Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (2/2012)

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

- ***Gerhard Hohloch:***" Die „Bereichsausnahmen" der Rom II-VO – Zum Internationalen Privatrecht in und um Art. 1 Abs. 2 Rom II-VO" – the English abstract reads as follows:

The scope of applicability of the regulation "Rome II" is governed by its art. 1. Art. 1 subpara. 1 defines this scope as the matter of "non-contractual obligations", art. 1 subpara. 2 traces the limits of this scope by a catalogue of "excepted areas" (lit. a–g). The subsequent article hereinafter has been dedicated to the research of the limits of these "excepted areas" as well as the conflict of laws rules governing these areas. The author underlines that art. 1 subpara. 2 has to be understood on the basis of "European law making"; therefore methods of classification have to follow European, not "national" ideas. The program of harmonization and unification of conflicts of laws ("Rome I"–"Rome V" and more) obliges to describe the scope of each regulation. The "excepted areas" are defined by methods of interpretation of European style, meanwhile their contents are governed by European conflict rules ("Rome I–III") or by conflict rules based on multilateral conventions or by "national rules". The author discusses their "border lines" and goes on to the residuary competences of national conflict rules and to look for the future development.

- ***Dieter Martiny:*** "Lex rei sitae as a connecting factor in EU Private International Law" – the English abstract reads as follows:

The situs rule is one of the classic connecting principles in private international law, particularly for property law. In European conflict law, which is mainly regulated by different Regulations, the lex rei sitae only plays a restricted role as a connecting factor. Property issues are generally outside the scope of the Regulations. In international civil procedure the situs functions as a basis for

exclusive jurisdiction. It is, however, difficult to separate the effects of relationships in contract law, succession and matrimonial property law from questions of property law as such. In international contract law the situs has only a reduced importance in the context of the form of the contract and overriding mandatory rules. Since there is a lack of harmonised property law, problems arise mainly in the context of non-possessory security rights when encumbered assets cross the border. The plethora of problems arising from a change of the applicable law and the recognition of foreign security rights suggest that the creation of an additional uniform security right might be more successful than a solution restricted to private international law.
The scission or dualist approach in matrimonial property law and succession law with its distinction between the law applicable to the person (and movable property) and the law applicable to immovables (the lex rei sitae applying as to the latter) is not followed by the proposed EU Regulations for succession and matrimonial property. However, it is necessary to a certain extent that the law of the place where property is located be applied or at least be taken into account. Property rights in rem, transfer of land and land registers have to be excluded from the scope of application of the EU instruments so long as there is no uniform law. For some separate issues a special connection to the place of location of property is appropriate. Precise definitions are of particular importance given the need to ensure legal certainty and satisfy the expectations of parties.

- ***Christoph Reithmann*** on foreign notarial deeds***: "***Urkunden ausländischer Notare in inländischen Verfahren"
- ***Timo Nehne***: "Die Internationale Geschäftsführung ohne Auftrag nach der Rom II-Verordnung – Anknüpfungsgegenstand und Anknüpfungspunkte" – the English abstract reads as follows:

The choice of law rules of the Rome II Regulation have so far been dealt with by a remarkable number of scholarly publications in different countries and languages. Most of them, however, pay only little attention to Article 11. Its legal category and connecting factors give rise to specific questions of construction and application which the following contribution aims to address.

- ***Susanne Fucks***: "Die Zustellungsbevollmächtigung von inländischen

Schadensregulierungsbeauftragten ausländischer Kraftfahrzeughaftpflichtversicherer" – the English abstract reads as follows:

According to Art. 4 of the 4th Motor Insurance Directive all motor vehicle insurers are required to appoint a claims representative in each Member State other than that in which they have received their official authorisation. The claims representative should be authorised to collect all necessary information in relation to claims and to take appropriate action regarding the settlement of claims on behalf and for the account of the insurance undertaking in cases where the victim of a motor vehicle accident abroad makes use of his or her direct right of action against the foreign insurance company. If the claim is not settled the insurance company may be sued before the courts for the place in a Member State where the injured party is domiciled.
This article discusses the decision made by the Higher Regional Court of Saarbrücken, which concluded that the service of the writ cannot be effected to the claims representative if the representative is not explicitly authorised to receive such a statement of claim. The article attempts to give reasons why Art. 4 of the 4th Motor Insurance Directive suggests such an authorisation and a service of process abroad including the translation of the statement of claim according to the European Regulation on the service of documents is not necessary in that case.

- ***Peter Mankowski:*** "Autoritatives zum „Ausrichten" unternehmerischer Tätigkeit unter Art. 15 Abs. 1 lit. c EuGVVO" – the English abstract reads as follows:

„Directing activities" in Art. 15 (1) (c) Brussels I Regulation is the key term for the width and scope of consumer protection in Europe. Now, the ECJ has adressed and refined it with regard to the most important area, e-commerce. The Joint Declaration of Council and Commission has lost any sway. A test of criteria has been established, creating some guidelines but leaving some remaining uncertainty. Some of the criteria mentioned deserve closer inspection. Going beyond the borders of the State in which a business has its seat is the foundation for a rebutable presumption that the business directs its activities to the consumer's State. The yardsticks developed in consumer protection law can be transferred to the PIL of unfair commercial practices.

- ***Heinz-Peter Mansel*** on the decision of the Disctrict Court Neustrelitz of 18 January 2011: "Rechtsprechungsübersicht zu AG Neustrelitz, Beschluss v. 18.1.2011 – 6 F 106/09"

- ***Renata Fialho de Oliveira***: "Die Zulässigkeit ausschließlicher internationaler Gerichtsstandsvereinbarungen in Brasilien" – the English abstract reads as follows:

In the absence of an express legal rule providing for international choice of court agreements and its effects under Brazilian law, the subject has to be analysed considering the national general legal framework regarding international jurisdiction, legal writing and case law. As far as the latest is concerned, courts in Brazil have adopted in the last decades different approaches when it comes to the derogatory effects of exclusive choice of court agreements. The lack of a clear line of decision in such an important subject for international affairs is source of legal uncertainty. A recent decision of the Superior Tribunal de Justiça gives rise to a brief analysis of the subject in the following note.

- ***Michael Stürner:*** "Internationale Zuständigkeit für provisorische Rechtsöffnung nach LugÜ" – the English abstract reads as follows:

Pursuant to Article 22 No. 5 Brussels I Regulation/Lugano Convention 2007, in proceedings concerned with the enforcement of judgments, the courts of the State in which the judgment has been or is to be enforced shall have exclusive jurisdiction. The jurisdictional concept of Brussels I/Lugano Convention is based on the assumption that proceedings can either qualify as being part of the enforcement stage or of the adjudication itself, the basis for such qualification being an autonomous interpretation. Given the multitude of different enforcement proceedings and recourses under national law it is not always clear if a particular type of proceeding falls within the scope of Article 22 No. 5 Brussels I/Lugano Convention. The decision of the Swiss Bundesgericht (Federal Supreme Court) of 7 October 2010 discussed here deals with the so-called provisorische Rechtsöffnung, which is a preliminary proceedings taking place before the actual enforcement proceedings. The Bundesgericht holds Article 22 No. 5 Brussels I/Lugano to be applicable, a decision, it is submitted here, which is to be criticised.

- ***Boris Kasolowsky/Magdalene Steup***: "Dallah v Pakistan – Umfang und Grenzen der Kompetenz-Kompetenz von Schiedsgerichten" – the English abstract reads as follows:

The UK Supreme Court and the Paris Cour d'appel have recently confirmed, in connection with the ICC arbitration involving Dallah and Pakistan, that the national state courts are not bound by any determinations made by an arbitration tribunal with regard to the existence of a valid arbitration agreement between the parties. The arbitration tribunal's Kompetenz-Kompetenz therefore remains subject to full review by the state courts at the recognition and enforcement stage. English and French courts have thus clarified that the principle of Kompetenz-Kompetenz is effectively just a rule of priority: the arbitration tribunal has the authority to rule on its own jurisdiction first and before any review by the national courts.

