Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2010)

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

Here is the contents:

- ***Anne Röthel/Evelyn Woitge*:** "Das Kollisionsrecht der Vorsorgevollmacht" – the English abstract reads as follows:

Various European national laws have recently implemented powers of representation granted by an adult to be exercised when he or she is not in a position to protect his or her interests. The authors show the existence and scope of these powers of representation within Europe and identify the need for conflict norms for this legal institution. Based on an analysis of the respective rules in the Hague Convention on the international protection of adults, the authors highlight the need to find a national solution that acknowledges the special interests of incapable adults. They suggest a regulation for powers of representation in autonomous international private law that adapts the concept of the Hague Convention.

- ***Stefanie Sendmeyer*:** "Die Rückabwicklung nichtiger Verträge im Spannungsfeld zwischen Rom II-VO und Internationalem Vertragsrecht" – the English abstract reads as follows:

In private international law, it is highly disputed whether the law applicable to claims aiming to reverse enrichment in case of a void contract is determined by Art. 10 (1) lit. e) Rome II Regulation or by Art. 10 (1) lit. e) Rome Convention or Art. 12 (1) lit. e) Rome I Regulation respectively. After a short analysis of the current state of discussion, it is shown that the argument emanates from the erroneous assumption that the question of restitution in such cases is a matter of unjust enrichment according to Art. 10 Rome II Regulation as well as a topic of private international law concerning contractual obligations. In fact, the

question has to be solved by clearly differentiating between contractual and non-contractual obligations and, therefore, between the scope of the Rome II Regulation and the scope of the instruments of private international law dealing with contractual obligations. In consistence with European international procedural law, restitution in case of a void contract is considered a contractual obligation and, therefore, the applicable law is determined by Art. 10 (1) lit. e) Rome Convention or Art. 12 (1) lit. e) Rome II Regulation respectively.

- ***Anatol Dutta:*** "Grenzüberschreitende Forderungsdurchsetzung in Europa: Konvergenzen der Beitreibungssysteme in Zivil- und Verwaltungssachen?" (on ECJ, 14.1.2010 – C-233/08 – Milan Kyrian ./. Celní úrad Tabor) **–** the English abstract reads as follows:

The dogma that claims of the State based on its penal, revenue or other public law are not enforceable abroad – a doctrine also known as the revenue rule – is more and more displaced by European instruments obliging the Member States to collect public law claims of their fellow Member States. One example for this development is the Tax Recovery Directive 76/308/EC (later: 2008/55/EC, now: 2010/24/EU) on the mutual assistance for the recovery of claims relating to taxes, duties and other measures – an instrument, which has been gradually extended to all taxes levied by the Member States. The present article, which discusses a recent decision of the European Court of Justice interpreting the Tax Recovery Directive, attempts to highlight some similarities between the European enforcement rules for public law claims and those for private law claims. These similarities do not only allow fertilisation across the public-private law border when applying and interpreting the different enforcement rules, but once more demonstrate that the revenue rule should be reconsidered.

- ***Sebastian Mock:*** "Internationale Streitgenossenzuständigkeit" **–** the English abstract reads as follows:

The international jurisdiction for claims against several defendants at the domicile of one of the defendants as today established by Art. 6 No. 1 Brussels I Regulation is unknown in several member states and consequently causes general doubts due to the existing possibilities of manipulation in this context. Although the European Court of Justice reflected these doubts by establishing the additional need of the risk of irreconcilable judgments resulting from

separate proceedings in the application of Art. 6 No. 1 Brussels Convention and Art. 6 No. 1 Lugano Convention – which was later recognized by the European legislator in the drafting of Art. 6 No. 1 Brussels I Regulation – the determination of this additional requirement is still left unclear. In its recent decision the German Federal Court of Justice delivered a rather broad understanding of this requirement. The court held that the jurisdiction under Art. 6 No. 1 Lugano Convention/Art. 6 No. 1 Brussels I Regulation does not require that all defendants have to be sued at the same time. Moreover the court held that the violation of a duty of a member of the board of directors is sufficient to establish a jurisdiction under Art. 6 No. 1 Lugano Convention/Art. 6 No. 1 Brussels I Regulation for a claim against the member of the board of directors when the plaintiff already filed a claim against the company of the director. However, the author doubts that this ruling can be considered as a general principle in the application of Art. 6 No. 1 Lugano Convention/Art. 6 No. 1 Brussels I Regulation and shows that the ruling has to be seen in context with a special provision of the applicable Swiss corporate law.

