Hess' Response to Mourre

Burkhard Hess has posted at the Kluwer Arbitration Blog a response to *Alexis Mourre's* post which had been a reaction to *Burkhard Hess'* Guest Editorial on the question whether arbitration and European procedural law should be separated or coordinated.

Brussels I Review: Responses to the Commission's Green Paper

The contributions received by the European Commission in response to the Green Paper on the review of the Brussels I reg. (published in April 2009 together with the Commission's report on its application: see our post here) have been recently published on the DG FSJ website.

Over 120 contributions have been collected, from Member States' governments, parliaments and other public authorities, third States (Switzerland), commercial, financial and civil society organisations, NGOs, and the legal and academic sector.

Readers of this blog had the opportunity to read in draft the excellent contribution prepared by Andrew Dickinson, and some comments and responses to his analysis (see this post by Prof. Jonathan Hill and this one by Martin Illmer and Ben Steinbrück).

Among the recent academic initiatives on the review of reg. 44/2001, see also our post on the latest issue of IPRax (2/2010), where some of the papers presented at the conference held in Heidelberg in December 2009 have been published. A two-day conference, organized by the Spanish Presidency of the EU, will be held in Madrid on 15 and 16 March 2010: "Bruselas I: La reforma de la litigación internacional en Europa".

(Many thanks to Federico Garau – Conflictus Legum – and Rafael Arenas – Àrea de Dret Internacional Privat)

Wood Floor Solutions at the ECJ: Art 5(1)(b) Brussels I

Today, the ECJ delivered its judgment in case C-19/09 (*Wood Floor Solutions*): Art. 5 (1) (b) second indent Brussels I is applicable in the case where services are provided in several Member States. *See also our previous posts on the AG opinion and the reference.*

Fourth Issue of 2009's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains two articles and several casenotes.

The first article is authored by Caroline Kleiner, who teaches at the Faculty of Law of Geneva University. It is a study of Interest in Private International Law (*Les intérêts de somme d'argent en droit international privé, ou l'imbroglio entre la procédure et le fond*). The English abstract reads:

> *Private international law has considerable difficulty with the way in which the French Civil Code deals with interests generated by debts which are*

> *enforceable by way of payment of a sum of money. It requires distinguishing between moratory and judicial interests. Moratory interests attach to the substantive relationship between creditor and debtor and are designed to compensate the loss resulting from the temporary unavailability of the sum owed, when payment is late; the existence and period of such interests are governed by the law applicable to the obligation whose performance has been delayed; on the other hand, since its rate depends on a decision of monetary authorities, it must be fixed by the law of the currency in which it is so determined. Judicially created interests are part of procedure and represent the pretium temporis which justifies the recourse to a court in view of the assessment and enforcement of a debt of damages. Hence, in proceedings before a given court, it will be the law of that court governing its functioning which will also govern judicial interests, whatever uncertainty there may be on this point in scholarly writings and in the case-law. In proceedings for recognition and enforcement of foreign judgments, when such interests have been imposed by the foreign court, whatever he applicable law, they remained intangible in the recognizing state at least until enforcement has been ordered, after which they may be relayed by any judicial interest, which the recognizing court may attach to its own judgment. When the foreign court has not provided for any judicial interests, this does not prevent the recognizing court from imposing interests as from the time of its own judgment, on the debt it has declared enforceable.*

I am the author of the second article, which discusses the Recognition in France of English Default Judgments (*La reconnaissance en France des jugements par défaut anglais – A propos de l'affaire* Gambazzi-Stolzenberg). The article is divided in two parts. The first presents the *Gambazzi-Stolzenberg* case. It begins by discussing the various decisions rendered by the supreme courts of New York, France and Switzerland. It then offers comments of the decision of the European Court of Justice. The second parts focuses more specifically on the issue of the recognition in France of English default judgments, and discusses in particular the public policy issue that such judgments raise because they do not give reasons.

Articles of the *Revue Critique* can be downloaded here.

2007 Lugano Convention in Force

The 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters entered into force between the Member States of the European Union (including Danemark) and Norway on January 1st, 2010.

Article 69(4) of the new Lugano Convention provides:

> *The Convention shall enter into force on the first day of the sixth month following the date on which the European Community and a Member of the European Free Trade Association deposit their instruments of ratification.*

The report of the Council of the European Union can be found here.

The Convention still does not apply with respect to other contracting states of EFTA, namely Switzerland and Island. It will on the first day of the third month following the deposit of their instrument of ratification (art. 69(5)), and eventually replace the 1988 Lugano Convention.

