Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2015: Abstracts

The latest issue of the *"Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)"* features the following articles:

Holger Jacobs, **The necessity of choosing the law applicable to non-contractual claims in international commercial contracts**
International commercial contracts usually include choice-of-law clauses. These clauses are often drafted narrowly, such that they do not cover non-contractual obligations. This article illustrates that, as a result, contractual and non-contractual claims closely linked to the contract risk being governed by different laws. This fragmentation might lead to lengthy and expensive disputes and considerable legal uncertainty. It is therefore advisable to expressly include non-contractual claims within the scope of choice-of-law clauses in international commercial contracts.

Leonard Hübner, **Section 64 sentence 1 German Law on Limited Liability Companies in Conflict of Laws and European Union Law**
The article treats the application of the liability pursuant to § 64 sentence 1 GmbHG to European foreign companies having its centre of main interest in Germany. At the outset, it demonstrates that the rule belongs to the lex concursus in terms of Art. 4 EuInsVO. For the purposes of this examination, the article considers the case law of the ECJ as well as the legal consequences of the qualification. At the second stage, it illustrates that the application of the rule to foreign companies does not infringe the freedom of establishment according to Art. 49, 54 TFEU.

Felix Koechel, **Submission by appearance under the Brussels I Regulation and representation in absentia**
In response to two questions referred by the Austrian Supreme Court, the ECJ ruled that a court-appointed representative for the absent defendant (Abwesenheitskurator) cannot enter an appearance on behalf of the defendant for the purposes of Article 24 of the Brussels I Regulation. This solution seems

convincing because the entering of an appearance by the representative would circumvent the court's obligation to examine its jurisdiction on its own motion under Article 26 para 1 of the Brussels I Regulation. Considering also the ECJ's decisions in cases C-78/95 (Hendrikman) and C-327/10 (Hypote?ní banka) it seems that the entering of an appearance within the meaning of the Brussels I Regulation is generally excluded in case of a representation in absentia. It is, however, doubtful whether the very specific solution adopted by the ECJ in the present case should be applied in other cases of representation in proceedings.

Peter Mankowski, **Tacit choice of law, more preferential law principle, and protection against unfair dismissal in the conflict of laws of employment agreements**

Labour contracts with a cross border element are a particular challenge. They call for a particularly sound administration of justice. Especially, the discharge of employees gives rise to manifold questions. The final decision of the Bundesarbeitsgericht in the case Mahamdia provides a fine example. It tempts to spend further and deepening thoughts on tacit choice of law (with a special focus on jurisdiction agreements rendered invalid by virtue of Art. 23 Brussels Ibis Regulation, Art. 21 Brussels I Regulation/revised Lugano Convention), the most favourable law principle under Art. 8 (2) Rome I Regulation, and whether the general rules on discharge of employee might possibly fall under Art. 9 Rome I Regulation.

Christoph A. Kern, **Judicial protection against torpedo actions**

In the recent case Weber v. Weber, the ECJ had ruled that, contrary to the principle of priority provided for in the Brussels I Regulation, the court second seized must not stay the proceedings if it has exclusive jurisdiction. The German Federal Supreme Court (BGH) applies this ratio decidendi in a similar case. In its reasons, the BGH criticizes – and rightly so – the court of appeal which, in the face of a manifestly abusive action in Italy, had denied an identity of the claims and the parties by applying an "evaluative approach". Nevertheless, the repeated opposition of lower courts to apply the principle of priority is remarkable. The Brussels I recast, which corrects the ECJ's jurisprudence in the case Gasser v. Misat, would, however, allow for an approach based on forum selection: Whenever the parties have had no chance to protect themselves against torpedo actions by agreeing on the exclusive jurisdiction of a court or the courts of a Member State, the court second seized should be allowed to deviate from a strict

application of the principle of priority.

Jörn Griebel, **The Need for Legal Relief Regarding Decisions of Jurisdiction Subject to Setting Aside Proceedings according to § 1040 of the German Code of Civil Procedure**

§ 1040 section 3 of the German Code of Civil Procedure prescribes that a so called "Zwischenentscheid", an arbitration tribunal's interim decision on its jurisdiction, can be challenged in national court proceedings. The decision of the German Federal Court of Justice (BGH) concerned the procedural question whether a need for legal relief exists in such setting aside proceedings concerning an investment award on jurisdiction, especially in situations where an award on the merits has in the meantime been rendered by the arbitration tribunal.

Bettina Heiderhoff, **No retroactive effect of Article 16 sec. 3 Hague Convention on child protection**

Under Article 21 German EGBGB it was possible that a father who had parental responsibility for his child under the law of its former habitual residence lost this right when the child moved to Germany. This was caused by the fact that Article 21 EGBGB connected the law governing parental custody to the place of habitual residence of the child.

Article 16 sec. 1 Hague Convention on child protection (1996) also connects the parental custody to the habitual residence. However, in Article 16 sec. 3 it has a different rule for the above described cases, stating that parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.

The author is critical towards the common understanding of Article 21 EGBGB. The courts should always have interpreted this rule in the manner that is now explicitly fixed in Article 16 sec. 3 Hague Convention. As the rule has been virtually out of force for many years due to the overriding applicability of the Hague Convention, a retroactive change in its interpretation would cause great insecurity.

The essay also deals with various transitional problems. It supports the view of the OLG Karlsruhe, that the Hague Convention cannot be applied retroactively when a child moved to Germany before January 2011.

Herbert Roth, **Rechtskrafterstreckung auf Vorfragen im internationalen Zuständigkeitsrecht**

The European procedure law (Brussels I Regulation) does not make any statement

concerning the scope of substantive res judicata of national judgments. However, the European Court of Justice extends the effects of res judicata to prejudicial questions of the validity of a choice-of-forum clause, in this respect it approves a European conception of substantive res judicata (ECJ, 15.11.2012 – Case C 456/11 – Gothaer Allgemeine Versicherung AG ./. Samskip GmbH, IPRax 2014, p. 163 Nr. 10, with annotation H. Roth, p. 136). The verdict of the higher regional court of Bremen as appellate court had to consider the precedent of the ECJ. It is the final decision after the case was referred back from the ECJ. The international jurisdiction of German courts was rejected in favour of the Icelandic courts, in spite of the defendant's domicile in Bremen.

Martin Gebauer, **Partial subrogation of the insurer to the insured's rights and the incidental question of a non-contractual claim**

The decision, rendered by the local court of Cologne, illustrates some of the problems that arise when the injured party of a car accident brings an action as a creditor of a non-contractual claim against the debtor's insurer, despite the injured party having already been partially satisfied by his insurer as a consequence of a comprehensive insurance policy. The partial subrogation leads to separate claims of the injured party, on the one hand, and its insurer on the other. According to Article 19 of the Rome II Regulation, the subrogation, and its scope, is governed by the same law that governs the insurance contract between the injured party and its insurer. The non-contractual claim, however, which is the object of the subrogation, is governed by a different law and presents an incidental question within the subrogation. The injured party, as claimant, can sue the debtor's insurer in the courts of the place where the injured party is domiciled. The injured party's insurer, however, may not sue the debtor's insurer in the courts of the place where the injured party is domiciled, but is rather forced to bring the action at the defendant's domicile. This may lead to parallel proceedings in different states and runs the risk of uncoordinated decisions being made by the different courts regarding the extent of the subrogation.