- ***David Diehl:*** "Keine Anwendbarkeit des US-amerikanischen Foreign Sovereign Immunities Act auf amtlich handelnde Individuen – Das Urteil des US Supreme Court in Samantar v. Yousuf" – the English abstract reads as follows:

The Foreign Sovereign Immunities Act (FSIA) and the Alien Tort Statute (ATS) are the two main pillars of the Human Rights Litigation in the United States. While the former constitutes the sole basis for suits against foreign states, the latter is frequently invoked by courts to establish jurisdiction over foreign government officials. However, in Amerada Hess Shipping v. Argentina, the US Supreme Court decided that plaintiffs may only rely on the ATS if the FSIA does not apply to the given case. As the FSIA does not explicitly mention individuals, courts were faced with the question of whether they may be subsumed under the notion of the "state" directly (28 U.S.C. § 1603 (a)) or can be regarded as an "agency or instrumentality of a foreign state" (28 U.S.C. § 1603 (b)) when acting in official capacity. Since the decision of the Court of Appeals in Chuidian v. Philippine National Bank, courts have regularly followed the latter interpretation. This interpretation however, has been challenged by other courts in recent years, leading to the decision of the Supreme Court in Samantar v. Yousuf. In this ATS case against the former prime minister of Somalia for torture and arbitrary killings, the highest US Court finally decided that the FSIA may not be read to include individuals at all. Instead, according to

the Court, all immunity of foreign individuals is solely governed by the (federal) common law, possibly forcing the courts to determine the scope of individual immunity according to international law in future cases. This may have severe impacts on the Human Rights Litigation in the United States which this article sets out to explore.

- ***Fritz Sturm***: "Schweizer Familiengut in Liechtensteiner Stiftungshut" – the English abstract reads as follows:

The assets of a family foundation regularly incorporated in Vaduz (Liechtenstein) have been spoiled by one of the managers of a credit institution in Geneva, where it had opened an account. The bank, however, refused to indemnify the foundation for its loss asserting that infringing the prohibition to create new family foundations (art. 335 sec. 2 Swiss Civil Code) the foundation as plaintiff could not be a subject of legal rights and duties. Following the Genevan instances, the Federal Court of Lausanne in a ruling dated 17/11/2009 rejected this argumentation. It stated that art. 18 Swiss Code of Private International Law can not be applied, the prohibition invoked not being intended to protect guiding principles of the Swiss social, political and economic policy.

- ***Hilmar Krüger***: "Zum auf Schiffspfandrechte anzuwendenden Recht in der Türkei"
- ***Carl-Johan Malmqvist***: "Die Qualifikation der Brautgabe im schwedischen IPR" – the English abstract reads as follows:

Sweden and Germany have become two multicultural countries with large Muslim minorities. This situation reflects on the court system and raises questions about some Muslim traditions and legal elements and their legal status within Swedish and German law. One example is the Mahr, the amount to be paid by the man to the woman at the time of marriage. This article is about the classification of Mahr according to German and Swedish law, but with main focus on the latter legal system. As part of this description, two basic Swedish cases regarding Mahr will be presented and analyzed and hopefully contribute to a clearer view on the Swedish standpoint on Mahr within the private international law.

- ***Karl Peter Puszkajler*** on the conference of the University of Belgrade: Current questions on international arbitration: “Aktuelle Fragen der Internationalen Schiedsgerichtsbarkeit – Tagung der Rechtsfakultät der Universität Belgrad”

Latest Issue of IPRax: No. 1, 2012

The latest issue of “Praxis des Internationalen Privat- und Verfahrensrecht (IPRax)” has just been released. The table of contents is available on the IPRax-Homepage and reads as follows:

***Articles**:*

H.-P. Mansel/K. Thorn/R. Wagner, **Europäisches Kollisionsrecht 2011: - Gegenläufige Entwicklungen,** p. 1:

> *The article gives an overview on the developments in Brussels in the judicial cooperation in civil and commercial matters from November 2010 until October 2011. It summarizes current projects and new instruments that are prevently making their way through the EU legislative process. It also refers to the laws enacted on a national level in Germany which are a consequence of the new European instruments. Furthermore, the article shows areas of law where the EU has made use of its external competence. The article discusses both important decisions and pending cases before the ECJ as well as important decisions from German courts touching the subject matter of the article. In addition, the present article turns to the current projects of the Hague Conference as well.*

C. F. Nordmeier, **Stand, Perspektiven und Grenzen der Rechtslagenanerkennung im europäischen Rechtsraum anhand Entscheidungen mitgliedstaatlicher Gerichte,** p. 31:

Current judgments of the ECJ – most recently in Runevi?-Vardyn – have given rise to the question if and under which circumstances a legal situation may be recognised, based on the rights of EU citizenship, in the European judicial area. The present article analyses the reception of the ECJ cases by courts of the member states. Based hereon, it is possible to demonstrate that the recognition of legal situations is not a new phenomenon. Some national courts resort to Art. 8 ECHR in order to generalize the ECJ decisions which does not convince without further differentiation. Regarding the conditions of application of rights derived from citizenship of the Union, the necessity of a cross-border element and the development of a substantial effect criteria are discussed. The analysed cases lead to the conclusion that it does not seem recommendable to replace classic private international law by a principle of recognition.

T. Rauscher, **Von prosaischen Synonymen und anderen Schäden – Zum Umgang mit der Rechtssprache im EuZPR/EuIPR**, p. 40:

EC/EU-Regulations on Conflict Law (Brussel I Regulation, Rome Regulations etc.) are suffering from significant linguistic problems. This article analyses different types of such defects including imprecisely used legal terms (like "damage" when used in the context of the concept of unjust enrichment), meaningless tautologies (like the use of "Schriftstück" and "Dokument" for what the English version consistently calls a "document"), redundancies in different Regulations featuring unclear variations of the respective wording or merely improper translations into other official languages of the EU of what originally had been developed in one of the EU's working languages.
The author does not suggest at all to replace the system of multiple official languages with a system of only one legal lingua franca. However, the quality of the rule making and translation process should be given greater attention including the co-operation of lawyers and interpreters in this process and a mechanism of control in comparative networks. Last but not least, in order to improve the consistency of the entire system of Regulations, a systematic codification of European Conflict Law should be taken into consideration.

M. Günes/K. Freidinger, **Gerichtsstand und anwendbares Recht bei - Konsignationslagern,** p. 48:

Consignment stocks are one of several techniques to ensure that goods reach

the intended market. In particular consignment agreements are used as a method of commercial transactions for oversea markets. Despite the fact that such agreements are regularly bedded in an international context the applicable law and the place of jurisdiction for any disputes have not been discussed scientifically in German law yet. After assessing the possible legal nature(s) of contracts in the context of a consignment stock, the paper establishes that in most cases – if contractual provisions do not stipulate otherwise –, German law would declare the Law of the storage location applicable and the Court of the storage location competent if it had to assess a legal question concerning the storage contract (the master agreement) itself. In a case concerning an individual sale agreement to this master agreement, a German court should – in most cases – hold the law of the place of residence of the seller applicable and determine the place of jurisdiction in the exact same manner as it does in case of an ordinary sale agreement. Nevertheless, these findings are not the only possible ones. Therefore, it is recommendable to conclude consignment agreements with paying special attention to the questions of the applicable law and the place of jurisdiction. The parties and in particular the seller must hereby consider that any agreed legal system may not be applied to the questions of title and the retention of the title in the goods.

C. Luttermann/S. Geißler, **Haftungsfragen transnationaler Konzern-finanzierung (cash pooling) und das Bilanzstatut der Gesellschaft,** p. 55:

We will enter a core domain of international legal practice and jurisprudence: Companies are globally organised as groups, consisting of numerous corporations (legal entities); as a rule, these are financed within the framework of common cash management in the affiliate relations (cash pooling). Under the dominion of the separate legal entity doctrine, this is problematic, for the individual corporation has only limited "assets". These have to be determined on the basis of accounting law. This means that transnationally, it is a matter of central questions of liability and in general, for an adequate asset order, a change of perspective regarding conflict of law rules, as will be shown: Instead of dealing with the classic company statute regarding organisational law (lex societatis), the material issue is rather which accounting law is valid for the individual company and its valuation (accounting statute of the company). This is the necessary basis on which a sustainable legal order can be developed. The fact that this is still lacking is illustrated by the ongoing worldwide "financial

crisis" with largely ailing balance sheets (financial reporting).

