Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2009)

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

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

- ***Anatol Dutta***: "Das Statut der Haftung aus Vertrag mit Schutzwirkung für Dritte" – the English abstract reads as follows:

The autonomous characterisation of national legal institutions is one of the challenging tasks of European private international law. This article attempts to determine the boundaries between the Rome I and the Rome II Regulation with regard to damages of third parties not privy to the contract but closely connected to one of the parties. Notably, German and Austrian law vest contractual rights in such third parties, especially in order to close gaps in tort law. It is argued here that those third party rights, although based on contract according to national doctrine, are to be characterised as a non-contractual obligation and governed by the Rome II regime (infra III). Under Rome II, in principle, the general conflict rule for torts in Art. 4(1) applies; if the damage suffered by the third party is caused by a product, the liability towards the third party is subject to the special rule in Art. 5(1) (infra IV). Hence, the law governing the contract from which the third party rights are derived plays only a minor role (infra V): for those third party rights neither the special rule for culpa in contrahendo in Art. 12(1) – insofar as pre-contractual third party rights are concerned – nor the escape clauses in Art. 4(3) and Art. 5(2) lead to the law which governs the contract.

- ***Ivo Bach***: "Neuere Rechtsprechung zum UN-Kaufrecht" – the English abstract reads as follows:

The number of case law on the CISG increases exponentially. Thanks to online

databases such as the one of Pace University or CISG-online a majority of cases are internationally available. The rapid increase of case law, however, complicates the task of staying up to date in this regard. This contribution shall be the first of a series that summarises the recent developments in case-law and at the same time categorises the cases in regard to their topic and in regard to their importance. The series aligns with the date the respective decisions become available to the general public, i. e. the date they are published on the CISG-online database, rather than the date of the decision. This contribution covers the cases with CISG-online numbers 1600–1699.

- ***Alice Halsdorfer***: "Sollte Deutschland dem UNIDROIT-Kulturgutübereinkommen 1995 beitreten?" – the English abstract reads as follows:

The ratification of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 is the perfect occasion to raise the question whether or not Germany should strive for an additional ratification of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995. While many contracting states of the UNESCO Convention 1970 did not implement comprehensive return claims for illegally exported cultural objects, the self-executing UNIDROIT Convention 1995 provides such claims and in addition further claims for stolen cultural objects. One of the major difficulties is the absence of provisions on property rights. It may be argued an initial lack or intermediate loss of ownership should not affect return claims for cultural objects with the consequence that the last possessor has to be considered the rightful claimant. Further, it may be argued that the return of cultural objects includes necessarily a transfer of possession but not a transfer of property. However, the return of cultural objects to the state from which these cultural objects have been unlawfully removed may influence the applicable law and indirectly affect property rights. Since this effect is achieved only under the condition that the lex rei sitae is replaced by the lex originis, it might be advisable to extend the scope of the ss 5 (1), 9 of the German Law on the Return of Cultural Objects in the event of a future ratification of the UNIDROIT Convention 1995.

- ***Martin Illmer***: "Anti-suit injunctions zur Durchsetzung von Schiedsvereinbarungen in Europa – der letzte Vorhang ist gefallen" – the English abstract reads as follows:

Yet another blow for the English: the final curtain for anti-suit injunctions to enforce arbitration agreements within the European Union has fallen. As the augurs had predicted, the ECJ, following the AG's opinion, held that anti-suit injunctions enforcing arbitration agreements are incompatible with Regulation 44/2001. Considering the previous judgments in Marc Rich, van Uden and Turner as well as the civil law approach of the Regulation, the West Tankers judgment does not come as a surprise. It accords with the system and structure of the Regulation. De lege lata the decision is correct. Moaning about the admittedly thin reasoning and an alleged lack of convincing arguments does not render the decision less correct. Instead, the focus must shift to the already initiated legislative reform of Regulation 44/2001. Meanwhile, one may look for alternatives within the existing system to hold the parties to the arbitration (or jurisdiction) agreement, foreclosing abusive tactics by parties filing actions in certain Member States notorious for protracted court proceedings.

- ***Matthias Kilian***: "Die Rechtsstellung von Unternehmensjuristen im Europäischen Kartellverfahrensrecht"
  The article reviews the judgment given by the European Court of First Instance in the joined cases T-125/03 and T-253/03 (*Akzo Nobel Chemicals Ltd. and Akcras Chimcals Ltd. ./. Commission of the European Communities*) which can be found here.

- ***Rainer Hüßtege***: "Der Europäische Vollstreckungstitel in der Praxis"
  The article reviews a decision by the Higher Regional Court Stuttgart (23.10.2007 – 5 W 29/07) dealing with the requirements of a European Enforcement Order Certificate in terms of Art. 9 Regulation (EC) No. 805/2004 stating that the issue of the ceritificate requires according to Art. 6 No. 1 (c) inter alia that the court proceedings in the Member State of origin met the requirements as provided for the proceeding of uncontested claims. This requirement was not met in the present case since the summons was not served in accordance with Art. 13 (2) of the Regulation.

