Dublin Up on Rome I

Following the conference to take place at University College Dublin this week, details of a second conference to take place in the Irish capital on the subject of the Rome I Regulation have been announced. This conference, organised by Trinity College Dublin, is entitled "The Rome I Regulation on the Law Applicable to Contractual Obligations: Implications for International Commercial Litigiation" and includes several of the speakers who participated in the organisers' earlier successful conference on the Rome II Regulation (for the published papers of which, see here).

The programme is as follows:

FRIDAY 9 OCTOBER

3:30 Registration
4:00 Professor Christopher Forsyth, "The Rome I Regulation: Uniformity, but at What Price?"
4:30 Connection and coherence between and among European Private International Law Instruments in the Law of Obligations
Dr. Janeen Carruthers, "The Connection of Rome I with Rome II"
Professor Elizabeth Crawford, "The Connection of Rome I with Brussels I"
5:15 Tea / Coffee Break
5:30 Professor Ronald Brand, "Rome I's Rules on Party Autonomy For Choice of Law: A U.S. Perspective"
6:00 Mr. Adam Rushworth, "Restrictions in Party Choice under Rome I and Rome II"
6:30 Conclusion of the Session

SATURDAY 10 OCTOBER

9:15 Dr. Alex Mills, "The relationship between Article 3 and Article 4"
9:45 Professor Dr. Thomas Kadner Graziano, "The Relationship between Rome I and the U.N. Convention on Contracts for the International Sale of Goods"
10:15 Professor Franco Ferrari, Article 4:Applicable Law in the Absence of Choice"
10:45 Tea / Coffee Break
11:10 Professor Jonathan Harris, "Mandatory Rules and Public Policy"

11.40 Professor Xandra Kramer, “The Interaction between Mandatory EU Laws and Rome I”
12:10 Professor Francisco Garcimartin Aflérez, “Article 6: Consumer Contracts”
12:50 Lunch
1:30 Professor Peter Stone, “Article 7: Insurance Contracts”
2.00 Professor Dr. Jan von Hein, “Article 8: Individual Employment Contracts”
2.30 Dr. Andrew Scott, “Characterization Problems in Employment Disputes”
3.00 Mr Richard Fentiman The Assignment of Debts, Articles 14 and 27: Implications for Debt Wholesalers in the Factoring and Securitisation Industries
3.30 Questions and Discussion
4.00 Conference Ends

Further details and a booking form are available on the TCD website.

Croatia Ratifies Hague Child Protection Convention

The report of the Hague Conference is here.

Greece Ratifies Hague Adoption Convention

The report of the Hague Conference is here.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2009)

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

It contains the following **articles/case notes (including the reviewed decisions)**:

- ***Christoph Althammer***: "Verfahren mit Auslandsbezug nach dem neuen FamFG" – the English abstract reads as follows:

The new "Law on procedure in matters of familiy courts and non-litigious matters" (FamFG) contains a chapter that deals with international proceedings. The author welcomes this innovation for German law in non-litigious matters as there is an increase of cross-border disputes in this subject matter. He especially welcomes that the rules on international procedure are no longer fragmented but are part of one comprehensively codified regulation. The author then highlights these rules on international procedures. Subsection 97 establishes the supremacy of international law. The following subsections (98 to 106) regulate the international jurisdiction of German courts in international procedures. Finally, subsections 107 to 110 detail principles for the recognition and enforcement of a foreign judgement.

- ***Florian Eichel:*** "Die Revisibilität ausländischen Rechts nach der Neufassung von § 545 Abs. 1 ZPO" – the English abstract reads as follows:

So far, s. 545 (1) German Code of Civil Procedure (Zivilprozessordnung – ZPO) prevented foreign law from being the subject of Appeal to the German Federal Court of Justice (Bundesgerichtshof – BGH); s. 545 (1) ZPO stipulated that exclusively Federal Law and State Law of supra-regional importance can be subject of an appeal to the BGH. The BGH could review foreign law only indirectly, namely by examining whether the lower courts had determined the foreign law properly – as provided for in s. 293 ZPO. The new wording of

s. 545 (1) allows the BGH to examine foreign law: now every violation of the law can be subject of an appeal. However, this change in law was motivated by completely different reasons. Parliament did not even mention the foreign law dimension in its legislative documents although this would be a response to the old German legal scholars' call for enabling the BGH to review the application of foreign law. The essay methodically interprets the amendment and comes to the conclusion that the new s. 545 (1) ZPO indeed does allow the appeal to the BGH on aspects of foreign law.