Apostolos Anthimos, **On the remaining value of the 1961 German-Greek Convention on recognition and enforcement**

Since the late 1950s, Greece has established strong commercial ties with Germany. At the same time, many Greek citizens from the North of the country immigrated to Germany in pursuit of a better future. The need to regulate the recognition and enforcement of judgments led to the 1961 bilateral convention,

which predominated for nearly 30 years in the field. Following the 1968 Brussels Convention, and the ensuing pertinent EC Regulations, its importance has been reduced gradually. That being the case though, the bilateral convention is still applied in regards to cases not covered by EC law and/or multilateral conventions. What is more interesting, is that the convention still applies for the majority of German judgments seeking recognition in Greece, namely cases concerning divorce decrees rendered before 2001, as well as adoption, affiliation, guardianship, and other family and personal status matters. The purpose of this paper is to highlight the significance of the bilateral convention from the Greek point of view, and to report briefly on its field of application and its interpretation by Greek courts.

David B. Adler, **Step towards the accommodation of the German-American judicial dispute? – The planned restriction of Germany's blocking statute regarding US discovery requests.**

Until today, US and German jurisprudence argue whether US courts are allowed to base discovery orders on the Federal Rules of Civil Procedure instead of the Hague Evidence Convention, despite the fact that evidence (e.g. documents) is located outside the US but in one of the signatory states. While the one side argues that the Hague Convention trumps the Federal Rules and has to be primarily, if not exclusively, utilized in those circumstances, the other side, especially many US courts, constantly resisted interpreting the Hague Evidence Convention as providing an exclusive mechanism for obtaining evidence. Instead, they have viewed the Convention as offering discretionary procedures that a US court may disregard in favor of the information gathering mechanisms laid out in the federal discovery rules. The Hague Evidence Convention has therefore, at least for requests from US courts, become less important over time.

The German Federal Ministry of Justice and Consumer Protection intends to put this debate to an end and to reconcile the differing legal philosophies of Civil Law and Common Law with regard to the collecting of evidence. It plans to alter the wording of the German blocking statute which, up to this date, does not allow US litigants to obtain pretrial discovery in the form of documents which are located in Germany at all. Instead of the overall prohibition of such requests, the altered statute is intended to allow the gathering of information located in Germany if the strict requirements of the statute, especially the substantiation requirements towards the description of the documents, are fulfilled. By changing the statute, Germany plans to revive the mechanisms of the Hague Evidence Convention with

the goal of convincing the US courts to place future exterritorial evidence requests on those mechanisms rather than on the Federal Rules.
The article critically analyses the planned statutory changes, especially with regard to the strict specification and substantiation requirements concerning the documents requested. The author finally discusses whether the planned statutory changes will in all likelihood encourage US courts to make increased usage of the information gathering mechanisms under the Hague Evidence Convention with regards to documents located in Germany, notwithstanding the effective information gathering tools under the Federal Rules of Civil Procedure.

Steffen Leithold/Stuyvesant Wainwright, **Joint Tenancy in the U.S.**
Joint tenancy is a special form of ownership with widespread usage in the USA, which involves the ownership by two or more persons of the same property. These individuals, known as joint tenants, share an equal, undivided ownership interest in the property. A chief characteristic of joint tenancy is the creation of a "Right of Survivorship". This right provides that upon the death of a joint tenant, his or her ownership interest in the property transfers automatically to the surviving joint tenant(s) by operation of law, regardless of any testamentary intent to the contrary; and joint tenants are prohibited from excluding this right by will. Joint tenancies can be created either through inter vivos transactions or testamentary bequests, and for the most part any asset can be owned in joint tenancy. A frequent reason for owning property in joint tenancy is to facilitate the transfer of a decedent's ownership interest in an asset by minimizing the expense and time-constraints involved with the administration of a probate proceeding. Additional advantages of owning property in joint tenancy include potential protections against a creditor's claims or against assertions by a spouse or minor children of homestead rights. Lastly, owning property in joint tenancy can result in inheritance, gift, property and income tax consequences.

Tobias Lutzi, **France's New Conflict-of-Laws Rule Regarding Same-Sex Marriage and the French ordre public international**
On 28 January, the French Cour de cassation confirmed a highly debated decision of the Cour d'appel de Chambéry, according to which the equal access to marriage for homosexual couples is part of France's ordre public international, allowing the court to disregard the Moroccan prohibition of same-sex marriage in spite of the Franco-Moroccan Agreement of 10 August 1981 and to apply Art. 202-1(2) of the French Code civil to the wedding of a homosexual Franco-

Moroccan couple. The court expressly upheld the decision but indicated some possible limitations of its judgment in a concurrent press release.

Research Handbook on EU Private International Law

A new Research Handbook on EU Private International Law, within the Edward Elgar Research Handbooks in European Law series has just been published. It is edited by *Peter Stone*, Professor and *Youseph Farah*, Lecturer, School of Law, University of Essex, UK.

It contains the following contributions:

1. Internet Transactions and Activities
Peter Stone
2. A Step in the Right Direction! Critical Assessment of Forum Selection Agreements under the Revised Brussels I: A Comparative Analysis with US Law
Y*ouseph Farah and Anil Yilmaz-Vastardis*
3. Fairy is Back – Have you got your Wand Ready?
Hong-Lin Yu

4. Frustrated of the Interface between Court Litigation and Arbitration? Don't Blame it on Brussels I! Finding Reason in the Decision of West Tankers, and the Recast Brussels I
Youseph Farah and Sara Hourani

5. Does Size Matter? A Comparative Study of Jurisdictional Rules Applicable to Domestic and Community Intellectual Property Rights
Edouard Treppoz

6. Article 4 of the Rome I Regulation on the Applicable Law in the Absence of Choice – Methodological Analysis, Considerations
Gülin Güneysu-Güngör

7. International Sales of Goods and Rome I Regulation"

Indira Carr

8. The Rome I Regulation and the Relevance of Non-State Law”
Olugbenga Bamodu

9. The Interaction between Rome I and Mandatory EU Private Rules – EPIL and EPL: Communicating Vessels?
Xandra E. Kramer

10. Choice of Law for Tort Claims”
Peter Stone

11. Defamation and Privacy and the Rome II Regulation
David Kenny and Liz Heffernan

12. Corporate Domicile and Residence
Marios Koutsias

More information is available on the publisher’s website.

Which Court is Competent for Prospectus Liability Cases? The CJEU Rules in Kolassa (Case C-375/13)

by *Matthias Lehmann*, University of Bonn

On 28 January 2015, the CJEU has decided for the first time on the question of jurisdiction over alleged liability for a wrong prospectus. The Kolassa judgment is of paramount importance for the future handling of investor claims. In a nutshell, the CJEU holds that the court at the place where the investor is domiciled and has its damaged bank account is competent to decide on the claim under Art 5(3)

Brussels I Regulation (now Art 7(2) Brussels Ia Regulation).

The Facts (as Easy as Possible)

The case concerned an Austrian investor who had bought a certificate from an investment firm in Austria. The certificate had been issued by Barclays UK, which had also distributed an accompanying prospectus, inter alia in Austria. After the value of the certificate had been wiped out completely, the investor brought a claim against Barclays before an Austrian court, alleging that Barclays' prospectus would not have given correct information regarding the way in which the money was to be invested. The Austrian court questioned whether it had jurisdiction to hear the case and submitted a reference for a preliminary ruling.