Case Notes

D.-C. Bittmann, **Ordnungsgeldbeschlüsse nach § 890 ZPO als Europäische Vollstreckungstitel? (BGH, S. 72),** p. 62:

In the decision reviewed in this article the German Federal Supreme Court held that penalty payments according to § 890 ZPO cannot be issued as European Enforcement Orders. The Court is reasoning that a decision imposing a penalty payment does not comply with the procedural minimum standards set in force by Regulation (EU) 805/2004. Decisions according to § 890 ZPO especially do not inform the debtor about how to contest the claim and what the consequences of not contesting are (art. 17).
The following article agrees with this result. It looks, however, critically at the way of reasoning of the Federal Supreme Court. The central point of the decision is the question, who is entitled to enforce a penalty payment. Different from the French system, according to which a penalty payment (astreinte) goes to the claimant of the injunctive relief, which shall be enforced, penalty payments according to § 890 ZPO flow into the treasury. As a consequence, in Germany the claimant of an injunctive relief cannot apply for a penalty payment issued as European Enforcement Order.

D. Schefold, **Anerkennung von Banksanierungsmaßnahmen im EWR-Bereich (LG Frankfurt a.M., S. 75)**, p. 66:

On appeal against a preliminary seizure order, the district court in Frankfurt on Main held that such an order by a German court against a German branch of an Icelandic credit institution violates the European directive 2001/24/EC, adopted for the entire European Economic Area (EEA), on the reorganisation and winding up of credit institutions when the credit institution undergoes reorganisation in its home state and the reorganization procedure entails a suspension of enforcement. In line with art. 3 of directive 2001/24/EC, the district court held that the administrative or judicial authorities of the home member state of a credit institution are alone competent to decide on implementation measures for a credit institution, including branches established in other member states. Such measures are fully effective according

to the law of the home member state, including against third parties in other member states, and subject to mutual recognition throughout the EEA without any further formalities.

Overview over Recent Case Law

OLG München 19.10.2010 31 Wx 51/10, **Noterbrecht nach griechischem Recht des einzigen Sohnes eines in Deutschland?1. ansässigen und verstorbenen Auslandsgriechen. Die Rückkehr nach Griechenland zur Ableistung des Wehrdienstes?2. stellt jedenfalls dann eine Aufgabe des Wohnsitzes in Deutschland dar, wenn der Wehrpflichtige seinen Hausstand auflöst und die gesamte Familie nach Griechenland umzieht. [E. J.],** p. 76

no abstract

View abroad

M. Pazdan, **Das neue polnische Gesetz über das internationale Privatrecht**, p. 77:

On 16th of May, 2011, the new act on private international that was enacted on the 4th February, came into force. The new law replaces the old act from 1965. It is harmonized with European private international law. The act governs matters excluded from the scope of regulations Rome I and Rome II and supplements the Hague Convention of 19th October, 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children with respect to issues not regulated therein.
The act of 2011 fills out many of the gaps that existed previously. For example, it determines the law applicable to power of attorney, personal rights, name and surname of a person, as well as to arbitration agreement and intellectual property. It also alters some of the rules adopted under the law of 1965. It permits, inter alia, a choice of law for matrimonial property regimes, marriage contract and succession. Moreover, the obligations arising out of unilateral legal acts have been treated differently than in the law of 1965. As with respect to the formal validity of legal acts related to the dispositions of immovable

property or corporate matters (such as creation, transformation or liquidation of a legal entity), the new law gives up the rule according to which it was sufficient to satisfy the requirements of the form of lex loci actus.

Finally, the act establishes a general rule in article 67, which applies in the circumstances where the act itself or other provisions of Polish law fail to indicate governing law. The provision is based on the concept of the closest connection.

M. Melcher, **Das neue österreichische Partnerschaftskollisionsrecht**, p. 82:

Due to the introduction of the registered partnership ("eingetragene Partnerschaft") as a legal institution for same-sex couples in Austria in January 2010, several provisions were added to the Austrian Private International Law Act (IPRG), which determine the law applicable to the establishment (§ 27a IPRG), the personal effects (§ 27b IPRG), the property regime (§ 27c IPRG) and the dissolution (§ 27d IPRG) of registered partnerships. The article analyzes the personal and temporal scope of application and describes the new conflict rules. Besides, a thorough assessment of the applied connecting system and its impact on registered partnerships is included, which identifies the inconsistency of connecting factors regarding the establishment and the dissolution of registered partnerships and the non-adaptation of conflict rules on inheritance, surnames and adoption to the particularities of registered partnerships as main areas of concern.

P. F. Schlosser, **Aus Frankreich Neues zum transnationalen einstweiligen - Rechtsschutz in der EU (Cour de cassation, 8.3.2011 – 09-13830 und Cour de cassation, 4.5.2011 – 10-13712)**, p. 88:

The author informs the readers of two decision of the French Cour de cassation (8 March 2011 09-13830 and 4 May 2011 10-13712) which according to him should be supported.
In the later decision the Cour de cassation is confirming its prior ruling that the rules of the Brussels I Regulation on provisional, including protective, measures cover measures for obtaining evidence. The German doctrine is spit on that issue. The Cour de cassation should, however, be encouraged to continue emphasizing that the Brussels I Regulation covers only evidentiary measures to

be granted in a case of urgency.
In the first decision the issue was the binding character of a Greek court decision refusing, after opposition of the debtor, to order the arrest of a seagoing vessel anchoring in a Greek port. When subsequently the vessel was anchoring in the port of Rouen the creditor tried again to obtain an arrest invoking the more creditor-friendly rules of French law. But he was again unsuccessful The Cour de cassation decided that pursuant to Art 32 Brussels I Regulation foreign decisions refusing to grant provisional measures must be recognized. The innovative nature of the decision is due to the fact that for the first time the issue of the binding force of a decision refusing to grant provisional protection was discussed. There is no trace of such a discussion in previous case law or legal doctrine.

H. Wais, **Zwischenstaatliche Zuständigkeitsverweisung im Anwendungsbereich der EuGVVO sowie Zuständigkeit nach Art. 24 S. 1 EuGVVO bei rechtsmissbräuchlicher Rüge der Unzuständigkeit (Hoge Raad, 7.5.2010 – 09/01115),** p. 91:

In this decision of the Dutch Hoge Raad, which deals with an alimony dispute between Dutch citizens domiciled in Belgium, three main issues arise: first, the applicability of the Brussels I-Regulation in cases where both parties are domiciled in the same member state; second, the observation of a cross-border transfer of a case on the grounds of a bilateral treaty when the Brussels I-Regulation is applicable; and third, the possibility of taking into account in its scope the abuse of process of one party. This article examines these questions, before presenting some thoughts on a possible alternative approach.

C. Aulepp, **Ein Ende der extraterritorialen Anwendung US-amerikanischen - Kapitalmarkthaftungsrechts auf Auslandstransaktionen? (US Supreme Court, 24.6.2010 – No. 08-1191 – Morrison v. National Australia Bank Ltd.),** p.95:

U.S. law provides for a broad issuer liability for securities fraud, especially under § 10(b) Securities Exchange Act of 1933 in connection with SEC Rule 10b-5. Together with the availability of opt-out class actions, this sets the United States apart from most other jurisdictions. In the past, the U.S. Federal Courts of Appeal have held that § 10(b) applies extraterritorially if there are

significant effects on American investors or the American market; or if significant conduct in the US contributed to the fraud scheme. In a landmark decision, the U.S. Supreme Court held in Morrison v. National Australia Bank, Ltd., 130 S. Ct. 2869 (U.S. 2010) that § 10(b) of the Exchange Act and Rule 10b-5 possess no extraterritorial reach. It adopted a bright-line rule that these provisions only apply to transactions in securities listed on domestic exchanges, and domestic transactions in other securities. The author argues that the Morrison decision constitutes a step in the right direction, as it provides a certain degree of legal certainty for transnational issuers in a previously convoluted area of international securities law. It is submitted that Morrison might provide valuable impulses for resolving conflicts of law in securities disputes within the European Union as well, as a transaction-base rule like the one articulated in Morrison can well be integrated within the framework of the Rome I and Rome II Regulations.