- ***Stephan Harbarth/Carl Friedrich Nordmeier:*** "GmbH-Geschäftsführerverträge im Internationalen Privatrecht – Bestimmung des anwendbaren Rechts bei objektiver Anknüpfung nach EGBGB und Rom I-VO" – the English abstract reads as follows:

According to German substantive law, a contract for management services (Anstellungsvertrag) concluded between a German private limited company (Gesellschaft mit beschränkter Haftung) and its director (Geschäftsführer) is only partially subject to labour law. The ambiguous character of the contract is reflected on the level of private international law. The present contribution deals with the determination of the law applicable to such service contracts in the absence of a choice of law, i.e. under art. 28 EGBGB and art. 4 Rome I-Regulation. As the director normally does not establish a principal place of business, the closest connection principle of art. 28 sec. 1 EGBGB applies. Art. 4 sec. 1 lit. b Rome I-Regulation contains an explicit conflict of law rule regarding contracts for the provision of services. If the director's habitual residence is not situated in the country of the central administration of the company, the exemption clause, art. 4 sec. 3 Rome I-Regulation, may apply. Compared to the determination of the applicable law to individual employment contracts, art. 30 EGBGB and art. 8 Rome I-Regulation, there is no difference regarding the applicable law in the absence of a choice of law provision.

- ***Michael Slonina***: "Aufrechnung nur bei internationaler Zuständigkeit oder Liquidität?" – the English abstract reads as follows:

In 1995 the European Court of Justice stated that Article 6 No. 3 is not applicable to pure defences like set-off. Nevertheless, some German courts and authors still keep on postulating an unwritten prerequisite of jurisdiction for

set-off under German law which shall be fulfilled if the court would have jurisdiction for the defendant's claim under the Brussels Regulation or national law of international jurisdiction. The following article shows that there is neither room nor need for such a prerequisite of jurisdiction. To protect the claimant against delay in deciding on his claim because of "illiquidity" of the defendant's claim, German courts can only render a conditional judgment (Vorbehaltsurteil, §§ 145, 302 ZPO) on the claimants claim, and decide on the defendants claims and the set-off afterwards. As there is no prerequisite of liquidity under German substantial law, German courts can not simply decide on the claimant's claim (dismissing the defendants set-off because of lack of liquidity) and they can also not refer the defendant to other courts, competent for claims according to Art. 2 et seqq. Brussels Regulation.

- ***Sebastian Krebber***: "Einheitlicher Gerichtsstand für die Klage eines Arbeitnehmers gegen mehrere Arbeitgeber bei Beschäftigung in einem grenzüberschreitenden Konzern" – the English abstract reads as follows:

Case C-462/06 deals with the applicability of Art. 6 (1) Regulation (EC) No 44/2001 in disputes about individual employment contracts. The plaintiff in the main proceeding was first employed by Laboratoires Beecham Sévigné (now Laboratoires Glaxosmithkline), seated in France, and subsequently by another company of the group, Beecham Research UK (now Glaxosmithkline), registered in the United Kingdom. After his dismissal in 2001, the plaintiff brought an action in France against both employers. Art. 6 (1) would give French Courts jurisdiction also over the company registered in the United Kingdom. In Regulation (EC) No 44/2001 however, jurisdiction over individual employment contracts is regulated in a specific section (Art. 18–21), and this section does not refer to Art. 6 (1). GA Poiares Maduro nonetheless held Art. 6 (1) applicable in disputes concerning individual employment contracts. The European Court of Justice, relying upon a literal and strict interpretation of the Regulation as well as the necessity of legal certainty, took the opposite stand. The case note argues that, in the course of an employment within a group of companies, it is common for an employee to have employment relationships with more than one company belonging to the group. At the end of such an employment, the employee may have accumulated rights against more than one of his former employers, and it can be difficult to assess which one of the

former employers is liable. Thus, Art. 6 (1) should be applicable in disputes concerning individual employment contracts.