- ***Martin Schaper:*** "Internationale Zuständigkeit nach Art. 22 Nr. 2 EuGVVO und Schiedsfähigkeit von Beschlussmängelstreitigkeiten – Implikationen für den europäischen Wettbewerb der Gesellschaftsrechte" – the English abstract reads as follows:

Art. 22 (2) Brussels I Regulation establishes an exclusive jurisdiction of a Member State's court for proceedings which have as their object, among others, the nullity or the dissolution of companies and the validity of the decisions of their organs. This jurisdiction depends on where the company's seat is located. For determining this seat the court has to apply its rules of International Private Law (lex fori). Although Germany generally adheres to the real seat theory, the OLG Frankfurt a.M. (Higher Regional Court) decided that a private limited company's statutory seat is the relevant factor for determining the exclusive jurisdiction.

Since the freedom of establishment, as interpreted by the Court of Justice of the European Union, promoted corporate mobility there is an increasing demand for settling disputes not in the state of incorporation, but in the country where the major business operations take place. Therefore, the article examines the

possibility of arbitration proceedings on the nullity and avoidance of decisions taken by shareholders' meetings in an international context.

Finally, based on the experience with the state competition for corporate charters in the USA, the impact of a jurisdiction's courts and the admissibility of arbitration proceedings is analysed within the context of regulatory competition in company law in Europe.

- ***Veronika Gärtner:*** "Internationale Zuständigkeit deutscher Gerichte bei isoliertem Versorgungsausgleichsverfahren" **–** the English abstract reads as follows:

Until recently, German law did not know an explicit rule on international jurisdiction with regard to proceedings dealing with the adjustment of pension rights between divorced spouses. The Federal Court of Justice held in several judgments that international jurisdiction with regard to the adjustment of pension rights followed – also in cases where those proceedings are initiated independently from divorce proceedings – the rules of international jurisdiction with regard to the divorce proceedings due to the strong link between both issues.

With reference to this case law, the Regional Court of Karlsruhe held in its decision of 17 August 2009 (16 UF 99/09) that German courts lacked international jurisdiction with regard to (independent) proceedings on the adjustment of domestic pension rights between two Portuguese divorced spouses habitually resident in Portugal, based on the argumentation that Art. 3 Brussels II bis Regulation had to be applied analogously with regard to the question of international jurisdiction. Due to the fact that the requirements of this provision were not met, German courts were – according to the Higher Regional Court Karlsruhe – not competent to rule on the adjustment of the (German) pension rights.

This result is undoubtedly incorrect under the present legal situation: With effect of 1 September 2009 – in the course of a general revision of the procedural rules in family law and non-contentious cases – a new rule has been introduced stating explicitly that German courts have international jurisdiction

with regard to proceedings on the adjustment of pension rights inter alia in cases concerning domestic (pension) rights (§ 102 Nr. 2 FamFG).

However, the author argues that also before the entry into force of this new rule, the Regional Court of Karlsruhe should have answered the question of international jurisdiction in the affirmative: First, it is argued that the court's reference to Art. 3 Brussels II bis Regulation was misplaced since – as Recital No. 8 of the Brussels II bis Regulation illustrates – "ancillary measures" – and therefore also proceedings on the adjustment of pension rights of divorced spouses – are not included into the scope of application of Brussels II bis.

Further, the author argues that the negation of international jurisdiction in cases concerning domestic (pension) rights leads to a denial of justice. Therefore it is argued that international jurisdiction could – and should – have been assumed on the basis of general principles of jurisdiction.

- ***Gerhard Hohloch/ Ilka Klöckner:*** "Versorgungsausgleich mit Auslandsberührung – vom alten zum neuen Recht – Korrektur eines Irrwegs" – the English abstract reads as follows:

On the 11th of February 2009, the Federal Supreme Court of Justice has had its first opportunity to decide whether or not the Dutch provisions on pension rights adjustment were to be regarded as equivalent to the German "Versorgungsausgleich" (VA) in the matter of Art. 17 III 1 EGBGB. Though until then this was generally accepted, the Court decided to deviate from the established opinion. In the course of the 2009 Reform, Art. 17 III EGBGB was revised and significantly restricted regarding its field of application. According to this new regulation, German law must now be applicable in order for the plaintiff to successfully be able to claim an adjustment of pension rights in Germany. Starting off with a critical examination of the Supreme Court's decisions, the authors then point out the impact of the Court's adjudication on the interpretation and the application of the new Art. 17 III EGBGB.