Announcements

H.-P. Mansel, **Werner Lorenz zum 90. Geburtstag,** p. 102

no abstract

E. Jayme, **Zur Kodifikation des Allgemeines Teils des Europäischen - Internationalen Privatrechts – 20 Jahre GEDIP (Europäische Gruppe für Internationales Privatrecht) – Tagung in Brüssel,** p. 103

no abstract

New Draft Report of European

Parliament on Future Choice of Law Rule for Privacy and Personality Rights

The Committee on Legal Affairs of the European Parliament has issued a new Draft Report with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II). The new report takes into account the recent *E-Date Advertising* judgment of the European Court of Justice.

The Draft Report proposes to add the following provision to the Rome II Regulation:

> *Article 5a – Privacy and rights relating to personality*
>
> *(1) Without prejudice to Article 4(2) and (3), the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, shall be the law of the country in which the rights of the person seeking compensation for damage are, or are likely to be, directly and substantially affected.*
> *However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by the first sentence.*
>
> *(2) When the rights of the person seeking compensation for damage are, or are likely to be, affected in more than one country, and that person sues in the court of the domicile of the defendant, the claimant may instead choose to base his or her claim on the law of the court seised.*
>
> *(3) The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.*
>
> *(4) The law applicable under this Article may be derogated from by an agreement pursuant to Article 14.*

Many thanks to Jan von Hein for the tip-off.

EU's Proposed Sales Law Hits the Shelves

The Commission has, today, published its Proposal for a Regulation on a Common European Sales Law, as a consequence of its 2010 consultation on contract law in the EU and the work of the Commission's (not uncontroversial) expert group. As expected, the proposed Common European Sales Law (CESL) takes the form of an optional instrument, which would apply only through the agreement of the parties to a contract falling within the scope of the instrument (which has contracts for the sales of goods at its core).

The Proposal marks the start of what seems likely to be a lively debate within and outside the institutions of the European Union. As a first reaction (and admittedly without having had sufficient time to explore the detail of the Proposal, which runs to 115 pages), it is suggested that two introductory points may be of particular interest to followers of this site.

First, the sole proposed legal basis of the measure is the internal market harmonisation power in TFEU, Art. 114. No reliance is placed on the civil justice power in TFEU, Art. 81.

Secondly, it is proposed that the Regulation should operate alongside (and not in lieu of) the choice of law regime established by the Rome I Regulation. According to Recital (10):

> *The agreement to use the Common European Sales Law should be a choice exercised within the scope of the respective national law which is applicable pursuant to Regulation (EC) No 593/2008 or, in relation to pre-contractual information duties, pursuant to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Regulation (EC) No 864/2007), or any other relevant*

> *conflict of law rule. The agreement to use the Common European Sales Law should therefore not amount to, and not be confused with, a choice of the applicable law within the meaning of the conflict-of-law rules and should be without prejudice to them. This Regulation will therefore not affect any of the existing conflict of law rules.*

Recital (12) emphasises that, since the CESL contains a complete set of fully harmonised mandatory consumer protection rules, there will be no disparities between the laws of the Member States in this area where the parties have chosen to use the CESL. Consequently, Art. 6(2) of the Rome I Regulation, which guarantees to the consumer the protection of non-derogable provisions of the law of his country of habitual residence, is said to have "no practical importance for the issues covered by the Common European Sales Law". Recitals (27) and (28) emphasise that the national law applicable under the Rome I and Rome II Regulations (or other rules of private international law) will apply in any event to matters falling outside the CESL.

The exclusive character of the CESL, when chosen by the parties, is affirmed by the first sentence of Article 11 of the Regulation, which provides that, where the parties have validly agreed to use the CESL for a contract (see Art. 8), only the European Sales Law shall govern the matters addressed in its rules. The second sentence of Art. 11 addresses pre-contractual duties.

This seems all very well when the law applicable to the contract under Arts. 3, 4 or 6 the Rome I Regulation (as applicable) is the law of a Member State, but what if it is the law of a non-Member State? Can Art. 10 be taken at face value in preserving the integrity of the Rome I and Rome II Regulations, or must the CESL be understood as being superimposed on the law applicable under the Rome I Regulation and (if so) on what basis? Recital (14) touches on this issue. It states that the CESL should not be limited to cross-border situations involving only Member States, but should also be available to facilitate trade between Member States and third countries. It continues by suggesting that:

> *Where consumers from third countries are involved, the agreement to use the Common European Sales Law, which would imply the choice of a foreign law for them, should be subject to the applicable conflict-of-law rules.*

It appears, therefore, that the proposed Regulation may contemplate that the choice of the CESL would involve an implicit choice under the Rome I Regulation of a law other than that of the third country consumer's country of habitual residence. The question is "Which law?", as Art. 3(1) of the Rome I Regulation requires that the law chosen be the law of a country, and not a choice of non-national law such as the CESL? In a contract between a seller habitually resident in an EU Member State and a consumer habitually resident in a non-Member State, one might argue that the choice of the law of the seller's State (including the CESL, as applicable in that State under the proposed CESL Regulation) may be demonstrated with sufficient clarity by the terms of the contract (Art. 3(1))? What, however, if the contract also (perversely) contains a choice of a third country's law? Does Art. 11 of the proposed Regulation then confer on the CESL rules the status of (party chosen) overriding mandatory provisions under Art. 9(2) of the Rome I Regulation, so as to trump the expressly chosen law, or does the CESL take effect as if incorporated by reference into the contract insofar as this is possible under the chosen law? Finally, even if a choice of a particular Member State's law can be clearly demonstrated, so as to give effect to the CESL, can the third country consumer still rely on more favourable protection under the law of his habitual residence, in line with Art. 6(2) of the Rome I Regulation (and in apparent contradiction of Recital (12))? These questions are likely to see more air time in the forthcoming legislative process. The point made here is that the proposed CESL and the Rome I Regulation do not, as Recital (10) and other parts of the Proposal appear to suggest, pass like ships in the night.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2011)

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

Here is the contents:

- ***Marc-Philippe Weller***: "Anknüpfungsprinzipien im Europäischen Kollisionsrecht: Abschied von der „klassischen" IPR-Dogmatik?" – the English abstract reads as follows:

Friedrich Carl v. Savigny has influenced modern private international law. His method is known as the "classic" private international law doctrine. Its principles are the international harmony of decisions and the neutrality of private international law, embodied in the principle of the most significant relationship.

However, in European private international law a slight paradigm change concerning the structure of the conflict of law rules can be detected from a classic point of view. The conflict of law rules of the Rome I and Rome II Regulation are prevalently oriented according to the material principles of the European Union such as the promotion of the internal market, the increase of legal security and the protection of the weaker party (e.g. consumer protection).

Nevertheless, in the event of a future codification of private international law at European level, the classic connecting principles of private international law deserve greater attention in the law making process. The Lisbon Treaty would allow such a "renaissance" of the classic private international law doctrine.

- ***Dieter Martiny***: "Die Kommissionsvorschläge für das internationale Ehegüterrecht sowie für das internationale Güterrecht eingetragener Partnerschaften" – the English abstract reads as follows:

On 16 March 2011 the European Commission proposed two separate Regulations, one for married couples on matrimonial property regimes and another on the property consequences of registered partnerships. A Communication of the Commission explains the approach of the proposals. While it is in principle to be welcomed that the Proposals are gender neutral and neutral regarding sexual orientation, the relationship between the intended overarching European rules with the (existent) divergent national rules for different types of marriages and partnerships raises some doubts. It is regrettable that, whereas spouses may themselves expressly choose the

applicable law to a certain extent, the assets of registered partnerships are, as a rule, subject to the law of the country where the partnership was registered. In the absence of a choice of law by the spouses, similar to the Rome III Regulation – but following the immutability doctrine – the law of their common habitual residence applies in the first instance. The scope of the Proposals as to "matrimonial property" is not totally clear, nor is the role of overriding mandatory rules. Rules on jurisdiction and recognition are broadly in line with the Brussels II bis Regulation and the Succession Proposal. Many details of the recent Proposals need more clarification. However, despite a number of flaws the Proposals seem basically to be acceptable – at least for the civil law Member States.

