Rome III Reg.: Council Adopts Decision Authorising Enhanced Cooperation on the Law Applicable to Divorce

On Monday, 12 July 2010, the Council adopted a decision authorising 14 Member States (Spain, Italy, Hungary, Luxembourg, Austria, Romania, Slovenia, Bulgaria, France, Germany, Belgium, Latvia, Malta and Portugal) **to participate in the first enhanced cooperation** in the history of the European Union, **on the law applicable to divorce and legal separation** (see the provisional version of the Council's press release, doc. no. 12077/10, at p. 15).

As we reported in our previous posts, the initiative for an enhanced cooperation in the field originated in 2008, when the Council noted that there were insurmountable difficulties in reaching the required unanimity in order to adopt the Commission's proposal amending the Brussels IIa Regulation and introducing rules concerning applicable law in matrimonial matters (Rome III reg.).

The first formal steps of the procedure are summarised as follows in Council document no. 10288/10 of 1 June 2010:

> *[…] Greece, Spain, Italy, Hungary, Luxembourg, Austria, Romania and Slovenia addressed a request to the Commission by letters dated 28 July 2008 indicating that they wished to establish enhanced cooperation between them in the area of applicable law in matrimonial matters and that they expected the Commission to submit a proposal to the Council to that end. Bulgaria addressed an identical request to the Commission by a letter dated 12 August 2008 and France by a letter dated 12 January 2009. On 3 March 2010, Greece withdrew its request. Germany, Belgium, Latvia and Malta joined the request by letters dated respectively 15 April 2010, 22 April 2010, 17 May 2010 and 31 May 2010. In total, thirteen Member States have thus requested enhanced cooperation.*
>
> *On 31 March 2010 the Commission presented to the Council:*
>
> *(a) a proposal for a Council Decision authorising enhanced cooperation in the*

area of the law applicable to divorce and legal separation [COM(2010)104 fin./2 of 30 March 2010]; and

(b) a proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [COM(2010)105 fin./2 of 30 March 2010: the proposed "Rome III" reg.].

The Commission assessed the legal conditions for enhanced cooperation in the explanatory memorandum to the proposal for a Council Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation.

On 1 June 2010 the Legal Affairs (JURI) Committee of the European Parliament voted unanimously for the proposal for a Council Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation.

The JHA Council, on 3-4 June 2010, reached a political agreement on the matter, and transmitted the draft decision to the Parliament, in order to obtain its consent to the enhanced cooperation, pursuant to Art. 329(1) of the Treaty on the Functioning of the European Union (see JHA Council's press release, doc. no. 10630/10).

On 16 June 2010 the plenary session of the European Parliament approved a legislative resolution giving its consent to the draft decision, that was finally adopted by the Council on 12 July 2010.

It is interesting to note that the Parliament in its resolution has called on the Council to adopt a decision pursuant to Article 333(2) of the Treaty on the Functioning of the European Union stipulating that, when it comes to the proposal for a Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, it will act under the ordinary legislative procedure (formerly known as codecision), and not under the special legislative procedure provided for in Article 81(3) of the TFEU, under which EP is merely consulted.

As regards the text of the Rome III reg., it is currently under discussion in the Council, on the basis of the Commission's March proposal. The latest available text is contained in Council document no. 10153/10 of 1 June 2010: at their latest

meeting on 4 June 2010, Justice ministers agreed on a general approach on key elements (see Council Secretariat's factsheet of 4 June 2010).

Transnational Securities Class Actions – A Private International Law Perspective

The focus of the debate on this website and elsewhere following the US Supreme Court's *Morrison* judgment has been upon the extra-territorial reach of US securities law before a US court, involving a process of statutory interpretation to identify the existence of a "mandatory rule" without regard to potentially applicable foreign laws. Those who were fortunate enough to have attended Professor Linda Silberman's presentation on Transnational Securities Class Actions last week at the British Institute of International and Comparative Law heard not only a full account of the *Morrison* litigation and the legislative background and fall out, but also Professor Silberman's thoughts as to the wider private international law implications of the decision and of securities class actions in the United States and elsewhere.

From a private international law perspective, although Professor Muir-Watt has questioned the suitability of existing techniques to deal with the problems arising from the regulation of securities by private law, it does not seem inappropriate to use traditional terminology in identifying the questions that will likely arise in the coming years. As least from an English law perspective, there are still more questions than there are definitive answers.

The following is a (non-exhaustive) attempt to list certain key questions:

Applicable law (Choice of law)

- Putting to one side the potentially mandatory application of a country's own securities law as regulating issues of civil liability, what rules of

applicable law (choice of law rules) should apply to claims made in transnational securities class actions?