- ***Pippa Rogerson*:** Forum Shopping and Brussels II bis (on: High Court of Justice, 19.4.2010 – [2010] EWHC 843 (Fam) – JKN v JCN)

Sometimes real life cases focus academic attention on important issues of

principle. In JKN v JCN a husband and wife from New York had been living in London for 12 years and had four young children together. Then they returned to New York where they are all now residing for the foreseeable future. The marriage has broken down and a divorce, financial settlement and arrangements for the children are required. Which court should deal with these matters? The wife commenced proceedings in England under Brussels II bis and the husband in New York. The parties had both UK and US citizenship and the husband at that time was still resident in England. Both parties were pursuing proceedings in a court which provided that party with some advantages. Ideally, the parties should come to a settlement without needing the court's determination. If not, preferably a single court should adjudicate matters. This is achieved within the EU by the lis pendens rule in Brussels II bis. However, there is no similar regime operating with non-Member States. A proliferation of judgments over the same matter is wasteful of the parties' time and assets as well as of the courts' resources. It also leads to problems of enforcement of possibly irreconcilable judgments.

- **Axel Kunze/ Dirk Otto:** "Internationale Zwangsvollstreckungszuständigkeit, rechtliche Grenzen und Gegenmaßnahmen" (on: New York Court of Appeals, Opinion v. 4.6.2009) – the English abstract reads as follows:

A New York Court recently ruled that courts in New York have international competence to order the cross-border attachment of rights and securities held by a foreign party with a foreign bank abroad as long as the foreign bank carries out business in the state of New York. This decision potentially exposes foreign banks operating in New York state to attachment disputes. The article describes the impact of the decision and compares it with the legal situation in Germany and other EU countries. The authors come to the conclusion that under German law, EU law as well as under the Lugano Convention a court may not order the attachment of claims located in other countries. In order to limit the risk for banks from being caught in the middle, the authors suggest contractual arrangements that would enable banks to "vouch in" customers into disputes before U.S. courts to ensure that banks are not liable if they comply with U.S. rulings. On the other hand customers could initiate legal steps in their home jurisdiction to prevent a bank from transferring assets/securities abroad; such an injunction would also be recognized by U.S. courts.

- ***Bartosz Sujecki*:** "Zur Anerkennung und Vollstreckung von deutschen Kostenfestsetzungsbeschlüssen für einstweilige Verfügungen in den Niederlanden" – the English abstract reads as follows:

The Dutch Supreme Court (Hoge Raad) had to give an answer to the question whether a German decision on the amount of cost (Kostenfestsetzungsbeschluss) related to an interim injunction (einstweilige Verfügung) can be recognized and enforced in the Netherlands. Since the German interim injunction was given in an ex parte procedure and the cost decision was not contested by the defendant, the question arose whether such an uncontested decision can be qualified as a "decision" according to article 32 of the Brussels I Regulation and can be enforced in the Netherlands. This paper discusses and analyzes the decision of the Dutch Supreme Court.

- ***Gerhard Hohloch:*** "Feststellungsentscheidungen im Eltern-Kind-Verhältnis – Zur Anwendbarkeit von MSA, KSÜ und EuEheVO" – the English abstract reads as follows:

The article discusses the Austrian Supreme Court's order issued on May 8th 2008, concerning the applicability of the 1961 Hague Convention "[…] on the protection of minors" on declaratory actions in statutory custody cases. It refers to the international jurisdiction rules (including "Regulation Brussels IIa") as well as to the conflict of law rules. As the significance of the Court's assessment extends beyond the Austrian-German border, the main emphasis is put on how the problems of the case at issue are to be treated in Germany, and furthermore on the impact the 1996 Hague Convention "[…] on the protection of Children" – which is expected to come into force soon – will have on the legal situation in Germany and in Austria.

- ***Oliver L. Knöfel:*** "Nordische Zeugnispflicht – Grenzüberschreitende Zivilrechtshilfe à la scandinave" **–** the English abstract reads as follows:

The article gives an overview of the mechanisms of judicial assistance in the taking of evidence abroad in civil matters as maintained by the five Nordic Countries (Denmark, Finland, Iceland, Norway, Sweden). In Central and Western Europe, it is little-known that the Nordic Countries have, since the 1970s, erected an autochthonous system of judicial assistance differing quite

significantly from the long-standing habits of taking evidence abroad as established by the Hague Conference or recently by the European Union. According to specific reciprocal legislation, Nordic residents are obliged to appear before the courts of any Nordic country, and to give evidence. Thus, there is hardly any need to have a foreign Nordic witness examined by her home court according to a letter rogatory, or to take evidence directly on foreign soil. The article aims at exploring this extraordinary mode of international judicial co-operation with special reference to Swedish procedural law. It is shown that the Nordic mechanism is a product of a very high level of convergence in the field of civil procedure, and that this is due to a common core of Nordic legal cultures.