- ***Urs Peter Gruber*** on the ECJ's judgment in case C-195/08 PPU (Inga Rinau): "Effektive Antworten des EuGH auf Fragen zur Kindesentführung" – the English abstract reads as follows:

According to the Brussels IIa Regulation, the court of the Member State in which the child was habitually resident immediately before the unlawful removal or retention of a child (Member State of origin) may take a decision entailing the return of the child. Such a decision can also be issued if a court of another Member State has previously refused to order the return of the child on the basis of Art. 13 of the 1980 Hague Convention. Furthermore in this case, the decision of the Member State of origin is directly recognized and enforceable in the other Member States if the court of origin delivers the certificate mentioned in Art. 42 of the Brussels IIa Regulation. In a preliminary ruling, the ECJ has clarified that such a certificate may also be issued if the initial decision of non-return based on Art. 13 of the 1980 Hague Convention has not become res judicata or has been suspended, reversed or replaced by a decision of return. The ECJ has also made clear that the decision of return by the courts of the Member State of origin can by no means be opposed in the other Member States. The decision of the ECJ is in line with the underlying goal of the Brussels IIa Regulation. It leads to a prompt return of the child to his or her Member State of origin.

- ***Peter Schlosser***: "EuGVVO und einstweiliger Rechtsschutz betreffend schiedsbefangene Ansprüche".
  The author comments on a decision of the Federal Court of Justice (5 February 2009 – IX ZB 89/06) dealing with the exclusion of arbitration provided in Art. 1 (2) No. 4 Brussels Convention (now Art. 1 (2) lit. d Brussels I Regulation). The case concerns the declaration of enforceability of a Dutch decision on a claim which had been subject to arbitration proceedings before. The lower court had argued that the Brussels Convention was not applicable according to its Art. 1 (2) No.4 since the decision of the Dutch national court included the arbitral award. The Federal Court of Justice, however, held – taking into consideration that

the arbitration exclusion rule is in principle to be interpreted broadly and includes therefore also proceedings supporting arbitration – that the Brussels Convention is applicable in the present case since the provisional measures in question are aiming at the protection of the claim itself – not, however, at the implementation of arbitration proceedings. Thus, the exclusion rule does not apply with regard to provisional measures of national courts granting interim protection for a claim on civil matters even though this claim has been subject to an arbitral award before.

- ***Kurt Siehr*** on a decision of the Swiss Federal Tribunal (18 April 2007 – 4C.386/2006) dealing with PIL aspects of money laundering: "Geldwäsche im IPR – Ein Anknüpfungssystem für Vermögensdelikte nach der Rom II-VO"

- ***Brigitta Jud/Gabriel Kogler***: "Verjährungsunterbrechung durch Klage vor einem unzuständigen Gericht im Ausland" – the English abstract reads as follows:

It is in dispute whether an action that has been dismissed because of international non-competence causes interruption of the running of the period of limitation under § 1497 ABGB. So far this question was explicitly negated by the Austrian Supreme Court. In the decision at hand the court argues that the first dismissed action causes interruption of the running of the period of limitation if the first foreign court has not been "obviously non-competent" and the second action was taken immediately.