- In particular:
    - How is the particular claim advanced in an individual case (or the particular issue) to be characterised (contract, tort, company law, other)?
    - Should the standard rules of applicable law for the relevant general category of obligation (or issue) be applied or are special rules needed for securities claims or class actions in a cross-border context (i.e. are there, or should there be, characterisations specific to claims arising from trading in securities)?
    - If the standard rules apply, how are they to be applied to the individual case? For example, depending on the nature of the relevant rule, where is the *lex loci delicti* or country of damage to be located?
    - What is the impact, if any, of any rule of the *lex fori* excluding or limiting the enforcement of claims based on a foreign penal or other public law? On this last point, Professor Silberman suggested that a private law right of action under securities legislation may be so closely intertwined with the regulatory regime that it may not be possible to disentangle them, but the recent trend in England and Australia seems to be towards facilitating the enforcement of foreign securities law where the action is taken for the benefit of private individuals (see Robb Evans v European Bank Limited [2004] NSWCA 82; US SEC v Manterfield [2009] EWCA Civ 27).

Jurisdiction

- How should the court approach the question of jurisdiction, in particular with respect to foreign members of an "opt out" claimant class? Should those claimants be considered to have "submitted" to the jurisdiction as a result of certification of the class in accordance with local law requirements, or must they be treated in the first instance as persons joined to proceedings against whom a basis of jurisdiction must be shown to exist (in the same way as for a defendant, or on some modified basis)?

Recognition and Enforcement of Judgments

- Can a judgment in a securities class action (whether following trial or approving a settlement) be recognised as having a preclusive effect, in favour of the defendant, as against foreign members of an "opt-out" claimant class who subsequently bring proceedings in another jurisdiction based on a cause of action which has been adjudicated by the foreign court or falls within the scope of the settlement? Here, Professor Silberman noted that U.S. courts certifying classes including foreign claimants have reached varying and inconsistent conclusions (reflecting, no doubt, differences in the expert evidence received by them) as to whether U.S. "opt-out" class action judgments would be recognised in particular foreign jurisdictions. In particular, she pointed to the class action certification in the *Vivendi* case (241 F.R.D. 213 [S.D. N.Y. 2007] – see comment, e.g., here and here) – in which the District Court had certified a class including U.K., French and Dutch investors (but excluding German and Austrian investors) having regard to the perceived likelihood that a U.S. judgment would be recognised and enforced in those jurisdictions against non-participating class members – and contrasted this to the clearly stated position of the French Republic in its Amicus Brief in *Morrison* (p. 26) that:

> *French courts would almost certainly refuse to enforce a court judgment in a U.S. 'opt-out' class action because … specifically, the 'opt-out' mechanism violates French constitutional principles and public policy.*

Equally, despite submissions to the contrary (see, e.g., A Pinna, "Recognition and Res Judicata of US Class Action Judgments in European Legal Systems" (2008) Erasmus Law Review, vol 1, issue 2, pp. 43-44), there appears presently to be no realistic prospect of a U.S. class action judgment being recognised by an English court as precluding the claims of an absent claimant who was not present in the U.S. at the time that the class was certified or the relevant notice published, and who did not actively opt-in to the class or otherwise participate in the proceedings or agree to submit to the jurisdiction

of the U.S. court. In short, as a matter of English law, the U.S. court would not be considered as jurisdictionally competent to determine the rights and obligations of these absent class members and, although it would be considered to have competence to determine the rights and obligations of present class members and those who have opted in, the judgment with respect to those persons is unlikely to have any wider *res judicata* effect against absent class members. The fact that the U.S. court may consider the named claimant and/or its lawyers to be authorised to represent absent class members is neither here nor there, as this is not an authority that is recognised under English private international law rules.

Even if the "competence" hurdle could be overcome, a successful class action defendant would undoubtedly face other obstacles in establishing the preclusive effect of a U.S. class action judgment in England. The English court may well conclude that the method of giving notice to the absent claimants of the existence of proceedings and requiring them to opt-out was insufficient and contrary to "principles of natural justice", so as to bar recognition of the judgment. More generally, the nature of the opt-out mechanism or other aspects of the class action procedure may be argued to be such as to make it contrary to public policy (for opposing opinions on this point, see the references in Pinna, above, fn. 69 and 70). Finally, in the case of a U.S. judgment approving a class action settlement, it seems doubtful whether the judgment meets the requirement that the judgment be "on the merits2 (*The Sennar (No. 2)* [1985] 1 WLR 490, 494 (Lord Diplock)) or, even if it were to meet that test and the other requirements for its recognition, whether recognition of the judgment would have the effect of binding the absent claimant contractually as if it, or its duly authorised legal representative, had concluded the settlement.