Thanks to Rafaël Jafferali for the tipp-off

ECJ: Distinction between “Sale of Goods” and “Provision of Services” in Terms of Art. 5 (1) (b) Brussels

I (Car Trim)

On 25 February, the ECJ delivered its judgment in case C-381/08 (*Car Trim*).

The *Bundesgerichtshof* had referred the following questions to the ECJ for a preliminary ruling:

> *(1) Is Article 5(1)(b) of Council Regulation No 44/2001 to be interpreted as meaning that contracts for the supply of goods to be produced or manufactured are, notwithstanding specific requirements on the part of the customer with regard to the provision, fabrication and delivery of the components to be produced, including a guarantee of the quality of production, reliability of delivery and smooth administrative handling of the order, to be classified as a sale of goods (first indent), and not as provision of services (second indent)? What criteria are decisive for the distinction?*
>
> *(2) If a sale of goods is to be presumed: in the case of sales contracts involving carriage of goods, is the place where under the contract the goods sold were delivered or should have been delivered to be determined according to the place of physical transfer to the purchaser, or according to the place at which the goods were handed over to the first carrier for transmission to the purchaser?*

Thus, the case concerns at a first level the distinction of contracts for the sale of goods and contracts for the provision of services within the meaning of Art. 5 (1) (b) Brussels I in the case of contracts for the supply of goods to be produced where the customer has specified certain requirements. On a second level the case raises the question whether, in case of a sales contract involving carriage of goods, the place where the goods sold were delivered or should have been delivered, is to be determined by reference to the place of physical transfer to the purchaser.

With regard to the **first question**, the ECJ starts from the presumption that it is necessary with regard to the classification of a contract, to determine its characteristic obligation (para. 32 et seq.). In this respect the Court refers to several provisions of European Union law and international law giving some indication that the fact that the goods to be delivered are to be manufactured

does not alter the classification of the contract as a sales contract (para. 34 et seq.).

Further, in favour of a classification of the contract as a contract for the sale of goods, the Court takes into consideration that the raw materials were not supplied by the purchaser (para. 40 et seq.).

Consequently, the Court held that

> ***Article 5(1)(b) [Brussels I] must be interpreted as meaning that where the purpose of contracts is the supply of goods to be manufactured or produced and, even though the purchaser has specified certain requirements with regard to the provision, fabrication and delivery of the components to be produced, the purchaser has not supplied the materials and the supplier is responsible for the quality of the goods and their compliance with the contract, those contracts must be classified as a 'sale of goods' within the meaning of the first indent of Article 5(1)(b) of that regulation.***

With regard to the **second question**, i.e. the question whether in case of a sales contract involving carriage of goods, the place where the goods were delivered or should have been delivered is to be determined by reference to the place of physical transfer to the purchaser, the Court held that

> ***the first indent of Article 5(1)(b) [Brussels I] must be interpreted as meaning that, in the case of a sale involving carriage of goods, the place where, under the contract, the goods sold were delivered or should have been delivered must be determined on the basis of the provisions of that contract. Where it is impossible to determine the place of delivery on that basis, without reference to the substantive law applicable to the contract, that place is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction.***

In its reasoning, the Court referred in particular to the aims and objectives of the Brussels I Regulation and held that the place where the goods were physically

transferred (or should have been physically transferred) to the purchaser at their final destination was the most consistent with the Regulation since it met the criterion of predictability as well as proximity (para. 60 et seq.).

See with regard to the referring decision also our previous post which can be found here.

Many thanks to Dr. Martin Illmer and Jens Karsten for the tip-off.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (2/2010)

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

This issue contains some of the papers presented at the Brussels I Conference in Heidelberg last December. The remaining papers will be published in the next issue.

Here is the contents:

- ***Rolf Wagner***: "Die politischen Leitlinien zur justiziellen Zusammenarbeit in Zivilsachen im Stockholmer Programm" – the English abstract reads as follows:

> *Since the coming into force of the Amsterdam Treaty in 1999 the European Community is empowered to act in the area of civil cooperation in civil and commercial matters. The "Stockholm Programme – An open and secure Europe serving and protecting the citizens" is the third programme in this area. It covers the period 2010–2014 and defines strategic guidelines for legislative and operational planning within the area of freedom, security and justice. This article provides an overview of the Stockholm Programme.*

- ***Peter Schlosser***: "The Abolition of Exequatur Proceedings – Including Public Policy Review?"