- ***Reinhard Giesen*** on a decision of the Norwegian Supreme Court on the applicable law with regard to defamation: "Das Recht auf freie Meinungsäußerung und der Schutz der persönlichen Ehre im Kontext unterschiedlicher Kulturen" (on: Norges Høyesterett, 2.12.2009 – HR-2009-2266-A)
- ***Kurt Siehr*** on the Austrian Supreme Court's decision of 18 September 2009 dealing with the question of the applicability of Brussels II bis with regard to the return of abducted children – in particular in cases where the child is over 16 years old : "Zum persönlichen Anwendungsbereich des Haager Kindesentführungsübereinkommens von 1980 und der EuEheVO "Kind" oder "Nicht-Kind" – das ist hier die Frage!" (on: Austrian Supreme Court, 18.9.2009 – 6 Ob 181/09z)
- ***Erik Jayme*** on the inaugural lecture held by Professor Martin Gebauer in Tübingen on 16 July 2010

The French Revision of Prescription: A Model for

Louisiana?

François-Xavier Licari, Professor at the University of Metz, and Benjamin West Janke, of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, have posted "The French Revision of Prescription: a Model for Louisiana?" on SSRN. The paper has also been publised at the Tulane Law Review, vol. 85, p. 1 (2010).

Here is the abstract

Though the draftsmanship of the French and Louisiana Civil Codes is generally celebrated, prescription in both Codes is notoriously defective. Located at the end of both Codes as almost an afterthought, the titles of prescription do not share the same general, relative style contained elsewhere. Part of the cause of the prescription title's shortcoming is attributable to the content.

The provisions that ring loudest are spelled out in numbers rather than letters. Numbers are blind, arbitrary, cold, and inanimate – ace of society accelerates, prescription becomes anachronistic. It is worth questioning whether the very nature of prescription eludes the capacity for codification.

Prescription's inherent difficulties have created turmoil for both the French and Louisiana civilian systems. Both have struggled with the arbitrariness of any one particular prescriptive period, attempting to balance objectivism against subjectivism, relativity against certainty, and generality against particularity. Though both France and Louisiana began with what might be considered excessively long general periods of prescription, the French and Louisiana legislatures either whittled down the general period or chiseled out particular actions from it. Over time, these piecemeal amendments eviscerated the core components of the doctrine, causing a desperate need for substantial revision.

In 2008, the French legislature took the necessary step and drastically reformed prescription. The general period is now shorter and unified (five years); there are new grounds for suspension (including codified contra non valentem); and a long-stop period is introduced. Louisiana has yet to make any substantial reform to prescription, and revision is long overdue.

This essay will outline the faults in Louisiana and France's original prescriptive regimes and identify the main innovative trends in the French revision. It then

will offer a critical appraisal of the French revision, endorse it as a basis for a Louisiana revision, and discuss how Louisiana jurisprudence is uniquely positioned to integrate the revision in French law. We offer the following as a true dialogue from both the French and Louisiana perspectives about the continuing influence of the French Civil Code in Louisiana, the nature of prescription and its placement in a Civil Code, and the unique opportunity for the Louisiana experience to influence the interpretation of the French revision.

Dane on the Natural Law Challenge to Choice of Law

Perry Dane, who is a Professor of Law at the Rutgers School of Law – Camden, has posted The Natural Law Challenge to Choice of Law on SSRN. The abstract reads:

> *Would a jurisdiction supremely confident that some or all of its own municipal law rests on natural law and universal legal truth ever have a good, purely principled, reason to look to ordinary choice of law principles and apply the substantive law of another place in a case involving foreign elements? This essay, a chapter in an upcoming volume on "The Role of Ethics in International Law," suggests several such reasons, some of them grounded in the natural law tradition itself and in sustained analysis of the relationship between natural law (if such a thing exists) and positive law. The essay also suggests at least a rough analogy between the jurisprudential challenges of choice of law and the theological challenges of interreligious encounter. It ends with a short effort apply the general argument to the specific question of the inter-jurisdictional recognition of same-sex marriages.*

The paper is forthcoming in *The Role of Ethics in International Law*, Donald Earl Childress III, ed., Cambridge University Press, 2010.

Belgian Reference for a Preliminary Ruling on Art. 6 of the Rome Convention

As pointed out by our friend *Federico Garau* over at the Conflictus Legum blog, **the Belgian Supreme Court** (*Hof van Cassatie/Cour de Cassation*) **has made a preliminary reference to the ECJ, with regard to the interpretation of Art. 6 (individual employment contracts) of the 1980 Rome Convention on the law applicable to contractual obligations**.