Questions of a different kind would, of course, arise if the class action judgment had been delivered, not by a U.S. court, but by a court of a State within the Brussels/Lugano Regime. Here, the opportunity for a review of the basis of jurisidiction is much more limited, and the most interesting questions relate to (1) the extent to which the absent claimant can oppose recognition through the public policy (Art. 34(1)) and default of appearance (Art. 27(2)) exceptions, (2) whether a court approved settlement must be recognised (cf. Case C-414/92, Solo Kleinmotoren v Boch [1994] ECR I-2237), and (3)

identification of the law(s) to be applied in determining the preclusive effect of the class action judgment or court approved settlement (cf. Case C-420/07, Apostolides v Orams [2009] ECR I-0000, para. 66).

Against the background of the rapid growth internationally of collective redress regimes in this and other subject matter areas, and growing political and economic pressures to promote private regulatory enforcement, it appears not unlikely that U.S. and European courts will become increasingly familiar with these private international law issues in the coming years as cross-border collective redress becomes an accepted part of the trans-national legal landscape. Legislative intervention, at least within the European Union, can also be foreseen (why have a button if you cannot press it?). For the time being, all we can say is "watch this space".

European Parliament Committee on Arbitration and Brussels I

On June 28th, the Committee on Legal Affairs of the European Parliament issued a report on the Implementation and Review of Regulation 44/2001.

On the exclusion of arbitration from the scope of the Regulation, the Committee expressed the following view:

> *Whereas the various national procedural devices developed to protect arbitral jurisdiction (anti-suit injunctions so long as they are in conformity with free movement of persons and fundamental rights,….) must continue to be available and the effect of such procedures … must be left to the law of those Member States as was the position prior to the judgment in West Tankers.*

On the proposal to grant exclusive jurisdiction to the court of the seat of the arbitration, the report provides:

> *Exclusive jurisdiction could give rise to considerable perturbations It appears*

from the intense debate raised by the proposal to create an exclusive head of jurisdiction for court proceedings supporting arbitration in the civil courts of the Member States that the Member States have not reached a common position thereon and that it would be counterproductive, having regard to world competition in this area, to try to force their hand.

See the report of Hans Van Houtte over at the Kluwer Arbitration Blog.

New Dissertation: European Private International Law on Legal Parentage?

A new dissertation on legal parentage has recently been published: *Kees Saarloos* (Maastricht University), **European private international law on legal parentage? – Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage.**

A summary has kindly been provided by the author:

The first part of the dissertation is a comparative analysis of the law on legal parentage in England & Wales, France, Germany, the Netherlands and Sweden. The second part examines the private international law on legal parentage in these countries. Special attention has been paid to the question to what extent legal parentage that has been established abroad, is recognised in the legal systems involved. In the third part, the influence of EU law on the free movement of persons on the recognition of civil status (Garcia Avello, Grunkin and Paul) has been analysed.

The conclusion is that at this point in time, the case law of the ECJ only obliges Member States to recognise a civil status that has been established in another Member State, if the civil status does not violate the public policy of the

recognising state and if there is no conflict of interest between the persons involved. Further implementation of the principle of mutual recognition in legal parentage requires action by the European legislator. In the final chapter, some suggestions have been made to work out the principle of mutual recognition in legal parentage. The starting point is that the law of the child's habitual residence should govern the registration of parentage at birth and the validity of the acknowledgment of parenthood; in court proceedings on parentage however, the grounds for jurisdiction should be limited and the courts should apply the lex fori.

The electronic version, including an English and a French summary, is available free of charge at the website of the library of the University of Maastricht: http://dissertaties.ub.unimaas.nl/default.asp?lang=eng

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French Supreme Court Breaks Land Taboo

On June 23rd, 2010, the French Supreme court for private and criminal matters (*Cour de cassation*) held that French courts had jurisdiction to determine the succession to a property situated in a foreign country.

The deceased person was a French national domiciled in Madrid. He owned two apartments, one in Spain and one in France, and monies on bank accounts. As his wife and his two children (one legitimate, one illegitimate) could not reach an agreement with respect to the succession, the wife sued the children before a French court. One of the children challenged the jurisdiction of the court on the ground that one of the properties was situated abroad.

The Court of appeal of Montpellier had retained jurisdiction over the Spanish immoveable. Remarkably, the *Cour de cassation* dismissed the appeal lodged against this decision and held that French courts did have jurisdiction.