The – alleged – basic paper to which reference is continuously made when exequatur proceedings and public policy are discussed is a so-called Tampere resolution. The European Council convened in a special meeting in the Finnish city in 1999 to discuss the creation of an area of security, freedom and justice in the European Union. The outcome of this meeting was not a binding text which would have been adopted by something like a plenary session of the heads of States and Governments. Instead, the document is titled "presidency's conclusion" and is a summary drafted by the then Finish president. It is a declaration of intention for the immediate future, pre-dominantly concerned with criminal and asylum matters and not binding on any European legislator. As far as "civil matters" are concerned, the "presidency's conclusion" reads as follows: "In civil matters the European Council calls upon the Commission to make a proposal for further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgment in the requested state. As a first step, these intermediate procedures should be abolished for titles in respect of small consumer or commercial claims and for certain judgments in the fields of family litigation (e.g. on maintenance claims and visiting rights). Such decisions would be automatically recognized throughout the Union without any intermediate proceedings or grounds for refusal of enforcement. This could be accompanied by the setting of minimum standards on specific aspects of civil procedural law. "The conclusion does no say whether it would be advisable to generally abolish intermediate procedures. It only states that intermediate procedures should be further "reduced". If one takes the view that the "first step" of reduction should be followed by a second or third one, one could refer to the regulation on "Creating a European Enforcement Order for Uncontested Claims" and to the regulation on "Creating a European Order for Payment Procedure". Not a single word mentions that at the end of all steps taken together the intermediate procedure or any control whatsoever in the requested state shall become obsolete and that even the most flagrant public policy concern shall become irrelevant. The need for a residuary review in the requested state is powerfully demonstrated by a recent ruling of the French Cour de Cassation: A woman resident in France had been ordered by the High Court of London to pay to the Lloyd's Society no less than £ 142,037. The judgment did not give

any reasons for the order except for stating that "the defendant had expressed its willingness not to accept the claim and that the judge accepted the claim pursuant to rule 14 par. 3 of the Civil Procedure Rules." The relevant text of this provision is drafted as follows: "Where a party makes an admission under rule 14.1.2 (admission by notice in writing), any other party may apply for judgment on the admission. Judgment shall be such judgment as it appears to the court that the applicant is entitled for on the admission." The judgment neither revealed at all the dates of the respective admissions made during the proceedings although the defendant had expressed its willingness to defend the case nor referred to any document produced in the course of the proceedings. One cannot but approve the ruling of the French Cour de Cassation confirming the decision of the Cour d'Appel of Rennes. The courts held that the mere abstract reference to rule 14 of the Civil Procedure Rules was tantamount to a total lack of reasons and that the recognition of such a judgment would be incompatible with international public policy. Further, that the production of documents such as a copy of the service of the action could not substitute the lacking reasoning of the judgment. The importance of the possibility to invoke public policy when necessary to hinder recognition of a judgment was evident also in the earlier Gambazzi case of the European Court of Justice (ECJ). In that case the defendant was penalized for contempt of court by an exclusion from further participation in the proceedings. The reason for the measure was the defendant's violation of a freezing and disclosure order. The ECJ ruled that in the light of the circumstances of the proceedings such a measure had to be regarded as grossly disproportionate and, hence, incompatible with the international public policy of the state where recognition was sought. In its final conclusions, general advocate Kokott emphasized that a foreign judgment cannot be recognized if the underlying proceedings failed to conform to the requirement of fairness such as enacted in Art. 6 of the European Convention on Human Rights. It is worth noting that also Switzerland refused to enforce the English judgment. The Swiss Federal Court so decided because after having changed its solicitor, Gambazzi's new solicitor was refused to study the files of the case. Even in the light of the pertinent case law regarding a very limited review in the requested state and the known promptness and efficiency of exequatur proceedings, the Commission still intends to abolish this "intermediate measure". In its Green Paper it literally states:" The existing exequatur procedure in the regulation simplified the procedure for recognition and enforcement of judgment compared to the previous systems under the 1968

Brussels Convention. Nevertheless, it is difficult to justify, in an internal market without frontiers that citizens and businesses have to undergo the expenses in terms of costs and time to assert their rights abroad." The context reveals that the term "the expenses" relates to the expenses of the exequatur procedure. However, the European Union is not the only internal market covering multiple jurisdictions. How is the comparable issue dealt with in other integrated internal markets? This is to be shown in the first part of this contribution. In the second part, I shall analyze in more detail and without any prejudice the ostensibly old-fashioned concept of exequatur.