The case (the second, to the best of my knowledge, to be made pursuant to the two 1988 Protocols on the interpretation of the Convention by the Court of Justice, after the *ICF* case, no. C-133/08), was lodged on 29 July 2010 under **C-384/10, *Jan Voogsgeerd v Navimer SA***.

> ***Questions referred***
>
> *Must the country in which the place of business is situated through which an employee was engaged, within the meaning of Article 6(2)(b) of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, 1 be taken to mean the country in which the place of business of the employer is situated through which, according to the contract of employment, the employee was engaged, or the country in which the place of business of the employer is situated with which the employee is connected for his actual employment, even though that employee does not habitually carry out his work in any one country?*
>
> *Must the place to which an employee who does not habitually carry out his work in any one country is obliged to report and where he receives administrative briefings, as well as instructions for the performance of his work, be deemed to be the place of actual employment within the meaning of the first question?*

Must the place of business with which the employee is connected for his actual employment within the meaning of the first question satisfy certain formal requirements such as, inter alia, the possession of legal personality, or does the existence of a de facto place of business suffice for that purpose?

Can the place of business of another company, with which the corporate employer is connected, serve as the place of business within the meaning of the third question, even though the authority of the employer has not been transferred to that other company?

The referring decision is available on the *Juridat* database (under no. S.09.0013.N), and can be downloaded as a .pdf file here.

Issue 2010/3 Nederlands Internationaal Privaatrecht

The third issue of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* is dedicated to the proposal for a new Dutch Act on Private International Law that will be incorporated in Book 10 of the Dutch Civil Code. It includes a critical general review, and contributions on private international law rules on marriages and the consequences for public policy and human rights; the regulation of overriding mandatory rules; the regulation of *fait accompli*; methods of interpretation in the light of Europeanization and internationalization; and party autonomy and the law of names.

- A.P.M.J. Vonken, Boek 10 BW: meer – incomplete – consolidatie dan codificatie van het Nederlandse internationaal privaatrecht. Een bekommernisvolle bespiegeling over een legislatieve IPR-surplace, p. 399-409. The English abstract reads:

In recent decades European private international law (PIL) has undoubtedly made progress. This is largely due to the fact that a number of legislators have either

codified part or all of their national PIL rules or adopted treaties and regulations drawn up by, e.g., the Hague Conference on Private International Law and the European Union. Recently, the Dutch legislator has also introduced a codification or, more precisely, a 'consolidation' covering an incomplete set of topics on the field of choice of law. I will argue that this Dutch project should be amended and supplemented to include the areas of international civil procedure (e.g., jurisdiction and the recognition and enforcement of foreign judgments) and to cover a more complete ruling of all kinds of choice of law issues for the sake of legal practice. Finally, I will propose some amendments and refinements to specific rules contained in this consolidation project.

- Susan Rutten, Aanpassing van het huwelijksrecht; gevolgen voor de openbare orde en mensenrechten in het IPR, p. 410-420. The English abstract reads:

The Dutch government is considering to take on problems of integration caused by the immigration of spouses through amending the rules governing marriage. The objective is to prevent immigrants living in the Netherlands from marrying abroad merely for the purpose of enabling their new spouse to acquire legal residence in the Netherlands. With this in mind, the government intends to raise the minimum age for marrying; to prohibit the conclusion of marriages between cousins; and to tighten the rules governing the recognition of foreign polygamous marriages. The plans will also affect rules of private international marital law, as well as the use of the public policy exception. In this article, the author examines whether the government's tentative proposals respect human rights, in particular the right to marry. Furthermore, she questions whether the public-policy exception is a suitable technique for warding off undesirable foreign marriages. The introduction and codification in the Dutch Civil Code of a new book on private international law provide an opportunity for the legislator to legally define the concept of public policy. An express reference could be made to the effect that human rights are part of our public policy, since human rights, because of their nature, are in any case seen as fundamental principles. The above proposals by the government also prompt us to be aware of the risk of public policy being used or abused for interests other than those for which the exception was intended, where it is invoked to safeguard rules of which it is less evident that they may be seen as fundamental.