The *Cour de cassation* offered a most innovative reasoning to justify that outcome.

First, it underlined that French courts had jurisdiction to determine the succession to part of the estate of the deceased person. It had jurisdiction over the moveables because the plaintiff was a French national (Civil code, art. 14), and it had jurisdiction over the immoveable situated in France because, well, it was situated in France.

But the best was still to come. The *Cour de cassation* ruled that, with regard to the Spanish immoveable, Spanish **law** operated a *renvoi* to French **law,** and that such *renvoi* was **granting jurisdiction** to the French court to decide the entire dispute and determine the succession to the whole estate. The court held that jurisdiction was only granted "to the exception of legal and physical operations flowing from the lex situs", but it did not find that such operations were involved in the case and thus ruled that French courts had jurisdiction over the Spanish immoveable.

The most important part of the judgement reads:

> *Mais attendu qu'ayant retenu, par motifs adoptés, que les juridictions françaises étaient compétentes pour connaître partiellement des opérations de liquidation et partage de la succession, tant mobilière en vertu de l'article 14 du code civil, qu'immobilière en raison de la situation d'un immeuble en France, la cour d'appel, constatant que la loi espagnole applicable aux dites opérations relatives aux meubles et à l'immeuble situés en Espagne, renvoyait à la loi française, loi nationale du défunt, en a exactement déduit que les juridictions françaises étaient, par l'effet de ce renvoi, compétentes pour régler l'ensemble de la succession à l'exception des opérations juridiques et matérielles découlant de la loi réelle de situation de l'immeuble en Espagne.*

Publication: Black on Foreign Currency Claims in the Conflict of Laws

The second book in Hart Publishing's new Studies in Private International Law is out, and it is Vaughan Black's ***Foreign Currency Claims in the Conflict of Laws***. From the blurb:

> *Problems in assessment of damages remain among the most contentious aspects of private law disputes. The assessment exercise becomes particularly difficult when one of the parties asks that damages be assessed in some foreign currency or claims that, even though damages should be assessed in the currency of the forum, foreign exchange losses should form a head of loss.*
>
> *The 1975 decision of the House of Lords in Miliangos v George Frank (Textiles) Ltd was revolutionary in that it permitted English courts to award judgment in a foreign currency. Miliangos has been influential throughout the common law world and courts in the commonwealth and the United States now contemplate awarding damages in currencies other than their own. However, that modernisation has hardly eliminated the problems in this area. When may a judge assess damages in a currency other than that of the forum? If a court elects to assess damages in its own currency, what conversion date should it select in converting from a foreign currency that was relevant to the obligations between the parties? In an age of fluctuating currencies questions of this nature present judges with choices involving significant financial implications.*
>
> *This book takes a comparative look at how common law courts have addressed damages claims when foreign currencies are involved, and at statutory responses to that issue. It describes the practices of UK, Commonwealth and American courts in this field and draws both on principles of private international law and of damages assessment to analyse current practice.*

It is £55 on the Hart website.

New South Wales and Singapore Supreme Courts Enter Into a Memorandum of Understanding on Questions of Foreign Law

From the press release:

> *The Supreme Courts of New South Wales and Singapore have entered into a Memorandum of Understanding (MOU) to work closely and expeditiously on issues arising under foreign law.*
>
> *It is the first time a formal agreement has been forged between an Australian and foreign court on a legal issue, as distinct from one related to education or mutual assistance.*
>
> *NSW Chief Justice James Spigelman and Singapore Chief Justice Chan Sek Keong jointly made the announcement today.*
>
> *Chief Justice Spigelman said the MOU and supporting amended Uniform Civil Procedure Rules would prove valuable in determining complex cross-border commercial and family disputes.*
>
> *"Money and people are more mobile today and courts are increasingly being asked to adjudicate on matters spanning multiple jurisdictions," he said.*
>
> *"This MOU reflects both the fluid and complicated nature of some modern legal proceedings, and the growing need for closer cooperation between courts and judges."*
>
> *Chief Justice Chan added: "The written agreement recognises the importance of facilitating legal cooperation in a way that has never been done before," he said.*

"I look forward to its more widespread adoption in the future as a new means of determining complex questions of foreign law."

Usually, when an issue of foreign law arises in a case before the Supreme Court, each party to the proceedings engages an expert to provide advice and to attend court – often travelling from overseas – for cross-examination.

In effect, the presiding judge is asked to adjudicate between conflicting expert witnesses.