- ***Paul Beaumont/Emma Johnston***: "Abolition of the Exequatur in Brussels I: Is a Public Policy Defence Necessary for the Protection of Human Rights?"

The principle of mutual recognition of judicial decisions and the creation of a genuine judicial area throughout the European Union was endorsed in Tampere in October 1999. Thus, one of the primary objectives of the Brussels I is to enhance the proper functioning of the Internal Market by encouraging free movement of judgments. It is clear that in Tampere the European Council wanted to start the process of abolishing "intermediate measures" ie the declaration of enforceability (exequatur). It went further and said that in certain suggested areas, including maintenance claims, the "grounds for refusal of enforcement" should be removed. It did not specifically require the abolition of intermediate measures in relation to Brussels I and certainly did not require the abolition of the "grounds for refusal of enforcement" in Brussels I. The European Council in Brussels in December 2009, after the entry into force of the Lisbon Treaty and with the adoption of the Stockholm Programme, is still committed to the broad objective of removing "intermediate measures". This is a process to be "continued" over the 5 years of the Stockholm Programme from 2010–2014 but not one that has to be "completed". The European Council no longer says anything about abolishing the "grounds for refusal of enforcement". Article 73 of the Brussels I Regulation obliged the European Commission to evaluate the operation of the Regulation throughout the Union and to produce a report to the European Parliament and the Council. In 2009 the Commission produced such a Report and a Green Paper on the application of the Regulation, which proposes a number of reforms. One of the main proposals concerns the abolition of exequatur proceedings for all judgments falling within the ambit of

the Regulation. Brussels I is built upon the foundation of mutual trust and recognition and these principles are the driving force behind the proposed abolition of exequatur proceedings. Article 33 of Brussels I states that no special procedure is required to ensure recognition of a judgment in another Member State. At first glance this provision seems to imply that recognition of civil and commercial judgments within the EU is automatic. The reality is however, somewhat more complex than that. In order for a foreign judgment to be enforceable, a declaration of enforceability is required. At the first instance, it involves purely formal checks of the relevant documents with no opportunity for the parties or the court to raise any of the grounds for refusal of enforcement. An appeal against the declaration of enforceability by the judgment debtor will trigger the application of Articles 34 and 35 which provide barriers to the recognition and enforcement of judgments. According to the European Court of Justice (ECJ), any such obstacle must be interpreted narrowly, "inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the [Regulation]" The overwhelming majority of cases are successful and if the application is complete, then the decision is likely to be made within a matter of weeks. The Commission is of the view that given the high success rate of applications, the exequatur proceedings merely hinder free movement of judgments at the expense of the enforcement creditor and provide for delays for the benefit of the male fides judgment debtor. It is with this in mind that the Commission asks whether, in an Internal Market without frontiers, European citizens and businesses should be expected to sacrifice time and money in order to enforce their rights abroad. It is argued that in the Internal Market, free movement of judgments is necessary in order to ensure access to justice. Exequatur proceedings can create tension between Member States, creating suspicion and ultimately destroying mutual trust. It will be seen however, that total abolition of exequatur proceedings would effectively mean judgments must be recognised in every case with no ground for refusal unless the grounds for refusal are moved to the actual enforcement stage. Total abolition of the grounds for refusing enforcement would result in an unfair bias in favour of the judgment creditor to the detriment of the judgment debtor. The Commission on the one hand proposes to abolish the exequatur procedure provided by Brussels I but on the other hand, suggests that some form of "safeguard" should be preserved. The Green Paper tentatively suggests that a special review a posteriori could be put in place which would in effect create automatic recognition of a judgment reviewable only after becoming

enforceable. Such an approach would enhance judicial co-operation and aid progressive equivalence of judgments from other Member States. Yet it is questioned whether allowing an offending judgment to be enforced in the first place, only to review it a posteriori is the most effective way of dealing with the problem. It is instead argued that a provision similar to that of Article 20 of the Hague Child Abduction Convention could strike a fair balance between the interests of the judgment creditor and debtor.As Brussels I stand it is open to the judgment debtor to appeal the declaration of enforceability. The appellant may claim a breach of public policy or lack of due process in the service of the documents instituting proceedings which may amount to a breach of Article 6 of the European Convention on Human Rights (ECHR). The grounds to refuse recognition of a foreign judgment are restrictive and under no circumstances may the "substance" of the judgment be reviewed. Such a review of the substance would seriously undermine the mutual trust between courts of the European Union. However, the public policy exception does allow States to uphold essential substantive rules of its own system by refusing to enforce judgments from other EU States that infringe the fundamental principles of its own law. The question is whether Member States will be prepared to abandon the "public policy" defence and thereby give up this right to protect the fundamental principles of their substantive law? Will they be content to have a defence that simply focuses on protecting the fundamental rights of the defendant?