The Decision (in a Bit more Detail)

The CJEU first rejects to consider prospectus liability as a matter relating to a consumer contract under Art 15 Brussels I Regulation (now Art 17 Brussels Ia Regulation). The Court also rules out a characterization as a contract matter under Art 5(1) Brussels I Regulation (now Art 7(1) Brussels Ia Regulation). This is understandable as the issuer arguably has not freely assumed an obligation towards the investors, at least not with regard to the accurateness of the content of the prospectus. It is astounding, however, that the CJEU refuses a final qualification and asks the Member State tribunal to verify whether there is a contractual obligation or not. The judgment does not provide any guidance on the criteria the national tribunal should use in making such a determination. This is rather unfortunate, given that the term 'contract' must be given an EU autonomous meaning.

In principle, the Court accepts the proposition that prospectus liability is a matter relating to a tort, delict or quasi-delict in the sense of Art 5(3) Brussels I Regulation (now Art 7(2) Brussels Ia Regulation). Using its twin approach to localise the harmful event (see *Mines de potasse*, Case 21/76, aka as "*Bier*"), the Court considers the place of the event giving rise to the damage and the place where the damage occurred.

With regard to the event giving rise to the damage occurred, the CJEU denies that it took place in Austria because all relevant decisions as to the arrangement of the

investments and the content of the prospectus had been taken by Barclays in the UK. The Court also highlights that the prospectus had originally been drafted and distributed there. It follows by implication that the place of the causal event is at the seat of Barclays unless the prospectus has originally been drafted and distributed elsewhere.

The most important and interesting part of the judgment concerns the localisation of damage. The CJEU first reminds of its judgment in Kronhofer (C-168/02), where it had ruled out the domicile of the investor *as such* as the place of financial damage. It goes on to say, however, that the courts in the country of the investor's domicile have jurisdiction 'in particular when the loss occurred itself directly in the applicant's bank account held with a bank established in the area of jurisdiction of those courts' (margin no 55).

This reference to the place of the establishment of the bank that manages the damaged account is remarkable. It coincides with what has been said earlier about the location of economic loss (see Lehmann, (2011) 7 Journal of Private International Law 527). One may wonder, though, why the CJEU also refers to the domicile of the investor. Does the Court want to suggest that it plays a role in determining the place of damage? This would be rather surprising. Perhaps the explanation lies in the way the submitting tribunal had framed the preliminary question, which focused entirely on the question whether the investor's domicile can be a basis of jurisdiction. The best way to read the Court's answer is probably that the damage arises at the domicile *only* under the condition that the investor's bank account is located there. Regrettably, the judgment still leaves room for speculation which court would be competent if the bank account from which the investor paid for the securities were located outside his domicile.

Particularly noteworthy are the criteria that the judgment does not mention. The Advocate General had suggested to consider the place of publication of the prospectus as an 'indicator' for where the harmful event occurred (see Conclusions by GA Szpunar of 3 September 2014, para 64 et seq). Similarly, many authors have proposed to look at the market on which the securities have been offered. The CJEU does not even discuss these views. One must understand its silence as rejection.

Furthermore, the judgment may have far reaching implications for conflict of laws. As is well known, Art 4(1) Rome II Regulation uses the same criterion of the

‘place where the damage occurred’ that is the second prong of the tort jurisdiction under Art 5(3) Brussels I Regulation (now Art 7(2) Brussels Ia Regulation) in order to determine the applicable tort law. If parallel interpretation still is a goal and Recital 7 of the Rome II Regulation should not be devoid of all meaning, then it seems that the Kolassa ruling must be followed in the area of conflict of laws as well. Yet this would cause a complete dispersal of the law applicable to prospectus liability. An issuer would potentially be liable under the laws of all countries of the world in which investors are domiciled and have bank accounts. Whether and to what extent this result can be avoided by using the escape clause in Art 4(3) Rome II Regulation is doubtful. The better way seems to introduce a special conflicts rule for financial torts (on this issue, see Lehmann, *Revue critique de droit international privé* 2011, 485).

For Those Not Interested in Financial Law

The Court also rules on a point that is of general interest outside the special area of prospectus liability: To which extent does a court have to take evidence in order to determine its jurisdiction? The answer given by the CJEU is somewhat sibylline. On the one hand, it rules that the tribunal seised does not have to enter into a comprehensive taking of evidence at this early stage of the procedure and may ‘regard as established … the applicant’s assertions’ (paras 62 and 63). At the same time, it requires the national tribunal to examine its international jurisdiction ‘in the light of all the information available to it, including, where appropriate, the defendant’s allegations’ (para 64). Can somebody make sense of this, please?

Volume on Private International Law in Mainland China, Taiwan

and Europe

Jürgen Basedow and Knut B. Pißler, both from the Max Planck Institute for Comparative and International Private Law in Hamburg, have edited a book on "Private International Law in Mainland China, Taiwan and Europe". The book has been published by Mohr Siebeck.

The official abstract reads as follows:

> *Over the last decades, private international law has become the target of intense codification efforts. Inspired by the stimulating initiatives taken by some European countries, by the Brussels Convention and the Rome Convention, numerous countries in other regions of the world started to enact comprehensive legislation in the field. Among them are Taiwan and mainland China. Both adopted statutes on private international law in 2010. In light of the rising significance of the mutual economic and societal relations between the jurisdictions involved and of the legal innovations laid down in the new instruments, the Max Planck Institute for Comparative and International Private Law convened scholars to present the conflict rules adopted in Europe, in mainland China and in Taiwan across a whole range of private law subjects. This book collects the papers of the conference and presents them to the public, together with English translations of the acts of Taiwan and mainland China.*
>
> *Survey of contents:*
> ***Part 1: Jurisdiction, Choice of Law, and the Recognition of Foreign Judgments in Recent*** *Legislation Jin Huang: New Perspectives on Private International Law in the People's Republic of China – Rong-Chwan Chen: Jurisdiction, Choice of Law and the Recognition of Foreign Judgments in Taiwan – Stefania Bariatti: Jurisdiction, Choice of Law and the Recognition of Foreign Judgments in Recent EU Legislation*
>
> ***Part 2: Selected Problems of General Provisions***
> *Weizuo Chen: Selected Problems of General Provisions in Private International Law: The PRC Perspective – Rong-Chwan Chen: General Provisions in the Taiwanese Private International Law Enactment 2010 – Jürgen Basedow: The Application of Foreign Law – Comparative Remarks on the Practical Side of Private International Law*

Part 3: Property Law
Huanfang Du : The Choice of Law for Property Rights in Mainland China: Progress and Imperfection – Yao-Ming Hsu: Property Law in Taiwan- Louis d'Avout: Property Law in Europe

Part 4: Contractual Obligations
Qisheng He: Recent Developments of New Chinese Private International Law With Regard to Contracts – David J.?W. Wang: The Revision of Taiwan's Choice-of-law Rules in Contracts – Pedro A. De Miguel Asensio: The Law Applicable to Contractual Obligations. The Rome I Regulation in Comparative Perspective

Part 5: Non-Contractual Obligations Guoyong Zou: The Latest Developments in China's *Conflicts Law for Non-contractual Obligations – En-Wei Lin: New Private International Law Legislation in Taiwan: Negotiorum Gestio, Unjust Enrichment and Tort – Peter Arnt Nielsen: Non-Contractual Obligations in the European Union: The Rome II Regulation*

Part 6: Personal Status (Family Law/Succession Law)
Yujun Guo: Personal Status in Chinese Private International Law Reform – Hua-Kai Tsai: Recent Developments in Taiwan's Private International Law on Family Matters – Katharina Boele-Woelki: International Private Law in China and Europe:A Comparison of Conflict-of-law Rules Regarding Family and Succession Law

Part 7: Company Law
Tao Du: The New Chinese Conflict-of-law Rules for Legal Persons: Is the Middle Way Feasible? – Wang-Ruu Tseng: Private International Law in Taiwan – Company Law – Marc-Philippe Weller: Companies in Private International Law – A European and German Perspective

Part 8: International Arbitration
Song Lu: China – A Developing Country in the Field of International Arbitration – Carlos Esplugues Mota: International Commercial Arbitration in the EU and the PRC: A Tale of Two Continents or 28+3 Legal Systems

Further information ist available here.