In a speech to commercial judges in Asia in Hong Kong earlier this year, Chief Justice Spigelman said this practice was "a costly process and leads to significant 'lost in translation' problems, with a real prospect that an incorrect understanding of the foreign law will be adopted and applied".

In the same speech, he raised the possibility of courts directly referring questions of foreign law for determination to the court of the governing law. Now, consenting parties will have the option to seek a ruling directly from the foreign court about its own laws.

Chief Justices Spigelman and Chan agreed a judgment by a foreign court would be more authoritative, accurate and expedient than opinions by conflicting expert witnesses.

The Supreme Court of Singapore was the first to refer a question of foreign law to a foreign court (Westacre Investments Inc v The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR) [2009] 2 SLR (R) 166), when it sought a determination of a question of English law. The Commercial Court in London answered the question (Westacre Investments Inc v Yugoimport SDPR [2008] EWHC 801 (Comm.)).

Earlier this year, the NSW Court of Appeal delivered judgment in Murakami v Wiryadi & Ors, which involved the Courts of Australia, Indonesia and Singapore.

Under the new Rules, parties involved in NSW cases will have another option to have questions of foreign law answered by a single referee. This process is expected to be highly cost-effective. The Supreme Court has a long established system of referees. However, it has not previously been used to determine an

issue of foreign law.

Many thanks to Adrian Briggs for the tip-off.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2010)

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

Here is the contents:

- ***Christoph Thole***: "Anscheinsbeweis und Beweisvereitelung im harmonisierten Europäischen Kollisionsrecht – ein Prüfstein für die Abgrenzung zwischen lex causae und lex fori" – the English abstract reads as follows:

The harmonisation of European private international law has been heavily debated. However, the new Rome Regulations (Rome I and II) have not been fully scrutinized with respect to the distinction between procedural law and substantive law and its implications for the applicability of the lex fori-principle. This article focuses on two well-known issues of civil procedure law – prima facie evidence and obstruction of evidence. It examines the difficult question of how to deal with these legal institutes in private international law under the regime of the Rome Regulations.

- ***Götz Schulze***: "Moralische Forderungen und das IPR" – the English abstract reads as follows:

Moral claims articulate ethical positions of values which are hardly considered in the judicial discourse. This article first shows the moral implications of

judicial claims in the field of the substantive civil law, which can be denominated as "minima moralia" of the civil law. Furthermore, moral claims exist as a social phenomenon. Their characteristic is the indeterminableness in claiming for an intrinsically pursued purpose which is regarded to be a good one. In Private International Law the ethical axiom of mutual recognition obtains a specific meaning. There, recognition refers to the claim of the other for being recognised. Thereby the other in Private International Law can be both, the individual and the state. The claims for identity of states and individuals are shaped by the law. The law of a state has to be acknowledged as a cultural achievement. Therefore, if there is a strong link to the facts, legal ethics demand an application of foreign law as a question of respecting state and individual. Beyond cosmopolitically conceived legal ethics demand to amend the applied law by cultural virtues. The judicial "gateways" for such ethical aspects are the general clauses like the good faith. Thus, the "moral-data"-doctrine of Jayme obtains a legitimation by legal ethics. Furthermore, ethical virtues may gain recognition in non-governmental treaties such as the Washington-Conference-Principles on Nazi-Confiscated Art. For provisions that articulate moral claims without comprehending an enforceable legal consequence Jayme has developed the term "narrative norms". They allow to balance contradicting moral positions and claims by finding a compromise instead of strict all-or-nothing-results. This can be shown on the basis of the ruling in the Sachs-case, which has dealt with the restitution of Nazi-Confiscated art-posters (Kammergericht Berlin on 28 January 2010).

- ***Rolf Wagner/Ulrike Janzen***: "Das Lugano-Übereinkommen vom 30.10.2007" – the English abstract reads as follows:

The revised Lugano Convention has entered into force on 1 January 2010 between the EU, Norway and Denmark. Switzerland will probably join the Convention in 2011. The aim of the Lugano revision was to achieve parallelism between the provisions of Regulation (EC) No. 44/2001 ("Brussels I") and the Lugano Convention, as it had existed between the Lugano Convention of 1988 and the Brussels Convention of 1968. In addition, as the ECJ has decided the Lugano Convention falls entirely within exclusive Community competence, the EU Member States (except Denmark) are no longer Contracting Parties to the Convention. This article explains the history and the concept of the "new" Lugano Convention. Further on it aims at exposing the differences between the

"old" and the "new" Lugano Convention as well as the latter's relationship with Regulation No. 44/2001.

