law and the consumer protection achieved by the the rules on Conflict of Laws. Moreover, the Draft Common Frame of Reference and the effect of full harmonisation on specific fields of law were discussed. The participants also debated the practical effects of possible full harmonisation measures.*

- ***Erik Jayme*** on the congress in Palermo on the occassion of the bicentenary of Emerico Amari's birth: "Rechtsvergleichung und kulturelle Identität – Kongress zum 200. Geburtstag von Emerico Amari (1810–1870) in Palermo"

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# De Miguel on Derecho Privado de Internet (4th edn)

The fourth edition of *Derecho privado de internet*, by Professor Pedro de Miguel (Universidad Complutense de Madrid) has just been published. Eight years have elapsed since the previous edition, so I would rather say this is a new book in line with the rapid evolution of Internet services, regulatory developments related to

it, and caselaw.

The First Chapter examines the legal architecture of the Internet, the role of ICANN and the organizations that develop technical standards as well as the main regulatory challenges raised by Internet activities. Chapter Two focuses on the legal aspects of information society services, including the implications of technological and media convergence and delimitation with electronic communications services and audiovisual services. This chapter contains a detailed analysis of information and other requirements applicable to information society service providers. Issues concerning liability arising out of illicit activities or contents and liability of intermediary service providers receive also special attention. Chapter Three offers a complete study of data protection issues, including an in-depth discussion of the legal treatment of data processing with regard to web pages, social networks, search engines and advertising services. Unfair practices and commercial communications are the subject-matter of Chapter Four. Advertising, spam and special restrictions affecting trade in certain products or services, like gambling and medicines, are among the topics covered. Chapter Five is devoted to industrial property rights. After discussing the role of patents and know-how in the protection of software and Internet business models, this part incorporates a complete analysis of domain name and trademark law, covering issues such as UDRP, use of trademarks as advertising keywords and metatags, and special treatment of certain activities such as auction sites. Chapter Six deals with copyright and related rights. Among the most innovative aspects of the new edition in this area, reference can be made to the in-depth treatment of intellectual property implications of the services related to the so-called Web 2.0 including a critical assessment of creative commons licences. This part incorporates also an analysis of copyright limitations in the context of the most relevant activities and services, such as the functioning of search engines. The responses to the challenges raised by p2p file-sharing are also considered with a critical analysis of the legal measures adopted in several EU countries, including Spain, France and UK. Other issues such as open access to academic works and the legal implications of the Google Book Search Project receive particular attention. Enforcement mechanisms and liability of intermediaries play also a prominent role. The last Chapter is devoted to electronic contracts. After discussing contract formation, information requirements, recourse to standards terms, requirements related to the performance of obligations, and protection of consumers,  Chapter Seven focuses on payment services and electronic money.

Electronic signatures and the assessment of their contribution to the development of e-commerce  are also the subject of detailed analysis. Finally, it is remarkable that in line with the global reach of the Internet the cross-border implications of all issues mentioned receive special attention all over the book. International jurisdiction, applicable law and recognition of decisions are discussed in detailed in every chapter.

Click here to get to the publishers page.

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# First e-Apostille issued and registered in Spain

According to the official press release of the Hague Conference on Private International Law dated on 20 May 2011 (see here), Spain has already issued and registered its first e-Apostilles using state-of-the-art technology developed under the e-APP (electronic Apostille Pilot Program) for Europe project, thus becoming the second State worldwide (after New Zealand) to have completed a comprehensive implementation of both of the e-APP's components

Full adoption of e-APP means that Spain has implemented a technologically advanced system to facilitate (1) the issuance of and use of electronic Apostilles (e-Apostilles), and (2) the electronic registration of Apostilles in an e-Register that is accessible online. Spain is also unique in that it has become the first State worldwide to develop a central e-Register to operate and record data across multiple domestic jurisdictions.

In practice, this means that the applicant can download e-Apostilles online from the website of the Spanish Ministry of Justice ("Sede electrónica"). The applicant will then obtain an electronic file consisting of a digitally signed e-Apostille and the underlying public document. These e-Apostilles are available for public documents issued in either paper or electronic form. The e-Apostille can be easily verified in other States via the central e-Register which will contain information regarding Apostilles issued by all Competent Authorities in Spain.