Kühn on Imbalance in Joint and Several Debt in Private International Law

Anna-Lisa Kühn has authored a book on the imbalance in joint and several debt in private international law (“Die gestörte Gesamtschuld im Internationalen Privatrecht. Am Beispiel einer Spaltung des Mehrpersonenverhältnisses zwischen deutschem und englischem Recht”). The book is written in German and has been published by Mohr Siebeck.

The abstract reads as follows:

> *Anna-Lisa Kühn analyzes a situation in which a creditor has a claim against several debtors whose obligations are governed by different legal systems and who would be liable for the same claim could one of them not rely on an exemption from liability, the impact of which is assessed differently by the legal systems involved. She shows how this should be treated under the Rome I and Rome II Regulations.*

More information is available here.

Latest Issue of “Praxis des Internationalen Privat- und

Verfahrensrechts" (5/2014)

The latest issue (September/October) of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** contains the following articles**:**

- ***Christian Schall/Johannes Weber***: "The precautionary choice of the law applicable to divorce according to Rome III"

The Regulation (EU) No. 1259/2010 (Rome III) has put conflict of law rules in cross-border divorce cases on a new footing. By implementing a wide range of possibilities to designate the applicable law, Rome III establishes party autonomy as a key principle in international divorce law. This article focuses on contractual choices of law prior to divorce proceedings and analyses substantial and formal provisions of choice of law clauses in marriage contracts.

- ***Deniz Halil Deren***: "The effect of a Swiss insolvency on domestic proceedings"

Foreign insolvency proceedings can force a temporary stay of domestic court proceedings. In respect of insolvency proceedings in Member States of the EU, Article 15 EIR (Insolvency Regulation (EC) 1346/2000) provides for a temporary stay of domestic court proceedings; for insolvency proceedings in non-Member States, the governing provision is § 352 InsO (German Insolvency Act). This article discusses whether the requirements of § 352 InsO are met in the event of a Swiss insolvency (Konkurs) as per Article 197 et seq SchKG (Swiss Insolvency Act). This question is of current importance in light of the recent judgment by the Bundesgerichtshof (German Supreme Court) of December 2011 which rejects the view that domestic court proceedings should be stayed following a Swiss moratorium (Nachlassstundung) under Article 293 et seq SchKG (old version). The article takes into account the new Swiss provisions on moratoria, Article 293 et seq SchKG (new version, in force since 1 January 2014).

- ***Robert Arts:*** "On the applicability of Regulation (EC) No. 1346/2000 – No unwritten requirement for a connection to more than one Member State to constitute international jurisdiction pursuant to Art. 3 (1) InsReg"

After confirming the applicability of the Insolvency Regulation on actions to set transactions aside in its landmark Seagon-decision, the ECJ now answers the remaining question of whether this applicability requires the defendant to be the resident of a Member State. After examining its wording and purpose as well as considering the practical implications, the Court concludes that the application of the Regulation does not necessitate such an unwritten connection to a second Member State.

Beyond the scope of application of Regulation (EC) No. 1346/2000 itself, the decision has bearing on the underlying issue of whether or not the EU law-maker does have the competence to regulate relationships between individual Member States and third states. The Court's interpretation of Art. 85 TFEU does assume the possibility of such a competence in principle.

- ***Felix Koechel:*** "When is the jurisdiction of the court first seised deemed to be established within in the meaning of Art. 27 of the Brussels I Regulation?"

The question when the jurisdiction of the court first seised is deemed to be established is vital for the coordination of parallel proceedings under Art. 27 of the Brussels I Regulation (Brussels I). However, a full reply to the question has yet to be achieved, as recent references for a preliminary ruling to the ECJ by, respectively, the French Cour de cassation, the German Higher Regional Court of Munich and the German Federal Supreme Court demonstrate. In particular, it is unclear whether it is necessary that the court first seised has impliedly or expressly rendered a decision on the issue of jurisdiction. Answering to the question referred by the Cour de cassation, the ECJ held that jurisdiction is deemed to be established within the meaning of Art. 27 (2) Brussels I if the requirements of submission according to Art. 24 Brussels I have been met before the court first seised. In that case, the second court must not await a decision of the court fist seised before declining jurisdiction according to Art. 27 (2) Brussels I. Contrary to the ECJ's decision, the second court should be requested to await a decision of the court first seised on its jurisdiction when applying Art. 27 Brussels I, especially when the first court might assume jurisdiction according to Art. 24 Brussels I. The main proceedings in the present case also gave rise to questions regarding the court's obligation to stay

proceedings and decline jurisdiction on its own motion under Art. 27 Brussels I. Contrary to the current concept set forth in Art. 27 Brussels I, under Art. 29 of the Brussels I Recast not only the legal requirements for the existence of this obligation but also the procedure to be followed by the second may be should be established autonomously.

- ***Wolfgang Hau:*** "Is there an appeal in law based on a violation of foreign law?"

Under the traditional German rules of civil procedure it was well established that provisions of foreign law were rules of law and not questions of fact. Nevertheless, the Federal Court of Justice would not review the application of foreign law by lower courts. In 2009 the relevant provision in the Code of Civil Procedure (§ 545) was modified. This was widely perceived as good reason to recede from the traditional rule of non-review and to allow an appeal in law based on a violation of the applicable foreign law. However, the Federal Court of Justice has recently refused to draw this conclusion from the new wording of § 545. This article argues that the correctness of this decision is doubtful and that the jury (i.e. the Federal Constitutional Court) is still out.

- ***Hans Jürgen Sonnenberger:*** "Die internationalprivatrechtliche Behandlung der Zession einer Kaufpreisforderung aus einem der CISG unterliegenden Kaufvertrag und der anschließenden Legalzession im grenzüberschreitenden Verhältnis Käufer-Verkäufer-Factor-Warenkreditversicherung"

The judgment of the Higher Regional Court (Oberlandesgericht) Oldenburg concerns the law applicable to a debtor – assignee (by operation of law) relationship in the case of successive cessions in the period prior to application of the Rome I Regulation. The cessions relate to claims originating from a sales contract subject to the CISG and arose as a result of factoring between seller and factor and performance between factor and insurance carrier due to trade credit insurance. The focus of the Higher Regional Court's statements is put on private international law issues concerning the applicable law, to which the following comments will be limited. Moreover, the Higher Regional Court had to consider a set-off by the purchaser, the private international law aspects of which will also be addressed briefly.