- ***Christian Schmitt***: "Reichweite des ausschließlichen Gerichtsstandes nach Art. 22 Nr. 2 EuGVVO" – the English abstract reads as follows:

This article analyzes the scope of exclusive jurisdiction pursuant to Art. 22 no. 2 of the Brussels I-Regulation („Brussels I"). Besides investigating whether Art. 22 no. 2 of Brussels I is merely applicable to formal organ decisions, it mainly deals with the question whether preliminary questions have to be considered in determining the matter in dispute. The ratio of Art. 22 no. 2 Brussels I is to avoid contradictory decisions about the existence of the company and the effectiveness of its organ's decisions. Taking into consideration this ratio and the established case law by the ECJ which leads to a restrictive interpretation of the provisions of Art. 22 of Brussels I, this article comes to the conclusion that Art. 22 no. 2 of Brussels I is not applicable to cases in which the effectiveness of the organ's decision is merely a preliminary question.

- ***Marius Kohler/Markus Buschbaum***:" Die „Anerkennung" öffentlicher Urkunden? – Kritische Gedanken über einen zweifelhaften Ansatz in der EU-Kollisionsrechtsvereinheitlichung" – the English abstract reads as follows:

On October 14th, 2009 the European Commission presented a 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. The proposed Regulation is aimed at unifying and simplifying the rules governing successions, increasing their predictability and providing more effective guarantees for the rights of heirs and/or legatees and other persons linked to the deceased, as well as creditors of the succession. In this context, the proposal is also aimed at guaranteeing that authentic instruments in matters of succession can move freely in the European Union. To this end the European Commission proposes to simply transfer the well-known concept of recognition as is used to enable the cross-border circulation of judicial decisions to authentic instruments. Kohler/Buschbaum seize upon this approach which they criticize as being inapt and even harmful to the objective of strengthening the free circulation of

authentic instruments. In particular, it turns out that the approach chosen by the Commission would even serve to circumvent the – harmonised – provisions of Private International Law on validity and legal effects of the legal acts underlying authentic instruments. A French version of the article is available under www.iprax.de*.*

- ***Paul Oberhammer***: "Im Holz sind Wege: EuGH SCT ./. Alpenblume und der Insolvenztatbestand des Art. 1 Abs. 2 lit. b EuGVVO" – the English abstract reads as follows:

Three decades after the ECJ decision in the case Gourdain ./. Nadler, the ECJ has rendered three decisions relating to the scope of application of the Brussels I Regulation and the Insolvency Regulation with respect to litigation emerging from insolvency proceedings in 2009 (Seagon ./. Deko Marty Belgium, SCT Industri ./. Alpenblume and German Graphics ./. van der Schee). The contribution discusses the procedural history, the relevant issues and future effects of the ECJ's decision SCT Industri ./. Alpenblume in detail.

- ***Moritz Brinkmann***: "Der Aussonderungsstreit im internationalen Insolvenzrecht – Zur Abgrenzung zwischen EuGVVO und EuInsVO" – the English abstract reads as follows:

In German Graphics, a German title retention seller tried to enforce in the Netherlands an order for the adoption of protective measures by a German court against the trustee of the Dutch buyer. On a reference by the Hoge Raad, the ECJ clarified that Art. 25 II EuInsVO must be interpreted as meaning that the words "provided that that Convention is applicable" imply that it is necessary to determine whether a judgment falls inside the scope of application of the EuGVVO. Thus, the case raised once more the question of the scope of the exception provided for in Art. 1 II lit. b) EuGVVO, this time in a recognition and enforcement context. The court held that a seller's claim based on his reservation of title does not fall under Art. 1 II lit. b) EuGVVO.

In his comment, Moritz Brinkmann argues that the court's reasoning in German Graphics is convincing with respect to title reservation clauses. Here, the seller tries to recover a piece of property that is not part of the buyer's estate. Such a claim is independent of the buyer's insolvency and is not related to the

insolvency proceedings. The mere fact that the order has to be enforced against the trustee is irrelevant. Title reserveration clauses, however, must be carefully dinstinguished from situations where the claimant is the owner of the asset in question by virtue of a fiduciary transfer of ownership for security purposes. Under such circumstances tha claim of the secured creditor – who is technically the owner – might nevertheless be characterized as a claim falling under Art. 1 II lit. b) EuGVVO. The author, furthermore, shows the consequences of the ECJ's decision for the validity of choice of court clauses.