- ***Andreas Engert*/Gunnar Groh**: "Internationaler Kapitalanlegerschutz vor dem Bundesgerichtshof" – the English abstract reads as follows:

In 2010, the German Federal Court handed down a number of judgments on the liability of investment service providers in an international setting. The Court faced two specific fact patterns: On the one hand, broker-dealers from the U.S. and Britain participated in a fraudulent investment scheme operated by a German asset manager through investment accounts located abroad. The question arose whether German courts had jurisdiction over the foreign defendants for aiding and abetting, and if so, which tort law governed the case. On the other hand, an investment fund from Turkey and a Swiss asset manager offered their services to investors in Germany without being licensed by the German financial services supervisor.

As regards the jurisdiction issue vis-à-vis defendants from the U.S. and Turkey, the Court concluded that foreign aiders and abettors to a tort committed in Germany can be sued in Germany. The tortfeasor's acts were imputed to them under § 32 Zivilprozessordnung (German Code of Civil Procedure). In relation to European defendants, the Federal Court claimed jurisdiction under art. 5 no. 3 Brussels I Regulation/Lugano Convention based on the place where the damage occurred. Because investors were almost certain to lose money on the

fraudulent scheme, the damage occurred in Germany when investors transferred their funds to a foreign account. In one case, the Court relied on its jurisdiction over consumer contracts for adjudicating a torts claim, which

allowed the Court to dismiss a jurisdiction clause.

With regard to the conflicts rules on tort law, the cases were still governed by German conflicts law leading to similar issues. As a result, investors were able to rely on German tort law. Under the new Rome II Regulation, future tort claims may well qualify as culpa in contrahendo. The applicable law then depends on the law applicable to the contract itself. In this case, the special conflict rule for consumer contracts (Art. 6 Rome I Regulation) ensures that retail investors can invoke their home country's tort law.

- ***Jürgen Samtleben:*** "Schiedsgerichtsbarkeit und Finanztermingeschäfte – Der Schutz der Anleger vor der Schiedsgerichtsbarkeit durch § 37h WpHG" – the English abstract reads as follows:

The present article discusses the disputed provision of § 37h of the German Securities Trading Act (WpHG), according to which non-merchants are not able to enter into a valid advance arbitration agreement as regards financial services transactions. The decision of the Federal Court of Justice (BGH) at issue addressed a damages claim brought against a US broker who had, through the use of independent German financial intermediaries, secured clients for the purchase of financially risky futures. As in other cases, the BGH found the business practice of the financial intermediaries to be contrary to public policy and concluded that the broker is subject to liability for his participation in an unlawful commercial practice. The central issue, however, was the defendant's contention that the court was bound to refer the matter to arbitration in light of an arbitration clause included in the original account agreement. Although signed only by the client, the clause arguably comported with US law, notwithstanding its failure to meet the formal requirements of Art. II of the New York Convention. As it was not clear whether the claimant could be labeled a merchant, the BGH could not make a final determination on the applicability of § 37h WpHG. Equally left open was the question whether the claimant had engaged in the financial activities in question for private purposes and thus as a consumer; in such a case the account agreement would fail to satisfy the formal requirements of § 1031(5) of the German Code of Civil Procedure (ZPO). The article makes clear that the formal requirements of § 1031(5) ZPO can be overridden by a written arbitration agreement that otherwise satisfies the New York Convention. In contrast, § 37h WpHG

constitutes a matter of (missing) subjective arbitrability which, according to the Convention, is to be determined under national law. Whereas § 37h WpHG in its current version only protects non-merchants, this limitation is overly narrow and should be abandoned so that all investors acting in a private capacity are protected from the application of an arbitration clause.

- ***Astrid Stadler***: "Prozesskostensicherheit bei Widerklage und Vermögenslosigkeit" – the English abstract reads as follows:

The key issue in the proceedings before the Court of Appeal in Munich was the question whether an insolvent US corporation – with its center of main interest being located in Great Britain – was exempt from its obligation to provide security for legal expenses of a counterclaim after the principal cause of action had been dismissed. The author agrees with the court's judgment, stating that the counterclaimant legally was exempt but disagrees with the reasons given by the court. In her opinion, an exemption would have been possible according to Sec. 110 para. 1 German Code of Civil Procedure, which imposes the obligation to provide security only upon claimants domiciled outside the EU. With the (counter-)claimants insolvency estate being located in Great Britain, the companies statutory head office in the US (Delaware) was irrelevant. The article furthermore raises the question whether an exemption to the obligation of providing security for legal expenses should be granted whenever the foreign (counter-)claimant is penniless. The article objects to such a rule considering the ratio legis of Sec. 110 German Code of Civil Procedure, which simply tries to compensate the difficulties being linked to an execution outside the EU or the EEA. The defendants risk of being sued by an insolvent plaintiff not being able to reimburse the defendant's legal costs in case of a dismissal of his action exists as well with respect to plaintiffs domiciled in the forum state. Thus a general rule applicable to all insolvent plaintiffs would be necessary, which however runs contrary to a tendency in European countries of generally abolishing the obligation of foreign plaintiffs to provide security for legal expenses in order to make their court more attractive.

- ***Thomas Rauscher:*** "Ehegüterrechtlicher Vertrag und Verbraucherausnahme? – Zum Anwendungsbereich der EuVTVO" – the English abstract reads as follows:

The contribution discusses several decisions rendered by the Berlin Court of Appeal (Kammergericht) concerning the qualification of a right in property as arising out of a matrimonial relationship in the sense of Art 2 (a) of the EC-Enforcement-Order-Regulation (Regulation (EC) No 805/2004) as well as the application of the EC-Enforcement-Order-Regulation towards consumer cases. The meaning of matrimonial property rights under the EC-Enforcement-Order-Regulation should be interpreted with regard to the ECJ's DeCavel-decisions given under the Brussels Convention. The primary claim will be decisive for the interpretation of this exemption from the Regulation's scope of application; secondary claims are exempted from the scope of application as well. The protection of consumers under Art 6 (1)(d) EC-Enforcement-Order-Regulation should not only apply in B2C-cases as under Art 15 Brussels I-Regulation but also in C2C-cases; the consumer being the defendant needs protection against certification of a title as European Enforcement Order without regard to the plaintiff's qualification as a consumer or professional. Finally it is questionable that the court did not ask the ECJ to render a preliminary decision concerning those remarkable questions.

- ***Martin Illmer***: "Englische anti-suit injunctions in Drittstaatensachverhalten: zum kombinierten Effekt der Entscheidungen des EuGH in Owusu, Turner und West Tankers" – the English abstract reads as follows:

Due to the territorial limits of the ECJ's judgments in Turner and West Tankers, English courts are still granting anti-suit injunctions in relation to non-EU Member States. However, even this practice may be contrary to EU law due to the combined effect of the ECJ's judgments in Turner, West Tankers and Owusu. This line of argument which was lurking in the dark for some time now came only recently before the English High Court. Based on the assumption that forum non conveniens (which was the critical issue in Owusu) and anti-suit injunctions (which were the critical issue in Turner and West Tankers) are two related issues with overlapping preconditions, anti-suit injunctions might have been buried altogether. The High Court, however, rejected such an assumption without further discussion of the issue and granted the anti-suit injunction.

- ***Ghada Qaisi Audi***: DIFC Courts-ratified Arbitral Award Approved for

Execution by Dubai Courts; First DIFC-LCIA Award pursuant to Dubai Courts-DIFC Courts Protocol of Enforcement

The enforcement of arbitral awards made by the Dubai International Financial Centre-London Court of International Arbitration (DIFC-LCIA) can only be achieved by a ratification Order of the Dubai International Financial Centre Courts (DIFC Courts). The first DIFC Courts-ratified arbitral award was recently approved for execution by the Dubai Courts under the 2009 Protocol of Enforcement that sets out the procedures for mutual enforcement of court judgments, orders and arbitral awards without a review on the merits, thus providing further uniformity and certainty in this arena.