- ***Horatia Muir Watt***: "Brussels I and Aggregate Litigation or the Case for Redesigning the Common Judicial Area in Order to Respond to Changing Dynamics, Functions and Structures in Contemporary Adjudication and Litigation"

Recent litigation relating to the recognition and enforcement of US class action judgments or settlements under Member States' common private international law (still applicable to relationships with third States), along with current trends in their domestic legislation towards the acceptance of representative, class or group actions, herald a whole set of new issues linked to the appearance of collective redress within the common area of justice. It is the thesis of this paper that the Brussels I Regulation in its present form is ill-equipped to deal with the onslaught of aggregate claims, both in its provisions on jurisdiction and as far as the free movement of judgments and settlements is

concerned. It may well be that the same could be said for the conflict of laws rules in Regulations Rome I and Rome II, which were also designed to govern purely individual relationships. Indeed, one may wonder whether the difficulties which arise under this heading are not the sign of an at least partial obsolescence of the whole European private international law model, insofar as it rests upon increasingly outdated conceptions of the dynamics, function, structure and governance requirements of litigation and adjudication. Although this conclusion may seem radical, it is in fact hardly surprising. Indeed, as it has been rightly observed, within the civilian legal tradition which is the template for the conceptions of adjudication and jurisdiction underlying the Brussels I Regulation (like the other private international law instruments applicable in the common area of justice), the recourse to group litigation, which is now beginning to appear in the European context as one of the most effective means of improving ex post accountability of providers of mass commodities freely entering the market, represents a "sea-change" in legal structures, away from exclusive reliance on public enforcement.

- ***Burkhard Hess***: "Cross-border Collective Litigation and the Regulation Brussels I"

The European law of civil procedure is guided by the "leitmotiv" of two-party-proceedings. Litigation is generally regarded as taking place between one specific plaintiff and one specific defendant. Especially Article 27 JR (JR = Brussels I Regulation) which concerns pendency and Articles 32 and 34 No. 3 JR which address res judicata and conflicting judgments, are based on this concept. However, the idea of collective redress is not entirely new to European cross border litigation. Article 6 No. 1 JR explicitly states that several connected lawsuits can be brought to the courts of a Member State where one of the defendants is domiciled. When related actions are pending in different Member States, the court which was seized later may stay its proceedings. By providing for a discretionary stay, Article 28 JR also includes situations of complex litigation. Several cases concerning the JR have dealt with collective redress. The most prominent case is VKI ./. Henkel. In this case, an Austrian consumer association sought an injunction against a German businessman. Another example is the Lechouritou case, where approximately 1000 Greek victims of war atrocities committed during WW II sued the German government for compensation. The famous Mines de Potasse d'Alsace case involved

damages caused to dozens of Dutch farmers by the pollution of the river Rhine. It goes without saying that in addition to the case law presented, several cross-border collective lawsuits have been filed in the Member States. These lawsuits mainly deal with antitrust and (less often) product liability issues. Finally, the Injunctions Directive 98/27/EC permits consumer associations from another state to institute proceedings for the infringement of consumer laws in the Member State where the infringement was initiated. However, this directive has not been very successful. It has only been applied in a few cross-border cases.

- ***Luca G. Radicati di Brozolo***: "Choice of Court and Arbitration Agreements and the Review of the Brussels I Regulation"