- ***Jan von Hein***: "Die Produkthaftung des Zulieferers im Europäischen Internationalen Zivilprozessrecht" – the English abstract reads as follows:

The most recent decision of the ECJ on Article 5 No 3 of the Brussels I-Regulation, Zuid-Chemie v. Philippo's, deals with the interpretation of the provision in a case involving product liability. The ECJ held that the place where the harmful event occurred' designates the place where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended. Jan von Hein agrees with the decision, but criticises the lack of harmonisation of Art. 5 (3) of Brussels I with the new provision on the law applicable to claims for product liability in Article 5 of the Rome II-Regulation. He examines in detail whether and to which extent a harmonious interpretation of the two provisions is possible. He comes to the conclusion that the diverging policies and methodological foundations underlying Art. 5 No. 3 Brussels I, which follows the traditional principle of ubiquity, on the one hand, and Art. 5 Rome II, which is a variation of the cascade system of connecting factors pioneered by the Hague Convention on Product Liability, on the other, will inevitably lead to scenarios where jurisdiction and the applicable law do not coincide.

- ***Bettina Heiderhoff***: "Einzelheiten zur öffentlichen Zustellung" – the English abstract reads as follows:

The due and timely serving of documents, especially those instituting proceedings (writ of summons), is an essential element of judicial proceedings. However, when the address of the recipient (respondent to the claim) is unknown, most European legal systems allow service by publication. In the two cases at hand, the courts had to deal with the prerequisites of such a service by

publication. The German Federal High Court (BGH) decided that service by publication may be excluded when the claimant has not invested enough effort in to discovering the address of the defendant. From a general perspective, this attitude seems convincing as it is important that fictitious forms of service be avoided whenever possible. It seems less convincing, however, that, through the introduction of the requirement of "sufficient effort", the rules on service by publication (and, in particular, foreign rules) are softened and legal certainty and predictability are reduced.

- ***Reinhold Geimer***: "Zurück zum Reichsgericht: Irrelevanz der merger-Theorien – Kein Wahlrecht mehr bei der Vollstreckbarerklärung"

The article analyses a judgment given by the German Federal Court of Justice (BGH, 2 July 2009, IX ZR 152/06) confirming the predominant opinion according to which an exequatur decision given by a third state cannot be declared enforceable in other states. In derogation from a previous judgment (BGH, 27 March 1984 – IX ZR 24/83) according to which the principle of the inadmissibility of double exequatur does not apply in case of the application of the doctrine of merger, the BGH now held that also in these cases there was no reason to derogate from this principle and thus returned to the approach adopted already by the Supreme Court of the German Reich.

- ***Maximilian Seibl***: "Kollisionsrechtliche Probleme im Zusammenhang mit einem Mietwagenunfall im Ausland – Anknüpfungsgrundsätze, Haftungsbeschränkung und grobe Fahrlässigkeit" – the English abstract reads as follows:

Traffic accidents abroad prove to be one of the most relevant matters in the area of International Tort Law. As the Convention of 4 May 1971 on the law applicable to traffic accidents has not been signed by Germany the question as to which law governs such cases must be answered by the general International Tort Law provisions, i.e. by the Regulation (EC) No. 864/2007 (Rome II) or, in older cases, by Art. 40 EGBGB. The Federal Court of Justice of Germany (BGH) had to decide on a case in which two medical students had spent three months in South Africa together in order to pass practical education required for their studies. During their stay they had commonly rented a car. Both of them had assumed that the insurance modalities in South Africa in case of an accident

were comparable to those in Germany, so that they had not contracted private insurance offered by the car rental company. In fact there was only the so-called "South African Road Accident Fund" which offered victims of car accidents compensation to the amount of 25.000 South African Rand (ca. 3.000 e) at that time. Since one of the students was not accustomed to driving on the left, she caused an accident after turning into a National Road resulting in severe injuries to the other. The BGH held that according to Art. 40 (2) EGBGB German law as the lex domicilii communis was applicable in the case. As the application of this rule can lead to a situation where strict liability applies to the keeper of the car while there is no insurance available, there is a controversy in German literature as to whether or not this rule should be applied if rented cars are involved. However, in this case the BGH provided a solution in the area of substantive law by assuming the existence of a tacit nonliability clause, which generally proves to meet the interests of the parties involved better than a modification of the Private International Law provision. In respect to classification the question as to whether or not such a clause can actually be assumed to have been concluded is a question of the law applicable to the contract, which was German law in the case. On the other hand it is up to the applicable tort law to decide as to whether or not such a clause is effective. Since German law, however, was also applicable in respect to tort matters, there was no problem concerning a possible restriction on the effectivity of the tacit clause in the present case. As a result the driver in the case would only have been liable if she had acted with gross negligence. On principle, the standards of conduct derive from local data whose applicability does not depend on the respective International Tort Law provision. However, in case a lex domicilii communis exists, the standards of conduct in respect to the relation of passengers in the same car must be taken from this law, insofar it makes no difference whether the tortuous act was committed inland or abroad. Since the condition for gross negligence according to German law had not been met in the case, the BGH found for the defendant.