- Cathalijne van der Plas, Het leerstuk van de voorrangsregels gecodificeerd in boek 10: werking(ssfeer), p. 421-429. The English abstract reads:

Draft book 10 of the Dutch Civil Code contains a general conflict of laws provision in Article 10:7 on super mandatory rules (lois de police). Many international instruments, in particular several Hague Conventions and the Rome I and II Regulations, provide for the application of such special rules of a mandatory nature in addition to, or in derogation from, applicable private law. It nevertheless makes sense for the Dutch legislature also to provide for a domestic conflict of laws rule on the application of super mandatory rules, because not all areas of private law have been covered (as yet) by international instruments: notably parts of family law and the law of succession, the law of property, and of corporations. Some aspects of the application of super mandatory rules which remain uncertain in connection with the Rome I and II Regulations have been made explicit by the legislature, in particular the principle that the application of a law pursuant to rules of PIL includes super mandatory rules of that lex causae. Article 10:7 also allows for the application of super mandatory rules of third countries, which goes beyond the room for the application of such rules under Article 9 of the Rome I Regulation. It is submitted that the test which a court must apply when deciding whether the application of foreign public or administrative rules of law is justified and bears a resemblance to the tests under EU case law for determining whether some national rule infringes the free circulation of assets, capital and persons. EU case law provides examples of compelling public interests which could justify the application of a super mandatory rule in a specific situation. However, the Dutch courts will have the freedom to decide on the tests to be applied, and it remains to be seen how the new Article 10:7 will work out in specific cases.

- M.H. ten Wolde, De mysteries van het *fait accompli* en Boek 10 BW, p. 430-436. The English abstract reads:

Article 9 of draft Book 10 of the Civil Code introduces a new fait accompli (an accomplished fact) exception to be used in every area of conflict of laws: 'In the Netherlands, the same legal consequences may be attached to a fact to which legal consequences are attributed under the law which is applicable under the

private international law of a foreign state, also when this contravenes the law which is applicable according to Dutch private international law, in as far as not attaching those consequences would constitute an unacceptable violation of the legitimate expectations of the parties or of legal certainty.' This provision aims to adjust the result of applying a Dutch conflict of law rule in the event that such a result is unacceptable since the parties involved assumed that a foreign conflict rule that referred the case to a different law was in fact applicable. The question arises whether the consequences attributed to a fact or act according to a foreign conflict of law rule may be accepted, even if those consequences do not arise under the law which is applicable according to Dutch conflict of law rules. In such a case Dutch conflict rules should yield in favour of the foreign conflict rule, but subject to the condition that the parties rightfully believed that their legal position was determined by the closely connected foreign conflict rules in question. Moreover, not granting such effects has to constitute an unacceptable violation of the legitimate expectations of the parties or of legal certainty It is remarkable that the fait accompli exception is codified as an universal exception to all conflict rules since it has never been regarded as such in the case law or literature. Among scholars it is mainly seen as a concept that helps to discover the applicable law. The legislator bases the exception of Article 9 on the principle of legitimate expectations as expressed in the Sabah case decided by the Supreme Court and on legal certainty. However, in the Sabah case the court dealt with a completely different problem, namely that of Dutch conflict rules succeeding each other in time. The author argues that the mentioned principle cannot, without any good reason, be extended to the question of the conflict between Dutch conflict rules and foreign conflict rules. Besides this, there is no valid reason to protect parties who deliberately cross the border to a foreign country against their unfamiliarity with the law (including confict of law) of that country. The reality of international legal practice is that a legal position as a consequence of differing conflict rules may have a different content in one country than in another. Parties should be aware of this fact. International legal practice does not need a fait accompli exception. It is advisable to delete Article 9 from Book 10 Civil Code.

- A.E. Oderkerk, Een lappendeken van interpretatiemethoden in de context van het Ontwerp Boek 10 BW – De invloed van Europeanisering en internationalisering van het IPR, p. 437-446. The English abstract reads:

In the Dutch Proposal on Private International Law (Book 10 of the Dutch Civil Code), a 'General Part' containing provisions on topics like public policy, internationally mandatory provisions, party autonomy, capacity et cetera has been included. However, unlike in some foreign private international law Acts, general provisions on interpretation and/or characterisation have been deliberately omitted. In this article it is argued that it would have been useful and possible to introduce such provisions. Useful because different methods (of a general, European or international background) of interpretation and characterisation have to be applied to different (groups of) provisions of this Book and it will not be obvious to practitioners which method will have to be applied when and how. Possible since – as will be shown – guidelines on which methods of interpretation and characterisation are to be applied and in which context can be laid down.