Similarities and differences between choice of court and arbitration agreements in the perspective of the review of Regulation (EC) 44/2001Choice of court agreements and arbitration agreements have much in common. Both involve the exercise of party autonomy in the designation of the judicial or arbitral forum for the settlement of disputes and have the effect of ousting the default jurisdiction. Both aim to ensure predictability and to allow the parties to choose the forum they consider best suited to adjudicate their dispute. The importance of these goals is by now largely acknowledged especially in international commercial transactions. Although it has not always been a foregone conclusion that parties could exclude the jurisdiction of local courts in favor of foreign ones or of arbitration, today most systems recognize the role of procedural party autonomy in this context. Also the policy reasons for favoring party autonomy in the choice of forum are largely similar for both types of agreements. Because of the broad recognition of the crucial role of these agreements, there is a growing concern that their effects are not sufficiently guaranteed in the European Union. It is not uncommon that proceedings are brought before a court of one member State in alleged violation of a choice of the courts of another member State or of arbitration by litigants who appear to attempt to circumvent these agreements by exploiting the perceived inefficiencies of some courts, or their reluctance to enforce such agreements effectively. In a number of well known, the European Court of Justice has found itself unable – quite correctly, in light of the existing text of Regulation (EC) 44/2001 (the "Brussels Regulation") – to accept interpretations aimed at preventing such situations, foremost amongst which anti-suit injunctions. Partly

for these reasons forum selection and arbitration agreements (and more generally arbitration) are amongst the topics on which the Commission has invited comments in the Green Paper on the review of the Regulation.

- ***Urs Peter Gruber***: "Die neue EG-Unterhaltsverordnung" – the English abstract reads as follows:

Actually, the relevant rules on jurisdiction, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations are contained in the Brussels I Regulation. In the near future, a new Regulation, which specifically deals with maintenance obligations, will apply. This new Regulation will bring about several significant changes. It will considerably strengthen the position of the maintenance creditor, in particular in the field of recognition and enforcement of decisions. It will contain rules on issues, which up to now have been left to the national legislators. Therefore, it can be said that the new Regulation marks a new level of integration in the field of European civil procedure.

- ***Ansgar Staudinger***: "Streitfragen zum Erfüllungsortsgerichtsstand im Luftverkehr" – the English abstract reads as follows:

In case of carriage of passengers by air the Bundesgerichtshof has to interpret article 5 (1) lit. b Brussels I-Regulation. In the author's view the grounds as well as the conclusion deserve absolute consent. However there persist several questions: The location of the place of the arrival or departure in the state, where the defendant carrier is domiciled or in a Non Member State of the EU does not a priori exclude the application of article 5 (1) lit. b Brussels I-Regulation including its passenger's voting right. The customer factual only stay an option for that place, which neither corresponds with the defendants domicile nor a EU-Non Member State. Are both connection factors located outside the Member State, remains a recourse to article 5 (1) lit. a Brussels I-Regulation. Waiving the courts jurisdiction for the place of performance of the obligation in question by a standard form contract through the carrier and stipulating an exclusive conduct of a case in the Member State of his domicile seems to be improper in terms of the Council Directive 93/13/EEC on unfair terms in consumer contracts respectively §§ 307 (1), 310 (3) no. 3 of the

"Bürgerliches Gesetzbuch" opposite to consumers, which are domiciled in the EU-Member State of the arrival or departure. This applies particularly when claims according to the Regulation (EC) No. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights are concerned.

- ***Rolf Wagner***: "Die Entscheidungen des EuGH zum Gerichtsstand des Erfüllungsorts nach der EuGVVO – unter besonderer Berücksichtigung der Rechtssache Rehder" – the English abstract reads as follows:

The article deals with the place of performance as a base for jurisdiction. There has been a lot of case law by the ECJ concerning Art. 5 No. 1 Brussels Convention: According to this case law, in general the place of performance had to be determined for each obligation separately (de Bloos-rule) according to choice of law rules of the forum (Tessili-rule). This system, however, has been strongly criticised. Thus, after long discussions during the negotiations concerning the revision of the Brussels Convention, a new wording was found for Art. 5 No. 1 Brussels Regulation, even though it was a compromise: The Brussels Regulation now defines at least the place of performance for the majority of contracts in international trade, i. e. for contracts for the sale of goods and contracts for the provision of services. Therefore it does not come as a surprise that the ECJ has been asked to give guidance in the interpretation of this definition. The present article comments on three important judgments by the ECJ connected to this question. In particular the author analyses in depth the judgment given in Rehder: In this case, the ECJ determined the place of performance with regard to contracts for the transport of passengers. Thus the author concludes that the European legislator neither could nor will be able to find a perfect solution. Therefore, patience is required with regard to the interpretation of the new definition because there are still open questions which have to be answered by the ECJ.