(To find more about the electronic Apostille Pilot Programme click here)

*Many thanks to Edina Marton for the tip*

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# Canadian Conflict of Laws Articles

Here are some recent articles from Canadian publications:

Janet Walker, "Are National Class Actions Constitutional?  A Reply to Hogg and McKee" (2010) 48 Osgoode Hall LJ 95

Jeffrey Haylock, "The National Class as Extraterritorial Legislation" (2009) 32 Dal LJ 253

Gerald Robertson, "The Law of Domicile: *Re Foote Estate*" (2010) 48 Alta L Rev 189

Joost Blom, "The Challenge of Jurisdiction: *Van Breda v. Village Resorts* and *Black v. Breeden*" (2010) 49 Can Bus LJ 400

Vaughan Black, Joost Blom and Janet Walker, "Current Jurisdictional and Recognitional Issues in the Conflict of Laws" (2011) 50 Can Bus LJ 499

The debate about the scope of Canadian class actions continues, and important questions about the analysis of a real and substantial connection for taking jurisdiction over foreign defendants await some answers from the Supreme Court of Canada in the four cases currently on reserve.

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# New Pocketbook of the Hague Academy

The Hague Academy of International Law continues to publish some of the courses in its pocket book serie.

The latest is the course given by Professor Andreas Bucher in 2009 on the social dimension of private international law (*La dimension sociale du droit international privé*).

> *Andreas Bucher, professeur honoraire de l'Université de Genève, a été membre de la délégation suisse à plusieurs sessions diplomatiques de la Conférence de La Haye de droit international privé et président de la commission relative à la Convention sur les accords d'élection de for lors de la vingtième session ; membre de la commission d'experts pour la codification du droit international privé suisse. Il est membre de l'Institut de droit international.*
>
> *Ce cours apporte la cohérence au pluralisme des méthodes, dans une perspective qui tient compte des intérêts de la société. Les règles de conflit de lois sont présentées dans une nouvelle structure, exhaustive, permettant de définir la place des règles unilatérales et bilatérales et des lois de police et d'y intégrer le droit de l'Union européenne. On distinguera ainsi entre les règles attributives, matérielles et réceptives de conflit de lois. Le lecteur emportera le message que les « mécanismes », la « proximité », l'« harmonie des solutions », la « coopération » et tant d'autres « techniques » en droit international privé doivent être remplies d'une idée de justice sans laquelle elles n'ont pas de mérite. Cette justice met en valeur l'identité et la protection de la personne à travers les ordres juridiques. Le regard sur cette idée sera le meilleur guide dans l'étude des règles et des méthodes du droit international privé.*

More information can be found here.

# First Issue of 2011's Revue Critique de Droit International Privé


The last issue of the *Revue critique de droit international privé* was just released. It contains two articles and several casenotes. The full table of content can be found here.

The first article discusses the new judicial review procedure introduced in France in 2009 in a European context.

In the second article, Bertrand Ancel (Paris II University, co-director of the *Revue*) presents a French translation of a lecture of private international law given in Latin by Charles du Moulin in 1553 when he taught at Tübingen university (*Les Conclusion sur les Statuts et Coutumes locaux de Du Moulin, traduites en français*).

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# Pocket a Rome II Commentary

A new commentary on the Rome II Regulation has been (or will shortly be) published by Sellier European Law Publishers.

The "Rome II Regulation: Pocket Commentary" is the first in a series of books designed to appeal to brain, hand luggage and wallet alike. It has been co-authored by a team of German scholars – Dr Martin Illmer (Max Planck Institute, Hamburg), Dr Angelika Fuchs (Academy of European Law, Trier), Professor Peter Huber, Dr Ivo Bach and Markus Altenkirch (all University of Mainz) – and edited by Professor Huber.

The Rome II Pocket Commentary is priced at €49.00 and available in paperback or eBook versions. Further information is available here.