- ***Christel Mindach***: Russland: Novellierter Arbitrageprozesskodex führt Sammelklagen ein
- ***Carl Friedrich Nordmeier***: Beschleunigung durch Vertrauen: Vereinfachung der grenzüberschreitenden Forderungsbeitreibung im Europäischen Rechtsraum – Tagung am 23./24.9.2010 in Maribor
- ***Mathäus Mogendorf***.: 16. Würzburger Europarechtstage am 29./30.10.2010

Clarkson & Hill, The Conflict of Laws (4th edn OUP, 2011)

Those who teach or study in private international law will be interested to know that Chris Clarkson and Jonathan Hill have published the 4th edition of their excellent student text on *The Conflict of Laws*. From the blurb:

- *Covers the basic principles of the conflict of laws in a succinct and approachable style making this an ideal introductory text*

- *Explains complex points of law and terminology clearly and without oversimplification, offering both an authoritative and accessible approach to a subject which has changed greatly in recent years*
- *Offers comprehensive coverage for undergraduate and postgraduate courses on the Conflict of Laws.*
- *Provides analysis of existing legislation in addition to considering reform proposals and theoretical issues.*

New to this edition

- *Restructured content better reflects the topic coverage of typical undergraduate courses in Conflict of Laws and allows for extended analysis of the most relevant topics*
- *Expanded introductory chapter discusses the major changes to the subject and the theoretical issues surrounding it*
- *Fully updated to reflect the emphasis on issues relating to jurisdiction and the recognition and enforcement of judgments in private international law*
- *Completely re-written chapter on choice of law relating to non-contractual obligations (Rome II Regulation)*
- *Substantially revised chapter on choice of law relating to contractual obligations in light of the Rome I Regulation*
- *Revised chapters on habitual residence and matrimonial causes taking account of increasing case-law (both domestic and European) on the Brussels II Revised Regulation.*

The fourth edition of this work provides a clear and up-to-date account of the private international law topics covered in undergraduate courses. Theoretical issues are introduced in the first chapter and, where appropriate, considered in greater detail in later chapters. Basic principles of the conflict of laws are presented in an approachable style, offering clarity on complex points and terminology without over-simplification.

The area of conflict of laws has undergone a profound change in recent decades. Much of the subject is now dominated by legislation, both domestic and European, rather than by case law. In practical terms, issues relating to jurisdiction and the recognition and enforcement of judgments have taken centre stage and choice of law questions have become of less practical

importance.

These changing emphases in private international law are fully reflected in this book. The authors provide detailed analyses of the most important commercial topics (civil jurisdiction, the recognition and enforcement of foreign judgements, and choice of law relating to contractual and non-contractual obligations) as well as the most central topics in family law (marriage, matrimonial causes and property law).

OUP has kindly offered a **15% discount** to all of our readers: purchase the text direct from OUP's website, then use promotional code **WEBXSTU15** when you add the book to your shopping basket. This takes the book from £34.99 to **£29.74**. Overwhelmingly recommended.

Van Den Eeckhout on Corporate Human Rights Violations

Veerle Van Den Eeckhout (Leiden and Antwerp) has posted Corporate Human Rights Violations and Private International Law – The Hinge Function and Conductivity of PIL in Implementing Human Rights in Civil Proceedings in Europe: A Facilitating Role for PIL or PIL as a Complicating Factor? on SSRN. Here is the abstract:

In this article the author explores the role private international law ('PIL') could play in addressing human rights violations committed by a multinational company operating outside Europe ? possibly in a conflict zone ? in a civil action in Europe. The article examines the feasibility of civil recourse in a European country seen from the perspective of PIL. Is PIL functioning as a neutral hinge – identifying the competent court(s) and the applicable law in a neutral way ? or does PIL lend itself rather to function as a tool, either serving the economic concerns of multinational companies, or the aims of plaintiffs who wish to hold companies accountable? To answer this question, the author

analyzes PIL rules and PIL techniques in a technical-legal way and evaluates them with a critical eye. In the analysis, the concept of 'access to justice' is used as a central key concept; access to justice is linked both with PIL rules on jurisdiction and PIL rules on applicable law: rules of jurisdiction are decisive in 'opening' the door to proceedings in a European country, in which subsequently – to the extent that the rules of applicable law allow this – human rights may be invoked and the interests of third-country victims as 'weaker parties' may be protected.

The area of PIL rules to be studied is ? mainly – the area of torts, with special attention for issues of negligence, omission, duty of care and complicity. As the PIL rules of European Member States are increasingly being 'communitarized', the main PIL rules to be studied and analyzed in this article are sources of European PIL. Thus, the focus will be on the Brussels I Regulation (including aspects of the ongoing revision process of this Regulation, particularly proposals which could either broaden or limit the possibility of starting proceedings in a European country) and the Rome II Regulation as unified European PIL sources, albeit with attention for potential national differences with respect to the application of the Rome II Regulation: evaluating the plausibility of various results is important, because it is conceivable that plaintiffs may choose between several European courts, taking into account in their choice the advantages or disadvantages of the specific way in which national courts will apply the Rome II Regulation ('shopping' possibilities for plaintiffs) and because it is conceivable that companies will take into account these differences in their decision where to 'establish' their headquarters and where to 'take decisions' etc. And indeed, the system of the Rome II Regulation makes it conceivable that different results are obtained depending on the European court that hears the case.

But what is more: the current literature is for the most part rather sceptical about the possibilities the Rome II Regulation offers to third-country victims of violations of human rights committed by companies outside Europe. Accordingly, although the author argues that some of the avenues for plaintiffs allowed by the system of the Rome II Regulation appear to be underestimated in the literature – and although the author also argues that even the current version of the Rome II Regulation has the potential to enhance human rights – it will be recognized that there are hurdles to be taken. This raises the question

whether the system of the Rome II Regulation needs to be amended or needs to be 'fleshed out' by a set of specific rules. This could comprise actions such as broadening the scope of Article 7 of the Rome II Regulation; unification of mandatory rules – e.g. similar to the way in which the European legislator intervened in international labour law by unifying mandatory rules in the Posting Directive ? see the opening offered by the 'overriding mandatory rules' of Article 16 of the Rome II Regulation; promulgation – on a European level? – of statutory duties for companies with regard to extraterritorial compliance with human rights standards and creating more possibilities to take into account national or European rules on extraterritorial corporate criminal responsibility for human rights violations ? see the opening offered by the 'rules of safety and conduct' of Article 17 of the Rome II Regulation; unification of 'surrogate law' for cases where the plea of public order of Article 26 of the Rome II Regulation is successfully invoked.

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

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

Here is the contents:

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

The extensive reform of the international law of obligations by the Rome I and Rome II-Regulations raises the question of the future classification of the liability of the falsus procurator under international private law. Since the new

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

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

The present essay discusses the decision of the European Court of Justice in the case of Voralberger Gebietskrankenkasse/WGV-Schwäbische Allgemeine – C-347/08. In this case, the court was concerned with the question whether, under Article 11 Paragraph 2 of the Council Regulation (EC) No. 44/2001 of 22 December 2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters a social insurance agency acting as the statutory assignee of the rights of the directly injured party has the right to bring an action directly against the insurer in the courts of its own Member State. The ECJ denies such a privilege, which is the correct decision in the author's opinion, who, after having reviewed the ECJ's judgement, also discusses the assignability of the decision to other conventions. Afterwards he raises the question to what extent legal entities, heirs or persons who claim compensation for immaterial damages, damages resulting of shock or alimony are allowed to sue the injuring party's insurer at their own local forum.

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

The article firstly deals with the question as to whether and to what extent international jurisdiction can be affected by pre-trial dispositions regarding the asserted claim by the parties to a lawsuit. Secondly, it examines the

consequences resulting from the new EC Regulations Rome I and Rome II to the classification of claims out of culpa in contrahendo in terms of international jurisdiction. The background of the article consists of two decisions, one by the OLG (Higher Regional Court) Frankfurt/Main and one by the OLG München. The former concerned a case in which the defendant had pursued commercial resp. professional activities in the Member State of the consumer's domicile in accordance with Art. 15 sec. 1 lit. c) of the Brussels I Regulation at the time he concluded a contract with a consumer, but had ceased to do so before he was sued for damages in connection with the very contract. The latter – against which an appeal has meanwhile been dismissed by the BGH (German Federal High Court of Justice), cf. BGH, 10.2.2010, IV ZR 36/09 – concerned a case in which the party of a consumer contract had assigned his claim based on culpa in contrahendo to the plaintiff, so that the plaintiff could file a lawsuit against the other party of the contract. Here the question arose as to whether or not the jurisdiction norm of § 29a ZPO (German Code of Civil Procedure) – which provides a special forum for cases concerning consumer contracts negotiated away from business premises – was also applicable, if the plaintiff was not the person who had concluded the contract. The OLG München negated this question. Apart from that the court decided that jurisdiction in this case could not be based on § 29 ZPO which provides a special forum at the place of the performance of the contract, either. This part of the decision gives reason to the examination as to whether or not all claims based on culpa in contrahendo can still be subsumed under § 29 ZPO. Since these claims are now subject to Art. 12 of the Rome II Regulation, it appears to be doubtful whether the traditional German classification of culpa in contrahendo as a contractual claim in terms of jurisdiction can be upheld.