- ***Gilles Cuniberti***: "Debarment from Defending, Default Judgments and Public Policy"

The origin of the Gambazzi case is to be found in the collapse of a Canadian investment company, Castor Holding Ltd., at the beginning of the 1990s. Castor had been incorporated in Montreal in 1977. Its first president was a German-

born Canadian businessman named Karsten von Wersebe. In the 1980s, however, its main manager became a German national named Otto Wolfgang Stolzenberg. Marco Gambazzi was a Swiss lawyer who had specialized in assets management. He first invested in Castor, and was then offered to become a member of the board of directors of the company. In 1992, however, Castor was declared insolvent. Dozens of suits followed. First, the trustee (syndic) sought to challenge payments made by Castor before 1992. He focused on a Can$ 15 million distribution of dividends to shareholders at the end of 1990, which he was eventually able to claim back after establishing that the company was already insolvent in 1990. More importantly, many investors sued the auditors of Castor, Coopers & Lybrand, who had certified its accounts between 1978 and 1991. After more than ten years of litigation, there was still no judgment on the merits, which led the Montreal Court of appeal to conclude that "it is not exaggerated to say that the Castor Holding case has been an exceptional one in Canadian legal history, a genuine judicial derailment". In 1996, a remarkable decision was made by a handful of Canadian investors. DaimlerChrysler Canada and certain pension and other benefit funds that it had established for its employees decided to initiate proceedings in London against four individuals formerly involved in the management of Castor (Stolzenberg, Gambazzi, von Wersebe and Banziger) and more than thirty corporate entities allegedly related to them. The plaintiffs argued that they had been defrauded by the defendants in Canada, and thus sought restitution. The reason why the proceedings were brought to England is unclear. There was virtually no connection between the case and the United Kingdom. The only exception was that Stolzenberg once owned a house in London, as he owned others in Paris and, it seems, Germany, Canada and South America. But even that house, which was the sole connecting factor which was likely to give jurisdiction to the English court over the entire case and the thirty-six defendants, was sold before the defendants were served with the writ instituting the proceedings in March 1997. Unsurprisingly, therefore, the jurisdiction of the English court was challenged. The case went up to the House of Lords which eventually ruled that the date which mattered to appreciate whether one defendant was domiciled in England and could thus be the anchor allowing to drag an infinite number of co-defendants to London was the time when the writ was issued by the English court. In this case, that meant May 1996, because the English court had permitted the plaintiffs to postpone service of the writ in order to enable them, first, to conduct ex parte hearings of several days for the purpose of convincing

the court that it should grant a world wide freezing order, and, second, to carefully prepare simultaneous service so that none of the defendants could escape the English trial by initiating parallel proceedings elsewhere. The only reasonable explanation for choosing to bring the case to England is the availability of powerful interim measures which have turned London into a magnet forum for international fraud cases. English world wide freezing orders and, even more importantly, English disclosure orders seem to be remarkably and uniquely efficient in the process of tracing stolen assets, so much so that an English court once called them one of the two nuclear weapons of English civil procedure. If other jurisdictions have not been able to tackle as efficiently the issue of international frauds, alleged victims cannot be blamed for seeking justice where it can effectively be achieved. But the quest for justice, or for making England the jurisdiction of choice, cannot justify everything. In this case, available nuclear weapons were used to their full capacity. This certainly enabled plaintiffs to secure a decisive victory. But this was at the costs of the fairness that the English legal system ought to have afforded to the defendants.

- ***Herbert Roth*** on the ECJ's judgment in case C-167/08 (Draka NK Cables Ltd.): "Das Verfahren über die Zulassung der Zwangsvollstreckung nach Art. 38 ff. EuGVVO als geschlossenes System"
- ***Christian Heinze***: "Fiktive Inlandszustellungen und der Vorrang des europäischen Zivilverfahrensrechts" – the English abstract reads as follows:

Some EU Member States' national procedural laws allow or used to allow service on defendants domiciled in another EU Member State by a form of "fictitious" service within the jurisdiction. Under these provisions and certain further requirements, service may be deemed to take effect at the moment when a copy of the document is lodged with a national authority or at the time when it is sent abroad for service, irrespective of the time when the recipient actually receives the copy. Even if the national law deems this form of service to take effect within the jurisdiction, the following article argues that the practice is incompatible with Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents, because it impairs the effectiveness of the European rules, in particular as concerns the date of service.