# International Maritime Law Conference on the Croatian Islands of Brijuni

The Institute of European and Comparative Law of the Rijeka Law Faculty, the Fridtjof Nansen Institute, The Croatian Comparative Law Association, the Croatian Maritime Law Association, and the Croatian Justice Academy organise the conference "**The Resolution of International Maritime Disputes within the European and International Legal Framework**". The conference will take place on 2 and 3 June 2011 on the Islands of Brijuni, one of the Croatian National Parks.

This is the second international scientific conference dedicated to the memory of one of the most prominent Croatian private international lawyers and the University of Rijeka Rector and Professor of Law Petar Sarcevic (the first conference was reported here). This event will gather number of international experts to discuss various topics in the fields of European law, private international law, international procedural law, and maritime law. The conference program is available here. Working languages are Croatian and English, with simultaneous translation provided throughout the event.

Applications are received at: zeup@pravri.hr, where any additional information concerning the conference may be obtained as well. The hotel inquiries and reservations should be addressed to: f.marsetic@brijuni.hr.

# Before the High Court: Michael Wilson & Partners Ltd v Nicholls

An interesting case is to be heard by the High Court on 31 May. It is an appeal from the decision of the New South Wales Court of Appeal in *Nicholls v Michael Wilson & Partners Ltd* (2010) 243 FLR 177; [2010] NSWCA 222.

The case arose out of the employment of two Australian citizens by a law firm operating in Kazakhstan. The firm commenced proceedings against the employees in the Supreme Court of New South Wales alleging that they and a partner of the firm had stolen clients of the firm when they left the firm and set up a rival business. The firm alleged that the employees were liable for breach of contract, inducing breach of contract, conspiracy to injure, breach of fiduciary duty and knowing assistance. The partner was not a party. The firm separately commenced arbitration proceedings in London against him, to which proceedings the employees were not party. The Supreme Court of New South Wales held the employees liable to the firm and awarded compensation. Subsequently the London arbitrators held that the partner had breached his duties but that this did not cause the firm any compensable loss.

Out of these circumstances, the matters before the High Court are:

1. whether, in light of the arbitral award, it was an abuse of process for the firm to seek to recover against the employees in the Supreme Court of New South Wales;
2. whether the judge ought to have recused himself on the ground of apprehended bias in light of findings he made at interlocutory stages of the proceeding; and
3. whether the employees waived their right to appeal the judge's judgment after trial on the ground that he wrongly dismissed their application, prior to trial, for him to recuse himself, where the judge invited the employees to appeal that decision and they did not do so.

The parties' written submissions may be found on the High Court's website. (It may be of interest to know that the High Court has, from this year, begun publishing parties' submissions on its website.)

One of the matters raised at trial, and before the Court of Appeal, but not the subject of the appeal to the High Court was the governing law of the firm's claims against the employees. The Court of Appeal upheld the judge's decision to apply the law of New South Wales to all of the claims. The Court of Appeal held that:

1. the trial judge did not err in holding that the onus was on the employees to prove the content of Kazakh law and that absent such proof the presumption of identity applied (at [320]-[335]);
2. equitable claims were ordinarily governed by the law of the forum and, in light of the judge's conclusion that the employment contracts were governed by the law of New South Wales, no occasion arose to depart from that ordinary position on the ground that the source of the equitable obligations was a contract governed by foreign law (at [339]-[346]); and
3. though the firm was incorporated in the British Virgin Islands, it was not necessary to consider whether under the law of that place the partner breached his obligations to the firm arising from company law (as required by the *Foreign Corporations (Application of Laws) Act 1989* (Cth)) because the obligations asserted arose in equity not from company law (at [347]-[363]).