- Emilie C. Maclaine Pont, Partijautonomie in het 'nieuwe' internationale namenrecht, p. 447-455. The English abstract reads:

Recently, a bill has been prepared by the Dutch legislature in order to consolidate the rules of Dutch private international law. This 'Book 10 of the Dutch Civil Code' includes personal status issues. More specifically, this article focuses on surnames. In two judgments – Garcia Avello *and* Grunkin-Paul – *the Court of Justice of the EU provided incentives for the Member States to reconsider their rules regarding surnames concerning conflict of law rules and the recognition of surnames. The question is whether the Dutch regulations as laid down in the new 'Book 10 of the Dutch Civil Code' are in conformity with these decisions. This article reaches the conclusion that this question must be answered in the negative and recommends some adjustments to the current bill with the introduction of a choice of law clause.*

Complutense PIL Seminar to be

held in March 2011. Call for papers

A new edition of the International Seminar on Private International Law (Universidad Complutense de Madrid) will be held on March 2011, the 24 (Thursday, morning and afternoon sessions) and 25 (just morning session). The place, as usual, will be the faculty of Law at the Universidad Complutense of Madrid.

For this edition, which is already the fifth, a general approach under the title "Trends in the evolution of private international law" has been preferred. The proposed theme is therefore a broad one, the organizers (Prof. Fernández Rozas and de Miguel Asensio) wanting to provoke reflection on recent developments and future prospects in three different areas of Private International Law: patrimonial law, familiy law, and inter-regional law.

As in previous editions the seminar will count with several general lectures, but it is open to teachers and specialists, either Spanish or foreigners, who wish to present papers on issues related to one of the main themes. Those wanting to participate should promptly contact Professor Carmen Otero García Castrillón by email (cocastri@der.ucm.es) indicating a title for their contribution. The deadline is December 15, 2010.

The inclusion of papers in the 2010 volume of the Anuario Español de Derecho Internacional Privado will be subject to prior scientific evaluation of each work, according to general criteria applicable to the publication of academic articles in the journal. In any case, the written version of the papers must be sent before April 1, 2011; this deadline is non-extendable due to the closure requirements of the Yearbook. Contributions shall not exceed 25 pages in Word format (double-spaced on DIN A-4, and Times New Roman 12 for text and 10 for footnotes pages).

Third Issue of 2010's Belgian PIL e-journal

The third issue of the Belgian e-journal on private international law Tijdschrift@ipr.be / Revue@dipr.be was just released.

It is a bilingual journal (French/Dutch) on private international law which essentially reports European and Belgian cases addressing issues of private international law, and also offers academic articles.

The issue can be freely downloaded here.

Update: London Arbitration Feast

Further to my post of last week, just to note that the start time of next week's BIICL seminar on the Supreme Court has been moved 15 minutes earlier to 5:15pm on Wednesday 24 November. This is to enable those attending to continue their arbitration themed evening by making the short journey to the LSE to hear Professor Jan Paulsson and Alexis Mourre discuss the subject of "Unilaterally Appointed Arbitrators – A Good Idea?" from 7:15pm.

Mills on Federalism in the EU and in the US

Alex Mills, who is a lecturer at Cambridge University, has posted Federalism in the EU and the US: Subsidiarity, Private Law and the Conflict of Laws on SSRN. Here is the abstract:

The United States has long been a source of influence and inspiration to the developing federal system in the European Union. As E.U. federalism matures, increasingly both systems may have the opportunity to profit from each others' experience in federal regulatory theory and practice. This article analyses aspects of the federal ordering in each system, comparing both historical approaches and current developments. It focuses on three legal topics, and the relationship between them: (1) the federal regulation of matters of private law; (2) rules of the conflict of laws, which play a critical role in regulating cross-border litigation in an era of global communications, travel and trade; and (3) 'subsidiarity', which is a key constitutional principle in the European Union, and arguably also plays an implicit and under-analyzed role in U.S. federalism. The central contention of this article is that the treatment of each of these areas of law is related – that they should be understood collectively as part of the range of competing regulatory strategies and techniques of each federal system. It is not suggested that 'solutions' from one system can be simply transplanted to the other, but rather that the experiences of each federal order demonstrate the interconnectedness of regulation in these three subject areas, offering important insights from which each system might benefit.

The paper is forthcoming in the *University of Pennsylvania Journal of International Law*. It can be freely downloaded here.

No Renvoi in Dallah

The United Kingdom Supreme Court delivered its judgment in *Dallah* on November 3rd, 2010.

Readers will recall that the case was concerned with an arbitral award made by an ICC tribunal in Paris. Dallah was seeking enforcement in England. The Supreme court confirmed that the award would not be declared enforceable for lack of jurisdiction of the tribunal over the defendant, the Government of Pakistan (for more details see our previous post here). The case raised a variety of issues of English international commercial arbitration law that I will leave to my learned

English coeditors. But it also raised a most interesting issue of conflict of laws involving French private international law.