- ***Yuanshi Bu***: "Danone vs. Wahaha – Anmerkungen zu Schiedsverfahren mit chinesischen Parteien" – the English abstract reads as follows:

The legal feud between Danone and Wahaha, both being leading beverage manufacturers in the Chinese market, had developed into one of the most significant investment disputes in the history of the People's Republic of China. A number of arbitration proceedings and civil actions were filed inside and outside China. In particular, several arbitration proceedings pending before the Swedish Chamber of Commerce since May 2007, the outcome of which was supposed to largely decide that of the disputes between the two parties, had drawn considerable public attention. Despite the surprising settlement shortly before the arbitration tribunals rendered their decisions, the disputes between Danone and Wahaha offer a valuable opportunity to inquire into the law and practice of arbitration relating to foreign investments in China. This case note will first comment on the award of a Chinese domestic arbitration proceeding dealing with one of the major issues of the whole disputes – the ownership of the trademark "Wahaha" – and then discuss questions that were relevant to the proceeding in Stockholm.

- ***Boris Kasolowsky/Magdalene Steup***: "Insolvenz in internationalen Schiedsverfahren – lex arbitri oder lex fori concursus" – the English abstract reads as follows:

The article deals with a recent English Court of Appeal decision which addresses the effects of the insolvency of a party to pending arbitration proceedings.The Court of Appeal concluded that the effects were to be determined by reference to English law and considered that the arbitration tribunal acted well within its jurisdiction when it ordered the proceedings to be continued. In reaching this Conclusion the Court of Appeal just as the arbitral tribunal and the High Court relied on the European Insolvency Regulation which forms part of English law. Being the first major court of an EU Member State to address the question of the insolvency of a party to pending arbitration proceedings by reference to the European Insolvency Regulation, the judgment is likely to serve as a signpost for what is to be expected in other Member States. The article further considers the likely impact of this particular decision on the future practice of choosing arbitration seats, and possibly also the timing for commencing arbitration proceedings. In doing so, the authors will consider

in particular the decision of the Swiss Bundesgericht which, by contrast to the English Court of Appeal judgment, concludes that the relevant company law/the lex concursus (i.e. the provisions of law applicable to the party that happens to have become insolvent in the course of the proceedings) are decisive for the purposes of determining the effects of the insolvency of one of the parties on the continuation of the proceedings.

- ***Erik Jayme*** on the meeting of the European Group for Private International Law in Padua in September 2009: "Die Vereinheitlichung des Internationalen Privat- und Verfahrensrechts in der Europäischen Union: Tendenzen und Widerstände Tagung der „Europäischen Gruppe für Internationales Privatrecht" (GEDIP) an der Universität Padua"
- ***Marc-Philippe Weller*** on the Heidelberg symposium on the occasion of the 75th birthday of Prof. Dr. Dr. h.c. mult. Erik Jayme: "Symposium zu Ehren von Erik Jayme"

"The ECJ and the end of the law"

The Autonomous University of Barcelona is organizing a Seminar of Professors under the suggestive title "The ECJ and the end of the law". The meeting will gather professors of several disciplines – Labor law, Financial Law, International public and private Law-, in order to discuss some of the most controversial decisions of the Court of Luxembourg. The Private International Law presentation shall be borne by Prof. Rafael Arenas Garcia, from the Autonomous University. The seminar is scheduled for March 18, beginning at 10 am and extending until 14 am. It will be held at the Sala de Juntes of the Faculty of Law in Building B – UAB 08193 – Bellaterra (Cerdanyola del Vallès), Barcelona. Admission is free and no registration is required. Spanish and Catalan will be spoken.

(The final program may be consulted here)

Mourre on Hess' Guest Editorial

Alexis Mourre has posted a response to Burkhard Hess' Guest Editorial on whether Arbitration and European Procedural Law should be Coordinated or Separated at the Kluwer Arbitration Blog.

Kessedjian on Arbitration and Brussels I

Catherine Kessedjian, who teaches at the European College of Paris (University Paris 2), has published in the last issue of the French *Revue de l'arbitrage* an article on Arbitration and the Brussels I Regulation (*Le Règlement 44/2001 et l'arbitrage*).

The English abstract reads:

> *The arbitration exception in Regulation 44/2001 must not be altered in the future amended Regulation, at least until all questions posed by the relation between an arbitral proceeding and a judicial proceeding have been thoroughly reflected upon. This must be done, notably, bearing in mind the role of Europe as a favoured place of arbitration. In addition, the reform of 44/2001 may not be limited to intra-European cases but also deal with relations to Third States, hence an even more cautious approach to the matter is necessary. In that context, Europe should not act unilaterally, unless efforts are undertaken at a universal level and have failed. With this in mind, this paper discusses the questions which occur in practice.*