- ***Friedrich Niggemann*** on recent decisions of the French Cour de cassation on the French law on subcontracting of 31 December 1975 (Loi n. 75-1334 du 31 décembre 1975 – Loi relative à la sous-traitance version consolidée au 27 juillet 2005) in view of the Rome I Regulation: "Eingriffsnormen auf dem Vormarsch"

- ***Nadjma Yassari***: "Das Internationale Vertragsrecht des Irans" – the English abstract reads as follows:

Contrary to most regulations in Arab countries, Iranian international contract law does not recognise the principle of party autonomy in contractual obligations as a rule, but as an exception to the general rule of the applicability

of the lex loci contractus (Art. 968 Iranian Civil Code of 1935). Additionally, the parties of a contract concluded in Iran may only choose the applicable law if they are both foreigners. Whenever one of the parties is Iranian, the applicable law cannot be determined by choice, unless the contract is concluded outside Iran. However, in a globalised world with modern communication technologies, the determination of the place of the conclusion of the contract has become more and more difficult and the Iranian rule causes uncertainty as to the applicable law. Although these problems are seen in the Iranian doctrine and jurisprudence, the rule has not yet been challenged seriously. A way out of the impasse could be the Iranian Act on International Arbitration of Sept. 19, 1997. Art. 27 Sec. I of the Arbitration Act allows the parties to freely choose the applicable law of contractual obligations, without any restriction. However, the question whether and how Art. 968 CC restricts the scope of application of Art. 27 Arbitration Act has not been clarified and it remains to be seen how cases will be handled by Iranian courts in the future.

Futher, this issue contains the following information:

- ***Erik Jayme*** on the conference of the German Society of International Law which has taken place in Munich from 15 – 18 April: "Moderne Konfliktsformen: Humanitäres Völkerrecht und privatrechtliche Folgen – Tagung der Deutschen Gesellschaft für Völkerrecht in München"
- ***Marc-Philippe Weller*** on a conference on the Rome I Regulation taken place in Verona: "The Rome I-Regulation – Internationale Tagung in Verona"

Third Issue of 2009's Journal du Droit International

The third issue of French *Journal du Droit International* (also known as *Clunet*) has just been released. It contains two articles dealing with conflict

issues.

The first is authored by Dr. Carine Brière, who lectures at the University of Rouen. It discusses the coordination of sources in the European private international law of contract (*Le droit international privé européen des contrats et la coordination des sources*). The English abstract reads:

> *The recent conversion of the Rome Convention into a Community instrument is an opportunity to study the harmonization of sources concerning International European private contract law. Rome I regulation consists of several rules which aim to enable the balanced co-existence of different sources, sometimes to the detriment of the uniformity and legibility for the legal expert in rules applicable within the European legal sphere. This question of source coordination is not only considered in terms of application in time but also regarding territorial and material scope and concerns both EU institutions legislation as well as Rome I regulation and international conventions.*

The second article is authored by Dr. Marie-Camille Pitton, a lawyer at Orrick, Rambaud, Martel (Paris). It offers a Franco-English perspective on Article 5-1, b, of the Brussels I Regulation (*L'article 5, 1, b dans la jurisprudence franco-britannique, ou le droit comparé au secours des compétences spéciales du règlement (CEE) n° 44/2001*). The English abstract reads:

> *The issue of the determination of the proper jurisdiction to hear contractual disputes was given a fresh perspective with the adoption of Regulation 44/2001. Article 5, 1 b of the Regulation provides for special jurisdiction in matters relating to a contract for the sale of goods or a contract for the provision of services. The purpose of this article was to simplify the determination of the proper forum to hear the case, which does not longer depend on the application of the method defined in the cases De Bloos/Tessili. However, new difficulties came to light when the courts were faced with establishing (a) the existence of the contract for the sale of goods or contract for the provision of services and (b) the place of performance of the contracts. The treatment of these difficulties by the courts is studied from a French/English perspective, this comparative approach being an informative tool to assess the respective efficiency of the Tribunal's decisions.*

Articles of the *Journal* are available online for lexisnexis suscribers.