While the Court of Appeal's conclusion on the first point is a helpful authority concerning the presumption of identity, the point in fact appears to have been a false one in light of the trial judge's reasoning ([2009] NSWSC 1033). The employees pleaded that all the claims were governed by Kazakh law as the law governing their employment contracts and the conduct of business in Kazakhstan (at [324]). Based on the expert evidence, the trial judge concluded that, under Kazakh choice of law rules, the employment contracts were governed by New South Wales law (at [314]-[342]). He concluded that the same result followed under Australian choice of law rules (at [343]-[363]). It is not apparent why it was felt necessary to consider the position under Kazakh choice of law rules, given that the question of the governing law of the contract would be expected to be addressed by Australian choice of law rules and they directed attention only to New South Wales law. In those circumstances, no renvoi question could arise. The judge then concluded (at [364]):

> *The defendants have failed to prove as a matter of fact that Kazakhstan law applies to the contracts of employment. The plaintiff has overwhelmingly proved it does not. The presumption that Kazakhstan law is the same as local*

> *New South Wales law applies in that event.*

The third sentence does not follow from the previous two. This was not a case involving the presumption of identity at all, ie one in which the court concludes that foreign law applies but there is no evidence as to its content. Rather, the employees' position was that Kazakh substantive law applied, the firm's position was that New South Wales substantive law applied and the judge accepted the latter view.

Finally, it is worth noting one — of a very large number — interesting earlier interlocutory disputes in this proceeding. In *Wilson & Partners Ltd v Nicholls* (2008) 74 NSWLR 218; [2008] NSWSC 1230, the Supreme Court made an order for production for inspection of client files, located in Kazakhstan, of Kazakh companies associated with the employees and the partner. The companies were defendants to the proceeding. The files had been discovered but were not made available for inspection on the ground that this would breach Kazakh law. The Court held that even if this were so, it would not be an absolute bar to an order for production for inspection, as that is a question of procedure governed by the law of the forum (at [5]-[11]) and, in any event, the competing expert evidence did not prove that it would be a breach of Kazakh criminal or administrative law (at [12]-[27]). In resolving this application, the Court was not greatly assisted by the experts (at [12]):

> *Neither of the experts was cross-examined, and no application for leave to cross-examine was made. Neither descended to much detail in setting out the statutory or other authoritative basis for the opinions that they tendered. In many cases, I am left with competing ipse dixits of the two experts.*

Not high praise!

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# Foreign arbitration awards in Australia: a 'pro-enforcement bias'

*Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 provides a recent example of the 'pro-enforcement bias' of at least some Australian courts when it comes to international arbitration awards. The Federal Court of Australia enforced a Ugandan arbitration award under the *International Arbitration Act 1974* (Cth) (which applies the *New York Convention*), notwithstanding that the Australian corporate respondent did not participate in the arbitration. That Act was amended in 2010 to favour the enforcement of foreign arbitral awards even further than had previously been the case. There are two points of more general interest.

First, the Court considered that the arbitration clause at issue — which provided that 'Any lawsuit, disagreement, or complaint with regards to a disagreement, must be submitted to a compulsory arbitration' — was not void for uncertainty and nor was the dispute outside its scope or determined otherwise than in accordance with the procedure agreed by the parties. The Court was prepared to read the clause as meaning (at [63]): 'All disputes under or in relation to the Contract must be referred to arbitration'. The Court thus effectively read the words 'under or in relation to the Contract' into the arbitration clause. The arbitral procedure adopted was in accordance with Ugandan arbitration legislation, which supplied any deficiencies in the parties' agreement concerning procedure.

Secondly, the Court rejected the respondent's submission that the award should not be enforced on grounds of public policy (s 8(7) of the Act). The respondent had sought to invoke this ground on the basis that the arbitrator made errors of law and fact when determining the award of general damages. The Court said (at [126]) that it was not:

> *against public policy for a foreign award to be enforced by this Court without examining the correctness of the reasoning or the result reflected in the award. The whole rationale of the Act, and thus the public policy of Australia, is to enforce such awards wherever possible in order to uphold contractual arrangements entered into in the course of international trade, in order to*

> *support certainty and finality in international dispute resolution and in order to meet the other objects specified in s 2D of the Act.*

The Court approved United States authorities consistent with this narrow approach to the public policy exception (*Parsons & Whittemore Overseas Co, Inc v Société Générale De L'Industrie Du Papier*, 508 F 2d 969 (2d Cir 1974); *Karaha Bodas Co, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F 3d 274 at 306 (2004)) and disapproved previous Australian authorities supporting a broader approach (*Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406 at 428–432; *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700; (2004) 183 FLR 317 at [6]-[14], [18]).