- ***Dirk Looschelders:*** "The Legal Situation of Commercial Heir Locators in German-Austrian Legal Relations"

The legal situation of commercial heir locators differs in Germany and Austria. The BGH rejects a right of the heir locator to reimbursement for expenses in negotiorum gestio, whereas the OGH has repeatedly recognized such a claim. Therefore, the heir locator's rights decisively depend on the applicable law pursuant to Art. 11 of the Rome II Regulation. In its decision the LG München I has referred to the place of the heir locator's initial activities. A preferable point of contact is however the location of the estate. In the present case both approaches lead to the application of Austrian law. The Austrian courts allow the heir locator a reimbursement amounting to 30% of the heir's proportional inheritance right. Though this conflict with the principle of the parties' negative freedom of contract and the constitutional guarantee of the right of succession, it does not quite rank as a violation of the ordre public.

- ***Carl Friedrich Nordmeier:*** "Interspousal Gifts in Private International Law: German-Portuguese Cases according to the Introductory Act to the German Civil Code, the Rome I-Regulation and the Proposal for a Regulation in matters of Matrimonial Property"

Interspousal gifts in cross-border cases cause particular problems if they – as in Portuguese law – have to comply with particular rules regarding form or are freely revocable. This contribution analyses the validation of contracts invalid as to form that is provided for in § 311b (1) (2) German Civil Code if the immovable property is located abroad. Then, the validation of a gift according to § 518 (2) German Civil Code is discussed if effected by a bank transfer to a joint bank account to which foreign law applies. In such a case, there is no disposition related to the transfer of property in terms of art. 11 (4) of the Introductory Act to the German Civil Code. With regard to the Proposal for a EU-Regulation in matters of Matrimonial Property, rules which prohibit interspousal gifts should be classified as being rules of matrimonial property. Regarding procedural law, this contribution discusses under which circumstances the question of the applicable law can be left open for the purpose of an appeal to the German Federal Court of Justice.

- ***Carl Friedrich Nordmeier****:* "The french instituion contractuelle in

Private International Law: Questions of conflict of laws and material law from a German and European perspective”

The French institution contractuelle concluded between spouses during the marriage is considered a disposition of property upon death for the purpose of art. 26 (5) (1) of the Introductory Law of the German Civil Code. The present contribution analyses the determination of the law of succession hypothetically applicable at the moment the institution contractuelle is concluded, with special regard to the fixation of the renvoi. In this context, the validation of a disposition of property upon death by the law effectively applicable to the succession is rejected. In a second step, the integration of the institution contractuelle into German material law is discussed. The nomination of a spouse as beneficiary to the greatest possible extent can be interpreted as a donation of the entire succession in accordance with § 2301 German Civil Code. A third step focuses on the new European Private International Law of Successions (Regulation (EU) No. 650/2012). An institution contractuelle is considered an agreement as to succession, meeting the definition in art. 3 (1) (b) of the Regulation. For an implicit choice of law, a distinction should be made between the intention to elect a certain law and to plan the estate in a certain way according to the material law applicable.

- ***Apostolos Anthimos:*** “On the application of Art. 14 Insolvency Regulation in Greece”

On the occasion of an opening of insolvency proceedings in Bitburg, Germany, the Thessaloniki CoA issued last year a highly interesting judgment on the application of Art. 14 Insolvency Regulation. This is the first decision applying the rule in Greece.

- ***Bea Verschraegen/Florian Heindler***: “Änderungen im russischen Internationalen Privatrecht”

This contribution deals with the amendments of the conflict rules in Chapter VI of the Russian Civil Code that entered into force on 1 November 2013. Special attention is dedicated to the changes regarding the rules on contracts, in particular to consumer contracts and agency, as well as to the increased role of choice of law. The strengthening of party autonomy reveals to be a special

feature of the law reform and becomes visible in various areas, such as the conflict rules for the form and torts. In the context of torts the changes regarding the objective attachment as well as the new rule on direct action against the insurer of the person liable, the rule on culpa in contrahendo, and the conflict rules on restriction of free competition are dealt with. Further amendments were made regarding the rules on property and related rights and also regarding the lex societatis. Furthermore, the amendments concerning the public policy-clause and the overriding mandatory rules are discussed by highlighting their different scope and consequences. Finally, the article focuses on the importance of the reform and the impact it has on the development of Russian conflict of law-rules.

- ***Erik Jayme/Sebastian Seeger:*** "Internationales Kunstrecht – Tagung in Basel"

Vogel on Choice of Law relating to Personality Rights

As a result of the global spread of media content, cross-border infringements of personality rights have increased significantly over recent years. However, the question of which law applies in these instances remains largely answered (see, for example, our online symposium as well as various posts). A recently published monograph, "Das Medienpersönlichkeitsrecht im Internationalen Privatrecht", takes up the long-running debate about a Europe-wide harmonisation of national conflict of law rules relating to personality rights. The author Benedikt Vogel, engages in a comparative analysis of media-related infringements in substantive and conflict of laws in Germany, France and the UK. The author develops a new proposal for a conflict of law rule for personality rights infringements. In doing so he takes into account the (failed) negotiations preceding the adoption of the Rome II Regulation which brought again to light the need for flexibility and compromise in all member states. The proposal aims to

satisfy all conflicting interests: those of the plaintiff and the media, those of the courts in view of practicability and efficiency and, last not least, the public's interest in protecting the freedom of expression and information in Europe.

The book has been published by Nomos and is written in German. Further information (in German) is available here.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2014)

The latest issue (July/August) of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** contains the following articles:

- ***Maximilian Hocke***: "Characterizing the culpa in contrahendo under Art. 12 Rom II-Regulation" – The English abstract reads as follows:

This article explores the scope of Art. 12 Rome II Regulation. According to Recital (30) Rome II Regulation, personal injuries shall not be covered by Art. 12, but rather disclosure duties as well as negotiation breakdowns. The article argues that the recent construction – Art. 12 addresses specific transactional duties and Art. 4 general duties – is too vague. Instead, a precise characterization of the culpa in contrahendo will be established by referring to comparative law. This characterization focuses on expectation as a condition for respective claims.

- ***Sebastian Mock***: "Verschuldete und unverschuldete Fristversäumnis im Europäischen Mahnverfahren"
- ***Felix Koechel***: "Section 23 of the German Code of Civil Procedure: For Domestic Claimants only?" – The English abstract reads as follows:

Seemingly in line with former case law, the Third Civil Panel of the German Federal Court of Justice (BGH) held that Section 23 of the German Code of Civil Procedure (ZPO) – providing for an exorbitant ground of jurisdiction based on the location of property of the defendant – is to be interpreted restrictively. According to case law, this provision requires (beyond its wording) a "sufficient connection of the dispute" with the State of forum. However, the Third Civil Panel virtually turned Section 23 ZPO into a claimant's forum when it held that the plaintiff's domicile in Germany already establishes such a connection. What started in 1991 as a quest of the Eleventh Civil Panel of the BGH to diminish the exorbitant character of Section 23 ZPO has thus been exploited to openly privilege domestic claimants. This article gives an overview on the development of the case law, and illustrates the inconsistency of the decision of the Third Civil Panel.