Conference: “Tendenze e resistenze all’uniformazione del diritto privato e del diritto processuale civile nell’Unione europea” (Padova, 17-18 September)

On **17 and 18 September 2009** the **Faculty of Law of the University of Padova**, in collaboration with the Bar Councils of Padova and Triveneto, will host an international conference on **current trends and resistances in the uniformization of European private law and civil procedural law**, organised by Profs. *Marco De Cristofaro* and *M. Laura Picchio Forlati* on the occasion of the 19th annual meeting of the European Group for Private International Law (GEDIP-EGPIL): “**Tendenze e resistenze all’uniformazione del diritto privato e del diritto processuale civile nell’Unione europea**“. Here’s the programme (.pdf version):

First session – Thursday 17 September (h 15-18): Diritto internazionale privato e diritto uniforme alla prova del diritto europeo dei contratti

Chair: *Nicolò Lipari* (Univ. of Rome “La Sapienza”)

- *Andrea Giardina* (Univ. of Rome “La Sapienza”): Il concorso di metodi alternativi di uniformazione nel diritto europeo dei contratti;
- *Jürgen Basedow* (Max Planck Institute for Comparative and International

Private Law, Hamburg): Lex mercatoria e diritto internazionale privato europeo dei contratti – un'analisi economica;
- *Fabrizio Marrella* (Univ. of Venice): L'autonomia contrattuale tra diritto internazionale privato europeo e codice europeo dei contratti;
- *Erik Jayme* (Univ. of Heidelberg): La violazione del diritto d'autore: giurisdizione e legge applicabile (Bruxelles I, Roma I e II).

Second session – Friday 18 September (h 9.30-13): Il mutuo riconoscimento delle sentenze straniere nel confronto/scontro tra diritto processuale inglese e diritti processuali continentali

Chair: *Kurt Siehr* (Univ. of Zürich)

- *Trevor Hartley* (London School of Economics and Political Science): Asset freezing orders in the context of recognizing judgments from other EU States and from third countries;
- *Alberto Malatesta* (University "Carlo Cattaneo" – LIUC of Castellanza): Il riconoscimento delle sentenze rese dal giudice competente a norma della Convenzione dell'Aja sulla scelta del foro;
- *Andrea Gattini* (Univ. of Padova): Il riconoscimento in Europa delle sentenze in tema di punitive damages;
- *Marco De Cristofaro* (Univ. of Padova): Ordine pubblico processuale e riconoscimento ed esecuzione delle decisioni nello spazio giudiziario europeo.

Further information and an online registration procedure are available on the conference's webpage.

(Many thanks to Prof. Fabrizio Marrella)

Asserting Personal Jurisdiction in

Human Rights Cases

My colleague Roger Alford has a fascinating post over at the blog Opinio Juris (available here) detailing a recent decision of the United States Court of Appeals for the Ninth Circuit in the case of Bauman v. DaimlerChrysler AG. In that case, a panel of the Ninth Circuit held that a United States federal district court did not have personal jurisdiction over DaimlerChrysler because the corporation did not have continuous and systematic contacts with the forum. The case arose out of the alleged kidnapping, detention, and torture of Argentinian citizens in Argentina by Argentinian state security forces acting at the direction of Mercedes Benz Argentina. The plaintiffs sued the parent company, DaimlerChrysler AG, and the Ninth Circuit concluded that it lacked personal jurisdiction.

As Roger notes, this conclusion is not surprising under current US caselaw. What is perhaps surprising is Judge Stephen Reinhardt's dissent, in which he argues that promoting international human rights is a state interest that should factor into a finding of personal jurisdiction. Reinhardt first concluded that DaimlerChrysler AG had minimum contacts in the forum through its American subsidiary. He then examined whether it was reasonable to assert jurisdiction based on seven factors, including "the state's interest in adjudicating the suit."

As Roger explains, this looks very much like a *forum non conveniens* argument "dressed up as an assertion of personal jurisdiction." On the one hand, such an argument is clearly incorrect in that personal jurisdiction and *forum non conveniens* are different analytical frameworks. In the context of personal jurisdiction, the question is whether the assertion of jurisdiction by a United States court is appropriate under due process. In the context of *forum non conveniens*, the question is whether the forum is a convenient place for resolving the suit in light of various public and private factors. On the other hand, there is a close relationship between the two doctrines. The historical development of the *forum non conveniens* doctrine in the US was closely related to evolving concepts of judicial jurisdiction in the early 1900s. As *Pennoyer's* strict territoriality rules were transformed into a minimum contacts analysis under *International Shoe*, it is arguable that *forum non conveniens* in the US was employed to moderate expansive jurisdiction by US courts. In that the two are connected historically, it was perhaps appropriate for Reinhardt to conflate the two analyses under a reasonableness approach. Although, there was perhaps no reason to reach the

question of reasonableness given the state of the law as to subsidiaries.