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

Article 34 (2) Brussels I in principle allows courts to deny recognition and enforcement of a foreign (default) judgment when the defendant was not served with the document which instituted the proceedings "in a sufficient time and in such way as to enable him to arrange for his defence". As an exception to this principle, courts must not deny recognition and enforcement if the defendant failed to challenge the judgment in the country of origin. In its decision of 21

January 2010, the German Bundesgerichtshof (BGH) dealt with both aspects of Art. 34 (2) Brussels I. Regarding the defendant's obligation to challenge the judgment, the BGH – rightfully – clarified that the obligation exists even when the defendant does not gain knowledge of the judgment before the enforcement proceedings. In such a case the defendant may request a stay of the enforcement proceedings while challenging the judgment in the country of origin. Regarding the time and manner of the service, the BGH relied on the formal service requirements as provided in the German code of civil procedure (ZPO) – Germany being the country where service was effected. The latter part of the decision calls for criticism. In this author's opinion, in interpreting Art. 34 (2) Brussels I courts should not rely on national rules, but rather should look to autonomous criteria. As regards the manner of service, such autonomous criteria may be taken from the minimum standards-catalogue in Arts. 13 and 14 EEO.

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

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

- ***Peter Mankowski/Friederike Höffmann***: "Scheidung ausländischer

gleichgeschlechtlicher Ehen in Deutschland?" – the English abstract reads as follows:

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

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

In its decision 7 Ob 18/09m of 8 July 2009 the Austrian Supreme Court of Justice (Oberster Gerichtshof, OGH), judged as substance of the case, the validity of an agreement conferring jurisdiction incorporated in a bill of lading, its character as well as its applicability to a civil claim for damages resulting from a breach of the contract of carriage on which the bill of lading was based. Aside from that, questions concerning the relation between the Lugano-Convention (LC) and the Brussels I Regulation arise in this judgement. An agreement conferring jurisdiction included in a bill of lading issued unilaterally by the carrier fulfils the requirements established in art. 17 par. 1 lit. c LC since in the international maritime trade the incorporation of agreements conferring jurisdiction in bills of lading can clearly be considered to be a generally known and consolidated commercial practice. Concerning the (non-)exclusivity of the agreement conferring jurisdiction (art. 17 par. 1/par. 4 LC) the OGH makes a distinction from its earlier case law and bases the decision on the European Court of Justices judgement of 24 June 1986, case 22/85, Rudolf Anterist ./. Credit Lyonnais. According to the in casu applicable Swiss Law the prorogatio fori in the bill of lading covers the contract of carriage as well, although in principle the contract does not depend on the bill of lading. Lastly, to identify

the relation between the LC and the Brussels I Regulation, the analogous application of art. 54b par. 1 LC is decisive.

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

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

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

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

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

the English abstract reads as follows:

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

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

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

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

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

- ***Erik Jayme*** on the conference on the Proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, which took place in Vienna on 21 October 2010: "Der Verordnungsvorschlag für ein Europäisches Erbkollisionsrecht (2009) auf dem Prüfstand – Tagung in Wien"
- ***Stefan Arnold:*** "Vollharmonisierung im europäischen Verbraucherrecht – Tagung der Zeitschrift für Gemeinschaftsprivatrecht (GPR)" – the English abstract reads as follows:

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

full harmonisation measures.

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

Fawcett & Torremans on Intellectual Property and Private International Law (2nd edn)

James Fawcett (*Nottingham*) and Paul Torremans (*Nottingham*) have published the second edition of their monograph on ***Intellectual Property and Private International Law*** (2011, OUP). The blurb:

- *Offers a comparative approach of private international law and intellectual property law and assesses how these disciplines impact on and co-operate with the other*
- *A new edition of a major work by top figures in the field which was the first full account in the legal literature and remains the only significant systematic treatment*
- *Addresses the large number of intellectual property cases that now involve foreign law, particularly in commercial courts and which are now of increasinging significance to practitioners*

New to this edition

- *Updated to take into account the replacement of the Brussels Convention by the Brussels I Regulation*
- *Updated to take into account the introduction of the Rome II Regulation dealing with the applicable law in relation to non-contractual*

obligations

- *Includes coverage of the extensive case law from national courts and the ECJ*
- *Brings case law on the issue of the Community Trade Mark and Directive up to date*
- *Includes all the major new Directives, eg implementing the WIPO treaties 1996*
- *Considers the development of the case law on the interaction between trade marks and domain names*
- *New chapters added; jurisdiction and validity of rights; jurisdiction, the internet and intellectual property rights; current proposals for jurisdictional reform; choice of law and the internet; reform in relation to the applicable law*
- *Fully updated and substantially rewritten to take account of the many major changes in the law over the past ten years*

Intellectual property has traditionally been regulated on a territorial basis. However, the protection and commercial exploitation of intellectual property rights such as patents, trade marks, designs and copyright occurring across borders are now seldom confined to one jurisdiction. This book considers how the introduction of a foreign element inevitably raises potential problems of private international law, ranging from establishing which court has jurisdiction and which is the applicable law to securing the recognition and enforcement of foreign judgments.

The Internet has brought a significant increase in the scale of this phenomenon and valuable new chapters have been added to this edition to reflect this. Nationally protected trade marks are now used globally on websites and copyright material is distributed, communicated and copied in a world without borders. Patents have already been licensed on a transnational basis for several decades. All this raises questions of jurisdiction and applicable law. The well-respected and expert author team address such questions as; which court will have jurisdiction to deal with the issues arising from intellectual property rights and their exploitation in an international context? And which national law will the court with jurisdiction apply? Private international law questions increasingly arise and the two disciplines that previously operated in different spheres are increasingly obliged to co-operate.

> *Although such issues are becoming increasingly important, a dearth of literature exists on the subject. Fawcett and Torremans remedy that neglect and provide a systematic and comprehensive analysis of the topic that will be welcomed by practitioners and scholars alike.*

Chapter 4 is available as a sample PDF. You can purchase it from Amazon UK for £185.25, or from OUP for £195.

Journal of Private International Law Conference 2011 (Milan) – Programme and Registration

The editors of J.Priv.Int.L are very pleased to announce that the **4th Journal of Private International Law Conference will take place in the University of Milan from Thursday 14th April 2011 at 2pm until Saturday 16th April at 5pm**. Over 50 early career papers are expected in parallel sessions on Thursday afternoon and Friday morning and 24 papers from experienced academics on Friday afternoon and Saturday.

- The fees for the conference are:

1. full price: 100 euros;
2. academics: 50 euros
3. students (undergraduate and postgraduate) and speakers: free

- The price for the dinner on Friday evening is 60 euros
- The price range for University accommodation per night is between 45-100 euros
- The price range for hotel accommodation per night is between 125-220 euros.

Accommodation has been reserved until the end of February 2011 and will be

allocated on a first come first service basis. For registration to the conference and for further details, as well as to book any University accommodation, please contact Dr Giuseppe Serranò and Paola Carminati at jpil_2011@unimi.it. For any other accommodation, please directly contact the hotel at issue, quoting the participation in the *JPIL 2011 conference*.