- ***Carl Friedrich Nordmeier:*** "French proceedings for the determination of paternity and German proceedings for a right to a compulsory portion: scission of the estate and coordination of proceedings according to § 148 German Code of Civil Procedure" – The English abstract reads as follows:

Under French and German law, the right to a compulsory portion of the estate depends on the number of descendants the deceased left. The present article analyses a succession with connections to France and Germany, in which the ancestry of one of the persons involved is doubtful. In case of scission of the estate, the calculation of a right to a compulsory portion in one part of the estate has to take into account the designation as an heir in another part of the estate if the rational of this right demands so. From a procedural point of view, the coordination of French proceedings for the determination of paternity and German proceedings for a right to a compulsory portion is discussed. Pursuant to § 148 (1) German Code of Civil Procedure, German proceedings can be stayed as a result of assessing the individual circumstances of the case in the light of the purposes of this provision. Results of foreign procedures for the safeguarding of means of proof can be used in German proceedings according to § 493 (1) German Code of Civil Procedure if the foreign proceedings are substitutable for a German independent procedure of taking evidence.

- ***Heinrich Dörner***: "The qualification of § 1371 Sect. 1 Civil Code – a

missed opportunity" – The English abstract reads as follows:

It is still discussed controversially whether § 1371 Sect. 1 Civil Code can be applied when succession after the deceased spouse is controlled by foreign law. The Federal Court of High Justice did not comment on this question in its judgment of 9th September 2012. This article will summarize current jurisprudence and outline the legal situation after the European Regulation on jurisdiction and applicable law in matters of succession will have come into force.

- ***Marianne Andrae:*** "Post-marital maintenance concerning a failed marriage between a German and a Swiss spouse" – The English abstract reads as follows:

The key aspect of the decision, which is discussed, lies on the law applicable to maintenance obligations. The issues to be resolved concern, in particular, the delimitation between the Hague Convention on the law applicable to maintenance obligations (HU
1973) and the Hague Protocol of 2007 for the determination of the law applicable to maintenance obligations (HUP) and the requirements for the use of the escape clause for the conjugal maintenance (Art. 5 HUP). Another aspect covers the assignation of the appropriate maintenance in accordance with § 1578 b BGB, if the dependent spouse has moved in consequence of the marriage from abroad to Germany and as consequence of the marriage is not gainfully employed. The last issue concerns the qualification of a contractual provision on the right to a monetary payment, which is drawn from Art. 164 Swiss Civil Code (ZGB).

- ***Tobias Helms***: "Implied choice of law applicable to divorce under Article 5 (1) of the Rome III Regulation?" – The English abstract reads as follows:

Contrary to the opinion of the OLG Hamm, it is highly doubtful whether Article 5 (1) of the Rome III Regulation permits an implied choice of law applicable to divorce. The fact that Iranian spouses agree in their marriage contract on offering the wife under certain, strict conditions the possibility to divorce does definitely not constitute such an implied choice of law. The finding made by the OLG Hamm on the point that Article 10 of the Rome III Regulation does not

necessarily preclude the choice of Iranian law, is, however, correct.

- ***Marc-Philippe Weller/Alix Schulz***: "The application of § 64 GmbHG to foreign companies" – The English abstract reads as follows:

The following article discusses the classification of § 64 GmbHG, pursuant to which directors are obligated to compensate payments effectuated to single creditors of the company despite of its insolvency. We are going to demonstrate that § 64 GmbHG is part of the lex concursus and thus falls into the scope of Art. 4 European Insolvency Regulation. The liability rule of § 64 GmbHG would then be applicable to managing directors of foreign companies having their centre of main interest in Germany. In a second step it is, however, to be determined whether the application of § 64 GmbHG violates the freedom of establishment (Art. 49, 54 TFEU) of EU-foreign companies with their centre of main interest in Germany.

- ***Thomas Pfeiffer:*** "Again: The Market as a Connecting Factor and the Country of Origin Principle in the Area of E-Commerce" – The English abstract reads as follows:

The decision of the Austrian Supreme Court of November 28th, 2012 demonstrates the difficulties of the interplay between the E-Commerce Directive and the Rome II-Regulation; it needs to be analyzed not only against the background of the ECJ's eDate Advertising decision but also with regard to other sources of EU conflicts law: Whereas the Directive's Country of Origin-Principle does not exclude Member State choice of law rules, such rules may be applied only insofar as they are in line with inter alia the Rome II-Regulation. The Austrian § 20 Electronic Commerce Act, if construed as a conflict of laws rule, is not acceptable under this standard. Therefore the applicable choice of law rule for commercial practices in the area of E-Commerce is to be found in Art. 6(1) Rome II-Reg. With regard to advertisements, this provision has to be construed as referring to the laws of the state where the advertisement affects its addresses, not the state where the services are rendered or the goods delivered. In case an advertisement has effects in more than one state, there is a need for some limits as to an application of laws of a state where the effect is only minimal; it is, however, doubtful whether Art. 6 Rome II-Reg. is open for this interpretation. Additionally, the courts of the country of origin have to

make sure that standards of their own laws are met (Art. 3(1) E-Commerce-Directive); this requirement only applies if the target country is an EU Member State. The latter statement, however, is not an acte clair.

- ***Martin Metz***: "Narrowing personal jurisdiction: Recent US Supreme Court jurisprudence" – The English abstract reads as follows:

After remaining silent on the topic for 25 years, the US Supreme Court recently reentered the contentious field of personal jurisdiction. With four decisions issued in the short period from 2011 to 2014, the Court reshaped and confined the concepts of personal jurisdiction and minimum contacts. In Goodyear and Daimler the Court narrowed the concept of general jurisdiction. In order to assert general jurisdiction over a corporate defendant, corporate affiliations with the forum state must be so continuous and systematic as to render the corporation "essentially at home" in the forum state. The McIntyre decision restricted specific jurisdiction in product liabilities cases, whereas theWalden decision limited specific jurisdiction in tort cases. In both instances, personal jurisdiction cannot be based solely on the fact that the conduct or the injury occurred in the forum state. Rather, it is crucial that the defendant purposefully created contacts with the forum state. Taking into account all four decisions with regard to personal jurisdiction, the Court is currently re-emphasizing considerations of territoriality over considerations of litigational fairness.

- ***Hilmar Krüger/Wagih Saad***: "Private International Law in the Sultanate of Oman" – The English abstract reads as follows:

The Sultanate of Oman is – with only the state of Bahrain still missing – the penultimate state among the small countries of the Arab Peninsula to codify its rules of conflict of laws. The Omani rules of private international law are contained in the Introductory Chapter of the Civil Code (act no. 29 of 2013). The Omani Civil Code entered into force August 12, 2013. The act is based on the models of Egypt, Jordan, and the UAE. Deviations are rare.

Fourth Issue of 2013's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The fourth issue of 2013 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features two articles and one comment.

Paola Ivaldi, Professor at the University of Genoa, examines the issue of environmental protection in the context of European Union law and private international law in **"Unione europea, tutela ambientale e diritto internazionale privato: l'art. 7 del regolamento Roma II"** (European Union, Environmental Protection and Private International Law: Article 7 of the Rome II Regulation; in Italian).

> *Art. 7 of Regulation No 864/2007 (so called Rome II Regulation) provides for a specific conflict of law rule concerning liability for environmental damage, which empowers the person sustaining the damage to choose between the application of the lex loci damni and the application of the lex loci actus. The present article analyses the rationale underpinning the attribution to only one of the parties concerned (the person sustaining the damage) of the unilateral right to choose the law applicable to their relationship, and it concludes that the provision at issue does not purport to alter the equal balance between such parties, as it rather aims at ensuring a high level of environmental protection, both by preventing a race to the bottom of the relevant national legal standards and by discouraging the phenomenon known as environmental dumping. Furthermore, the article compares the specific provision laid down by Art. 7 of the Rome II Regulation with the general conflict of laws rule provided by Art. 4 and Art. 14 of the same instrument, with particular reference to the role played – in the peculiar context of environmental liability – by party autonomy and to the different relevance attributed by such rules to the lex loci damni and to the lex loci actus.*

Anne Röthel, Professor at the Brucerius Law School in Hamburg, discusses party autonomy under the Rome III Regulation in **"Il regolamento Roma III: spunti per una materializzazione dell'autonomia delle parti"** (The Rome III Regulation: Inputs for Concretizing Party Autonomy; in Italian).