The issue was which law governed the validity/existence of an arbitration agreement. English law and the New York Convention provide that, in the absence of a choice by the parties, the validity of an arbitral agreement is governed by "*…the law of the country where the award was made*." In this case, that was French law. And the Supreme Court applied French law.

The problem with this view is that, if one were to ask a French court whether it would apply French law in such case, it would most certainly say no. Since the *Dalico* case in 1993, the French Supreme Court for private and criminal matters (*Cour de cassation*) has ruled that international arbitration agreements are not governed by any national law. This might look like a remarquable statement. It has shocked many French lawyers. It seems to have equally shocked quite a few Law Lords (more on this later). But however shocking it might be, it is a clear statement. According to the French *Cour de cassation*, French law does not govern the validity of arbitration agreements when the seat of the arbitration is in France. And one would think that the *Cour de cassation* knows what it is talking about when it comes to French law.

Which law governs then? Well, the two French law experts in this case had offered a reasonable interpretation. Their Joint Memorandum stated:

> *"Under French law, the existence, validity and effectiveness of an arbitration agreement in an international arbitration need not be assessed on the basis of national law, be it the law applicable to the main contract or any other law and can be determined according to rules of transnational law. To this extent, it is open to an international arbitral tribunal the seat of which is in Paris to find that the arbitration agreement is governed by transnational law".*

After citing *Dalico*, Lord Mance also started to explain:

> *15. This language suggests that arbitration agreements derive their existence, validity and effect from supra-national law, without it being necessary to refer to any national law.*

Indeed.

Renvoi or not *renvoi*?

There was therefore an interesting issue before the English Supreme court. Its choice of law rule designated French law, but the French choice of law rule did not designate French susbtantive law. The question of *renvoi* had thus to be asked: would the English court ignore that French law did not want to be applied, or would it take it into consideration?

One possible answer could have been that, in the English conflict of laws, the scope of *renvoi* is limited to family law, and that, in all other fields, English courts do not care about foreign choice of law rules. Alternatively, the English Court could have answered that the New York Convention excludes *renvoi*. Lord Collins did suggest so. He cited one author to this effect. It is disappointing that he did not mention all the others, in particular the numerous Swiss scholars who have argued to the contrary.

But this is not the main answer that Lord Collins gave. The distinguished jugde ruled that there could be no *renvoi*, because the applicable French choice of law rule designated French law. He held:

> *124 … it does not follow that for an English court to test the jurisdiction of a Paris tribunal in an international commercial arbitration by reference to the transnational rule which a French court would apply is a case of renvoi. Renvoi is concerned with what happens when the English court refers an issue to a foreign system of law (here French law) and where under that country's conflict of laws rules the issue is referred to another country's law. That is not the case here. What French law does is to draw a distinction between domestic arbitrations in France, and international arbitrations in France. It applies certain rules to the former, and what it describes as transnational law or rules to the latter.*

So, in a nutshell, although the *Cour de cassation* rules that transnational law applies, that is not the content of French law. French law provides for the application of rules specifically designed for international arbitration, and these rules are French.

Lord Mance would certainly not have disagreed with this. He ruled:

> *15. … the true analysis is that French law recognizes transnational principles as potentially applicable (…), such principles being part of French law.*

Lord Mance, however, might not have been absolutly sure about this. He thus found useful to state that this had to be a correct view, since both barristers appearing before the Court also agreed. Just as 60 million Frenchmen can't be wrong, how could three English lawyers get it wrong on French law (even after two senior French lawyers had concluded differently)?

Lord Collins and Lord Mance's London Lectures

Are Lord Collins and Lord Mance right when they say that what French courts mean, or are doing, is to lay down French rules of international arbitration? Maybe. Quite a few French scholars have written exactly this. It might be, as Lord Collins put it, that French courts are wrong, and that what they do is is only to "describe" that transnational law applies. Yet, none of these scholars is authoritative when it comes to laying down rules of French law. Neither are Lord Collins or Lord Mance. Only French courts are. What they "describe" *is* French law.

The Lords sitting in the English Supreme Court were acting in a judicial capacity. They were faced with a question of foreign law. Their job was therefore to assess its content, and, for that purpose, they were to look at French *authorities*. Instead, the English Supreme Court explained how French law ought to be understood despite clear judgments of France's highest court ruling otherwise. It made an interesting academic point. But one would have thought that foreign law is a fact that ought to be assessed rather than an idea that can be endlessly discussed.

No doubt, French academics who disagree with this cases will appreciate the judgment in *Dallah*. It is less clear that the *Cour de cassation* will appreciate as much to have been lectured by Lord Collins and Lord Mance on the French conflict of laws.