Programme

Thursday 14 April 2011: 14.00-15.45

Group 1 – Treatment of Foreign Law, Preliminary Questions, PIL Treaties

- C. Azcárraga Monzonís, The urgent need of harmonization of the application of foreign laws by national authorities in Europe
- A. Gardella, Foreign law in member States' courts and its relationship with European Union law
- S. Gössl, The Preliminary Question in European Private International Law
- S. Grossi, An international convention on conflict of laws: the path to Utopia?
- T. Kyselovská, Bilateral (Multilateral) Treaties on Legal Aid as Sources of Law in the European Judicial Area

Group 2 – Jurisdiction in civil and commercial cases

- A. Arzandeh, Twenty five years of Spiliada
- U. Grusic, Jurisdiction in complex contracts under the Brussels I Regulation
- J. Kramberger Škerl, A. Jurisdiction over third party proceedings: articles 6/2 and 65 of the Brussels I Regulation and the countries in-between
- U. Maunsbach, New Technology, new problems and new solutions – Private International Law and the Internet Revisited

Group 3 – Family law – Adults

- J. Borg-Barthet, Family Law in Europe: Should Civil Rights be Divorced from Questions of Sovereignty?
- M. Harding, The public effect of marriage and the un-oustable jurisdiction of the English Matrimonial Courts over the financial consequences of

marriage
- M. Melcher, An EU Regulation on the law applicable to registered relationships
- A. Sapota, What happened with Regulation Rome III? Seeking the way for unifying the rules on applicable law in divorce matters.
- S. Shakargy, Local Marriage in a Globalized World: Choice of Law in Marriage and Divorce

16.15-18.00

Group 4 – General PIL

- V. Macokina A new bill of Polish private international law – double edged sword?
- C. Staath, Human Rights Protection in Private International Law: the role of access to justice
- E. Tornese, Mandatory rules within the European legal system
- T. Kozlowski, Ever Growing Borders in the Ever Closer Union of the EU

Group 5 – Choice of Law in Contract

- A. Dyson, Interpreting Article 4(3) of the Rome I Regulation: Something Old, Something Borrowed or Something New?
- M. Erkan, Examining the Overriding Mandatory Rules under the Rome I Regulation and the Turkish Private International Law Perspective
- E. Lein, The Optional Instrument for European Contract Law and the Conflict of Laws
- W. Long, Mandatory Rules in Cross-Border Contracts: Is China Looking Towards the EU?

Group 6 – Recognition and enforcement of judgments

- P. Mariani, The free movement of judgements in the European Union and the CMR
- C. Nagy, Recognition and enforcement of US judgments involving punitive damages in Europe
- W. Zhang, A Comparative Research on the Exequatur Procedure within the EU and China
- G.B. Özçelik, Application of the Brussels I Regulation and property

disputes in Cyprus: reflections on the Orams case

Friday 15 April 2011: 09.00-10.30

Group 7 – Choice of Law in Tort/Delict

- J. Papettas, Rome II, Intra-Community Cross Border Traffic Accidents and the Motor Insurance Directives
- D. Krivokapic, Potential impact on the US Speech Act: Influence of the Speech Act on Ongoing PIL Debate within EU and Third Countries
- J.J. Kuipers, Towards a European approach in cross-border infringement of personality rights
- T. Thiede, The protection of personality rights against supra-national invasions by mass-media

Group 8 – Family Law – children

- P. Jimenez Blanco, The Charter of fundamental rights of the European Union and international child abduction
- I. Kucina, K. Trimmings, P. Beaumont, Loopholes in the Brussels IIbis Child Abduction Regime
- A. Muñoz Fernández, Recognition of guardianships that were established abroad and preventive powers of attorney granted abroad
- F. S. ?ahin, S. Ünver, Affiliation in surrogate motherhood in private international law perspective
  M. Wells-Greco, Cross-border surrogacy and nationality: achieving full parent status

Group 9 – Competition Law and Intellectual Property

- M. Danov, Cross-border EU competition law actions: should private international law be relied upon by the EU legislator in the European context?
- P. Dolniak, The rule in Article 6 of the Rome II Regulation as a „clarification" of general rule specified in Article 4
- S. Neumann, The infringement of intellectual property rights in European private international law – meeting the requirements of territoriality and private international law
- B. Ubertazzi, Intellectual Property Rights, Exclusive (Subject-Matter)

Jurisdiction and Public International Law
- N. Zhao, China’s Choice-of-law Rules in International Copyright and Related Right Disputes

11.00 – 12.30

Group 10 – Trusts and insolvency

- N. Zitkevits, Recognition of trusts in the European Union countries
- R. Yatsunami, The Choice of Law Rules on Trust in Japan
- Z. Crespi Reghizzi, Jurisdiction, recognition of judgments and law applicable to reservation of title in insolvency proceedings
  A. Leandro, EU cross-border insolvency: a free zone for the anti suit injunctions?

Group 11 – Choice of Court and Arbitration

- V. Salveta, The Enforceability of Exclusive Choice-of-Court Agreements
- L. Manigrassi, Arbitration Exception and Brussels I -Time for Change? An appraisal in light of the review of the Brussels I Regulation
- N. Zambrana Tévar, A new approach to applicable law in investment arbitration
  B. Yüksel, The relevance of the Rome I regulation to international commercial arbitration in the European Union

Group 12 – Class actions, Property and Succession

- V. Ruiz Abou-Nigm, Maritime Liens in the Conflict of Laws Revisited
- M. Casado, The investigation of the debtor´s assets abroad
- K. Svobodova, Relation Between Succession Law Determined under the EU Draft Regulation on Succession and the Lex Rei Sitae
- B. Glaspell, Global Class Actions Prosecuted in Canadian Courts

12.30 – 14.00 Lunch break

14.00-15.45

PLENARY SESSION

Theory of PIL and party autonomy

- R. Michaels, What Private International Law Is About
- T. Kono, P. Jur?ys, Institutional Perspective to Private International Law
- M. Keyes, Party autonomy in private international law beyond international contracts
- A. Mills, Party Autonomy in Non-Contractual Private International Law Disputes

15.45-16.15 Coffee break

16.15 -18.00

Connecting Factors, Law Reform and Model Laws

- E. Schoeman, The connecting factor in private international law: neglected in theory, yet key to just solutions
- I. Canor, Reform of Choice-of-Laws in Torts in the Israeli Legal System – A Normative Perception and a Comparative Perspective
- D. E. Childress III, Courts and the conflict of norms in private international law
- J.A. Moreno Rodríguez, M.M. Albornoz, The Contribution of the Mexico City Convention to the Reflection on a New Soft Law Instrument on Choice of Law in International Contracts

20.00 Conference Dinner – After Dinner Speaker is Hans Van Loon, Secretary General of the Hague Conference on Private International Law

Saturday 16 April 2011: 09.00-10.45

Characterisation, external relations in PIL, declining jurisdiction and choice of law in contract

- G. Maher, B. Rodger, The respective roles for the lex fori, the applicable law and autonomous/harmonised concepts in international private law, with particular focus on key aspects of the law of obligations

- P. Mostowik, M. Niedzwiedz, Five Years after ECJ “Lugano II Opinion” – Its Current Developments and Further Consequences
- S. Pitel, The Canadian Codification of Forum Non Conveniens
- G. Tu, Contractual Choice of Law in the People’s Republic of China: the Past, the Present and the Future

11.15-13.00

Lex mercatoria, arbitration and consumer protection

- C. Gimenez Corte, Lex mercatoria, independent guarantees and non-state enforcement
  L. Radicati di Brozolo, Conflicts between arbitration and courts in the EU: free for all, harmonization or home country control?
- S.I. Strong, Resolving mass legal disputes in the international sphere: are class arbitrations an option? lessons from the United States and Canada
  G. Rühl, Consumer Protection in Private International Law

Lunch break 13.00-14.00

14.00-15.30

Torts and Intellectual Property

- I. Kunda, Overriding mandatory rules in intellectual property contracts
- M. Lehmann, Where Do Pecuniary Damages Occur?
- C. O. García-Castrillón Private international law issues of non-contractual liability with special reference to environmental law claims
- E. Rodriguez Pineau, The law applicable to intra-family torts

Coffee break 15.30-15.45

15.45-17.00

Family law, succession, nationality and Europeanisation of PIL

- K. Trimmings, P. Beaumont, International Surrogacy Arrangements – An Urgent Need for a Legal Regulation at the International Level

- T. Kruger, J. Verhellen, Dual nationality = double trouble?
- J Fitchen, The Cross-Border Recognition and Enforcement of Authentic Instruments in the proposed European Succession Regulation
- L. Gillies, The Europeanisation of the Conflict of Laws and Third States: Scottish Perspectives