> *Regulation (EU) No 1259/2010 of December 20th 2010, the so-called "Rome III" Regulation, lays down uniform conflict-of-laws rules on divorce and legal separation. It represents the first case of enhanced cooperation between (part of) the Member States of the European Union, and it became applicable on June 21st 2012. After reporting the criticism of German legal literature, the author points out that the Regulation, although at first sight only aiming at international private law, finally covers substantial matters such as the scope of autonomy when it comes to divorce and legal separation. Her analysis comprises as a first step a comparative view which underlines the existence of deeply rooted legal and cultural differences in the field of divorce. She also presents statistical data regarding the situation in Germany. In this context she highlights the meaning of the "availability" of divorce in the "conservative" legal systems and in the "liberal" ones, that basically depends on whether marriage is conceived entirely as a legal institution or as well as a contract depending on the autonomy of the parties. Secondly, she focuses on Art. 5 of Regulation No 1259/2010 that allows the spouses to determine the law applicable to divorce and legal separation. In this respect, the Regulation goes farther than the existing national rules of international private law. The author questions therefore the legitimacy of party autonomy within private international law. Finally, she examines the conditions for a valid choice of law. The German legislator decided to impose the form of a public (notarial) act for the choice-of-law agreement. The author questions whether the fulfillment of the formal requirements can sufficiently guarantee by itself that the parties are aware of the impact of their decision. She therefore suggests a further judicial control to take place in order to guarantee autonomous decisions in the light of the fundamental rights and the jurisprudence of German Federal Constitutional Court on agreements in matters of matrimonial property regimes.*

In addition to the foregoing, the following comment is also featured:

Ester Di Napoli, PhD in Law, **"A Place Called Home: il principio di territorialità e la localizzazione dei rapporti familiari nel diritto**

internazionale privato post-moderno" (A Place Called Home: The Principle of Territoriality and the Localization of Family Relations in Post-Modern Private International Law: in Italian).

> *The way in which space is conceived and represented in private international law is changing. This development reflects, on the one hand, the emergence of non-territorial spaces in the legal discourse (the market, the Internet etc.) and, on the other, the acknowledgment, in various forms and subject to different limitations, of the individual's "right to mobility". The interests of States and those of social groups are gradually losing ground to the interests of the individual, the freedom and self-determination of whom is now often likely to be exercised in the form of a choice of law. In the field of family law, European private international law shapes its rules by taking into account the "fluidity" of postmodern society: conflict-of-laws rules become more flexible and "horizontal", while the "myth" of abstract certainty is outweighed by the quest for adaptability and effectiveness.*

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale. This issue is available for download on the publisher's website.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (2/2014)

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

- ***Moritz Renner/Marie Hesselbarth***: "Corporate Control Contracts and the Rome I Regulation"

> *The article deals with the law applicable to control contracts within a group of*

corporations in the sense of §§ 291 et seq. AktG. Here, the Rome I Regulation calls for a reassessment of current conflict-of-laws approaches. As the article seeks to show, applying the Rome I Regulation to corporate control contracts demands a contractual qualification of the latter. Interpreting the notions "contractual obligations" and "questions governed by the law of companies" according to EU law methods leads to an extensive definition of the former and a narrow scope of application of the latter provision. Two aspects merit special attention. First, a systematic comparison to the Brussels I Regulation has to be drawn. Under Brussels I, the ECJ has extensively interpreted the term "contractual relation", especially in contrast to company law questions. Secondly, primary EU law, namely the freedom of establishment, demands contractual freedom of choice for corporate control contracts. Domestic law provisions protecting creditors and minority shareholders can be applied as overriding mandatory provisions in the sense of art. 9 Rome I Regulation.

- ***Jürgen Stamm***: "A plea for the abandonment of the European account preservation order – Ten good reasons against its adoption"

The cross-border enforcement of claims shall be facilitated by the adoption of a European account preservation order. In view of the heterogeneous enforcement systems of the EU Member States this undertaking resembles the attempt to introduce a European enforcement law through the back door. In addition, the current draft of a Council Regulation considers neither the constitutional principles nor the system of the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The following article illuminates these aspects and makes suggestions to reduce obstacles to the cross-border enforcement of claims in the existing system of Council Regulation (EC) No 44/2001.

- ***Oliver L. Knöfel:*** "A new approach to EU Private International Law for seamen's employment agreements: with special reference to the employer's engaging place of business"

The article reviews a judgment of the European Court of Justice (Fourth Chamber) of 15 December 2011 (C-384/10), relating to the construction of Article 6(2)(b) of the Rome Convention of 19 June 1980 on the law applicable to

contractual obligations. Dealing with labour aboard a sea-going vessel, the ECJ ruled that the concept of "the place of business through which the employee was engaged" must be understood as referring exclusively to the place of business which engaged the employee and not to that with which the employee is connected by her actual employment. Thus, the ECJ approaches a modern classic of European conflicts law in employment matters, but unfortunately takes the wrong side in a long-standing controversy between a "contract test" and a "function test". The author analyses the relevant issues of cross-border labour in the transportation sector, explores the decision's background in EU private international law, and discusses its consequences for the coherency and justice of the system of connecting factors in Art. 6 Rome Convention/Art. 8 Rome I Regulation.

- ***Herbert Roth***: "Europäischer Rechtskraftbegriff im Zuständigkeitsrecht?"– the English abstract reads as follows:

The European Court of Justice has developed an autonomous conception of substantive res judicata concerning a special question of the international jurisdiction of the courts. The claim dismissing adjudication by first instance courts comprises, inter alia, the prejudicial question of the validity of a choice-of-forum clause, which shall be binding on the Court of recognition in accordance with Art. 33 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The decision must be rejected because the interests of the parties are not taken into account sufficiently.

- ***Nils Lund***: "Der Rückgriff auf das nationale Recht zur europäisch-autonomen Auslegung normativer Tatbestandsmerkmale in der EuGVVO"– the English abstract reads as follows:

The ECJ's decision discussed in this article concerns two provisions of the Brussels I Regulation. In the first part of its ruling the ECJ has held that the concept of "civil and commercial matters" of Art. 1(1) includes an action for recovery of an amount unduly paid by a public body in compensation of an act of persecution carried out by a totalitarian regime. The second part of the decision, that is concerning Art. 6(1), clarifies that a "close connection" between the claims exists if the defendant's pleas have to be determined on a

uniform basis and that the provision does not apply to defendants domiciled outside of the EU. Regarding the approach of the court to the interpretation of the terms "civil and commercial matters" and "close connection", this article concludes that the autonomous construction of the Regulation does in certain cases allow for the recourse on national law.