International Max Planck Research School on Successful Dispute Resolution in International Law: Doctoral Research Positions

The Max Planck Institute for Comparative Public Law and International Law in Heidelberg, in cooperation with the Institute of Comparative and Private International Law, Ruprecht Karls University of Heidelberg and the Max Planck Institute for Foreign and International Criminal Law in Freiburg, is accepting applications for several **doctoral research positions** in the areas of international law, international private law and international criminal law beginning 1 January 2010 or later.

The Max Planck Research School on Successful Dispute Resolution in International Law will concentrate on the question which conditions must be present to successfully resolve disputes at the international level and is headed by *Prof. Burkhard Hess* and *Prof. Rüdiger Wolfrum* (both Heidelberg).

Further details and contact information can be found here.

Research Assistants in Trier

The Faculty of Law of the University of Trier (Professor Dr. Jan von Hein) is seeking to recruit two Assistants (PhD students) in Private International Law, Comparative Law or Civil Law/Corporate Law. The candidates should be PhD students who will be expected to work on their doctorate, to teach a few hours per week and to contribute to research projects, mainly in private international law and comparative law. The contracts are 2-year fixed-term, renewable once.

Trier is not only Germany's oldest city, a world cultural heritage and a favourite tourist destination, but also a hot spot for research in private international law, as it is the seat of the Academy of European Law (see our recent post) and very close to Luxembourg, where the European Court of Justice is situated and the newly founded Max-Planck-Institute for International Procedural Law will start its work in 2010.

The full text of the advertisement can be found here. The deadline for the application is 25 September 2009.

Dublin Conference on Rome I and Brussels I Regulations

The Commercial Law Centre at University College Dublin has arranged a morning conference next Thursday (17 September 2009, 8:45am-1pm) dealing with the Rome I and Brussels I Regulations.

According to the conference materials on the CLC's website:

> *The Rome I Regulation on the Law Applicable to Contractual Obligations, replacing the Rome Convention comes into effect on 17th December 2009.*
>
> *A thorough familiarity with this Regulation is essential for all professionals*

engaged in drafting, reviewing and litigating international commercial agreements.

At this seminar, a panel of distinguished experts will review some key elements in the Regulation:

1. *What limitations does the Regulation place on the freedom of parties to an international contract to choose the governing law?*
2. *Where the parties fail to select a governing law, how do courts and practitioners determine the relevant law?*
3. *How does Rome I apply to the difficult issue of contracts on financial instruments?*

The remainder of the seminar will focus on some key issues under Brussels I Regulation:

- *How do practitioners ensure effective choice of court agreements under Brussels I?*
- *How will the Hague Choice of Court Convention, recently signed by the European Community and which seeks to establish a global choice of court regime, interact with Brussels I.*
- *How effective are dispute resolution agreements which embody both litigation and arbitration options?*

As a consequence of increasing globalisation, the problem of concurrent international procedures is becoming more frequent. The seminar will consider the vexed question, discussed recently in Ireland in GOSHAWK DEDICATED, of whether a Brussels Regulation court as the domiciliary court of the defendant, can stay proceedings in favour of earlier proceedings begun in a non-member state court.

This seminar will provide a unique opportunity for practitioners involved in international litigation to learn about the new developments and to engage in discussion with an international panel of speakers.

As well as the author of this post, the speakers include Michael Collins SC (Chairman, Bar Council of Ireland), Michael Wilderspin (Legal Services, Commission), Dr Joanna Perkins (Financial Markets Law Committee), Geraldine

Andrews QC (Essex Court Chambers) and Liam Kennedy (A&L Goodbody).