- ***Anna Radjuk***: "Grenzen der Anwendung des ausländischen Rechts in Russland" – the English abstract reads as follows:

In Russia, International Private Law was recently newly codified into the Russian Civil Code. Among others, new provisions with regard to the imperative norms and public policy were implemented. The present article investigates the

impact of the imperative norms and public policy on the freedom of choice of law both in theory and practice from the time of the new codification.

- ***Christian Hoppe***: "Englisch als Verfahrenssprache – Möglichkeiten de lege lata und de lege ferenda"

The article presents a current attempt in Germany to admit – in certain cases – English as the language of procedure. Two German states ("Bundesländer"), North Rhine-Westphalia and Hamburg have presented a legislative proposal according to which special chambers for international commercial matters should be introduced which should, according to the proposal, litigate in English.

- ***Erik Jayme/ Carl Friedrich Nordmeier*** on a seminar held on 12 November 2009 at the "Pontifícia Unversidade Católica" in Rio de Janeiro on international maintenance law: "Neue Wege im Internationalen Unterhaltsrecht: Parteiautonomie und Privatisierung des ordre public Seminar in Rio de Janeiro"
- ***Erik Jayme*** on a conference held in Heidelberg on living wills and private international law: "Patientenverfügung und Internationales Privatrecht Tagung im Italienzentrum der Universität Heidelberg"

French Supreme Court Recognizes Foreign Gay Adoption

Yesterday, the French supreme court for private and criminal matters (*Cour de cassation*) held that an American judgment permitting the adoption of a child by the female partner of the mother was not contrary to French public policy and could be recognized in France.

The women were two doctors living in the United State. They had entered into a domestic partnership. The mother was a American national, while her partner was

French. After the child was born, the Superior Court of the county of Dekalb, Georgia, permitted the adoption of the child by the French female partner of the mother in 1999. As a consequence, the birth certificate mentioned that the American woman was the mother, and that the French woman was a parent.

The Paris court of appeal had denied recognition to the judgment. The appeal against their decision is allowed by the *Cour de cassation* which rules that the American judgement is recognised. The French text of the judgment of the *Cour de cassation* can be found here.

This decision is presented as historic by French newspaper *Le Monde*.

Van Den Eeckhout on Transnational Corporate Social Responsibility

Veerle Van Den Eeckhout, who is professor of private international law at Leiden university (the Netherlands) and the University of Antwerp (Belgium), has posted International Environment Pollution and some other PIL–Issues of Transnational Corporate Social Responsibility on RefGov and on SSRN. The Article is in Dutch. The English abstract reads:

> ***A case-study of the instrumentalisation of Private International Law in the year 2010: developments at the beginning of a new decade***
>
> *On the 30th of December 2009, the court of The Hague accepted international competence in the case "Shell/Shell Nigeria". As the jurisdiction issues have been solved, legal proceedings can actually start.*
>
> *During these legal proceedings it is possible that issues about applicable law will come forward. In this article, the author focuses on Private International Law Issues as related to cases like Shell, without focusing however on the PIL-*

issues of the specific Shell case itself.

The article focuses on the Rome II Regulation – the new European PIL-source including rules of applicable law on torts. The crucial question is the following: in how far does the Rome II regulation allow to declare applicable – if desired by the victims – Dutch tort law in cases of "Transnational Corporate Social Responsibility" as they might be brought in future against parent companies holding their seat in the Netherlands, either before the Dutch judge or before another European judge, especially if the claim of the victims concerns Parent Corporation liability for damages occurred in developing countries.

In her attempt to answer this question, the author gives some comments on the impact of national PIL-rules of EU-Member States – e.g. national rules about "surrogate law" – and the interaction of these rules with European interference in PIL, as well as on the impact of the way issues of "qualification" are solved by the EU-Member States – e.g. the complication of the delimitation between "tort law issues" and "corporate law issues" – and the interaction thereof with European interference.

In this analysis, issues about respect for Fundamental Rigths as related to Transnational Corporate Social Responsibility come forward. Particularly, the case of Transnational Corporate Social Responsibility shows how national practices of EU-Member States could lead to more – or less – respect for Fundamental Rights and, more in general, more – or less – protection of "victims", interrelating with European interference in PIL.

It can be freely downloaded here (extensive version) and here.