- ***Reinhold Geimer:*** "Streitbeendigung durch Vergleich in Südafrika"
- ***Jan D. Lüttringhaus: "***Eingriffsnormen im internationalen Unionsprivat- und Prozessrecht: Von Ingmar zu Unamar" – the English abstract reads as follows:

Thirteen years after the landmark Ingmar case, the ECJ has again been asked to define the concept of overriding mandatory provisions and, in particular, to characterise national rules transposing Directive 86/653/EEC on commercial agents. Whereas in Ingmar the parties had chosen the law of a non-EU-Member State that did not provide for a level of protection required by European law, Unamar involves a scenario where the law designated by the parties is the law of a Member State which meets the minimum requirements laid down by Directive 86/653/EEC. The question brought before the ECJ in the case at hand is whether the court of another EU Member State may nonetheless apply its national provision as overriding mandatory rules on the grounds that the protection of a commercial agent under the lex fori goes beyond that provided for by the European Directive. Since the ECJ answers this question in the affirmative, Unamar may have far-reaching consequences for the system of European private international law.

- ***Dirk Looschelders***: "Continuance or Extinction of Parental Responsibility after a Change of Habitual Residence"

Different legal systems provide very different rules for determining the parental responsibility of non-married parents. Therefore, if the habitual residence of the child changes, the joint responsibility of non-married parents established under the law of the child's former residence state may become extinct under the law of the new residence state. In order to avoid this unreasonable result, Article 16 (3) of the 1996 Hague Convention on the Protection of Children expressly rules that parental responsibility which exists under the law of the state of the child's

habitual residence persists after a change of that habitual residence to another state. However, Article 16 (3) is not applied in German courts if the child's habitual residence changed before the Convention came into force in Germany on 1 st January 2011. In such cases, joint parental responsibility appears to cease.

The present decision of the Oberlandesgericht Karlsruhe shows that the problems usually can be solved by a judicial order awarding parental responsibility back to both parents. Nevertheless, with regard to cases of child abduction it is preferable to maintain joint parental responsibility on a continuing basis by limiting changes in the law governing parental care according to Article 21 EGBGB.

- ***Florian Eichel:*** "The application of s. 287 of the German Code of Civil Procedure (investigation and estimation of damages) within the scope of the Rome I and Rome II Regulations"

S. 287 of the German Code of Civil Procedure (dZPO) empowers a court to estimate a damage at its discretion and conviction, when the issue of whether or not damages have occurred is in dispute among the parties. The assessment is based on the court's evaluation of all circumstances. The court, therefore, may decide at its discretion whether or not – and if so, in which scope – any taking of evidence should be ordered as applied for, or whether or not any experts should be heard. Where the law to be applied is foreign law, the question arises whether a German court may refer to s. 287 dZPO as lex fori or whether s. 287 dZPO has to be classified as substantive law preventing the court from estimating the damage when such a rule is unknown by the lex causae. Recently, two German district courts adopted a different view on this issue and, thus, produced different outcomes of two lawsuits with comparable facts. Whereas this question has been in dispute in the German doctrine of international civil procedure for decades, the Rome I/II Regulations set a new legal reference for this discussion: Due to the fact that s. 287 dZPO concerns both the law of assessment of damages and the law of procedure, not only Article 1(3) of each regulation, but also Article 12(1)(c) Rome I and Article 15(c) Rome II Regulation have to be considered. The essay argues that the application of a rule like s. 287 dZPO is neither affected by Articles 12(1)(c)/15(c) nor by Articles 18/22 Rome I/II Regulation and remains

applicable pursuant to their Article 1(3).

- ***Andreas Fötschl***: "No Application of the Lugano Convention for Plaintiffs from Third States – The Decision of the Norwegian Highest Court in Raffels Shipping v. Trico Subsea AS"

The decision of the Norwegian Highest Court on 20 December 2012 deals with the question of whether a Norwegian court has jurisdiction over an international dispute, concerning a ship-broker's commission, between a plaintiff from Singapore and a defendant registered in Norway. This depended upon whether the Norwegian courts should apply the Lugano Convention in a case where the plaintiff is registered in a Third State and the dispute has no connection to the Contracting States, other than the fact that the seat of the defendant is located in the forum. The Norwegian Highest Court refused to apply the Lugano Convention and applied the Norwegian rules on international jurisdiction instead, which include a statutory requirement comparable to the doctrine of forum non conveniens.

- ***Friedrich Niggemann:*** "Eine Entscheidung der Cour de cassation zu Art. 23 EuGVVO – Fehlende Einigung, fehlende Bestimmbarkeit des vereinbarten Gerichts oder Inhaltskontrolle?" – the English abstract reads as follows:

In its decision of 29.9.2012 the French Cour de cassation held that a choice of forum clause is void which provides for the exclusive jurisdiction of the courts at a bank's seat (Luxembourg), but allows the bank to sue its client at any other jurisdiction. The court found that the clause fails to correspond to the sense and purpose of Art. 23 of the Brussels I Regulation; it only binds the client and contains an element of arbitrary ("un element potestatif") in favor of the bank. Clauses of this kind are frequent in banking contracts and financing transactions. The Cour de cassation uses terminology of French law, which gives rise to the question whether it abides by the principle of autonomous interpretation. Further it appears to introduce into Art. 23 of the Brussels I Regulation an element of appreciation of equal rights of the parties.

- ***Hilmar Krüger:*** "Zur Anerkennung nicht begründeter ausländischer

Entscheidungen in der Türkei”

- ***Hilmar Krüger:*** “Zum obligatorischen Gebrauch der türkischen Sprache in Schiedsverträgen”
- ***Florian Heindler:*** “Precedence of the 1996 Hague Child Protection Convention over the Brussels IIbis Regulation when leaving the EU”

The annotated judgement focuses on the question of international jurisdiction for parental responsibility cases. If the habitual residence of a child changes during a pending procedure in Austria, and the new place of habitual residence is in Australia (contracting state to the Hague Convention 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children), Art. 5 no. 2 Hague Convention 1996 shall be applied. Thus, Australian institutions have jurisdiction and contradicting Austrian decisions shall be annulled by Austrian courts. Judgements rendered before the change of the habitual residence remain in force, however, they can be replaced by courts at the child’s new place of habitual residence. Contrary to Art. 5 no. 2 Hague Convention 1996, Art. 8 no. 1 Brussels IIa Regulation stipulates jurisdiction of the Member State court “over a child who is habitually resident in that Member State at the time the court is seized” (perpetuatio fori). Neglecting this provision, the Austrian Supreme Court (OGH) applied Art. 5 no. 2 Hague Convention. Hence, the decision of the appellate court had to be set aside, because jurisdiction was denied without establishing at which date the habitual residence in Australia commenced.

- ***Hilmar Krüger:*** “Zum Problem der Brautgabe im türkischen Recht”
- ***Tong XUE***: “New Rules from the Supreme People’s Court: The first Judicial Interpretation of the Chinese Choice of Law Rules Act”

On 10 December 2012, the Supreme People’s Court promulgated the Interpretation on issues concerning the application of the Act of the People’s Republic of China on Application of law in Civil Relations with Foreign Contacts, which came into effect as of 7 January 2013. This Interpretation reconstructs the sources of law of Chinese conflict of laws rules and gives a number of detailed regulations on various specific issues, such as preliminary

question, mandantory rules, party autonomy, habitual residence and proof of foreign law. Beginning with a short introduction to the background of these judicial rules this article will deliver a detailed insight into these new rules with moderate analysis.

- ***Erik Jayme:*** "Der internationale Rechtsverkehr mit den lusophonen Ländern – Jahrestagung der Deutsch-Lusitanischen Juristenvereinigung in Hamburg"