- ***Christoph M. Giebel***: "Die Vollstreckung von

Ordnungsmittelbeschlüssen gemäß § 890 ZPO im EU-Ausland" – the English abstract reads as follows:

Under German law, the State is exclusively responsible for enforcing contempt fines issued by German courts. Thus, the State collects the contempt fine through its own public authorities ex officio. This approach is in contrast to the legal situation in several other EU Member States that allow the judgment creditors not only to decide upon the enforcement of the contempt fine but also to keep the funds obtained through the enforcement. In terms of EU cross border enforcement, it is commonly accepted that for example a French "astreinte" may be enforced in Germany by invoking Art. 49 of the Regulation (EC) No. 44/2001. However, it is still doubtful whether or not German judgment creditors could similarly enforce a German contempt fine in another EU Member State. These doubts were recently intensified by a resolution rendered by the Higher Regional Court of Munich on 3rd December 2008 – 6 W 1956/08 – (not res judicata). The Higher Regional Court of Munich has refused to confirm a contempt fine issued by the Regional Court of Landshut as a European Enforcement Order under the Regulation (EC) No. 805/2004. The Higher Regional Court of Munich basically argues that the judgment creditor has no legitimate interest to apply for such confirmation due to the German legislator having attributed the responsibility for the enforcement exclusively to the State. The arguments put forward by the Higher Regional Court of Munich would also rule out any cross border enforcement of German contempt fines according to the rules of the Regulation (EC) No. 44/2001. This would lead to a considerable disadvantage of German judgment creditors within the Common Market. In the article, the author discusses in detail the arguments put forward by the Higher Regional Court of Munich both from a German and European Community law perspective. The author comes to the conclusion that prior-ranking European Community law demands that German contempt fines may also be enforced in other EU Member States both on the basis of the Regulations (EC) No. 44/2001 and No. 805/2004. In reconciling the requirements of European Community and German law, the author proposes that the judgment creditor shall be entitled to act on the basis of a representative action for the State. The funds obtained through the enforcement in the relevant EU Member State shall therefore invariably be paid to the relevant State treasury in Germany.

- ***Felipe Temming***: "Zur Unterbrechung eines Kündigungsschutzprozesses während des U.S.-amerikanischen Reorganisationsverfahrens nach Chapter 11 Bankruptcy Code"
  The article reviews a judgment of the German Federal Labour Court (27.02.2007 – 3 AZR 618/06) dealing with the interruption of an action for protection against dismissal according to the reorganization proceedings under Chapter 11 U. S. Bankruptcy Code.

- ***Kurt Siehr:*** "Ehescheidung deutscher Juden"
  The article reviews a judgment of the German Federal Court of Justice (28.05.2008 – XII ZR 61/06) concerning in particular the question whether divorce proceedings before a Rabbinical Court in Israel lead to the result that the plea of lis alibi pendens has to be upheld in German divorce proceedings. As stated by the Federal Court of Justice this could only be the case if the Jewish divorce could be recognised in Germany. This was answered in the negative by the Federal Court of Justice under the given circumstances confirming its previous case law according to which a divorce before a Rabbinical Court constitutes an extra-judicial divorce – and not a sovereign act – which can, under German law, only be recognised if the requirements of the law applicable according to German PIL (Art. 17 EGBGB) are satisfied. Due to the fact that in the present case German law was applicable with regard to the divorce according to Art. 17 EGBGB, this was not the case.

- ***Frank Spoorenberg/Isabelle Fellrath***: "Offsetting losses and profits in case of breach of commercial sales/purchase agreements under Swiss law and the Vienna Convention on the International Sale of Goods"

This contribution analyses the computation of damages that may be awarded in order to compensate the buyer for the losses incurred on the substitution transactions as a result of the seller's default in a commercial sales/purchase agreement. It discusses more specifically the possible compensation of substitution and additional losses with any profits incurred on a single substitution transaction, and on successive substitution transactions, focusing on the articulation of the international and Swiss law provisions governing general losses and substitutions losses. Reference is made by ways of illustration to a recent unpublished ICC arbitration award addressing the issue from a set off perspective.

- ***Dirk Otto***: "Formalien bei der Vollstreckung ausländischer Schiedsgerichtsentscheidungen nach dem New Yorker Schiedsgerichtsabkommen" – the English abstract reads as follows:

The author criticises a decision of Austria's Supreme Court which required a party seeking to enforce a foreign arbitration award in Austria to submit a legalised original or certified/legalised copy of the arbitration award although the defendant never disputed that a submitted simple copy was authentic. The author submits the correct approach would have been to require compliance with the formalities of Art. IV of the New York Convention only if (i) defendant disputes the authenticity of a copy or (ii) the enforcing court has to pass default judgment as only in these situations there is a genuine need to prove the conformity of documents.

- ***Götz Schulze***: "Anerkennung von Drittlandscheidungen in Frankreich" – the English abstract reads as follows:

The author analyses two judgments of the French Court of Cassation pertaining to the incidental recognition of foreign divorce decrees under French law. In the first case, a Moroccan wife had filed for divorce in France. The conciliation hearings were opposed by the husband, who claimed that the marriage had already been dissolved by a final Moroccan divorce decree. The second case regarded a French married couple who had been resident in Texas. Upon separation, the husband returned to France, where he filed a petition for divorce. The admissibility of the latter was contested because divorce proceedings were already pending in Texas, which finally led to a final divorce decree. Since the cases did not fall within the scope of the Brussels II Regulation, French procedural law was applicable. In both cases, the question at stake was whether the courts had to take into account the foreign judgments when assessing the admissibility of the divorce petition. The Court of Cassation answered in the affirmative. It held that national courts have to determine the recognition of foreign divorce decrees in every stage of the procedure as an incidental question. It thereby overruled an earlier judgment, according to which the recognition of foreign judgments was reserved for the "juge de fond" and could not be determined in conciliation hearings or summary proceedings. It also held that recognition could not be denied for reasons beyond the three exhaustive grounds of non-recognition established under French law, which are

lack of international jurisdiction, misuse of rights, and public policy. In the second case, the lower court had denied recognition because the divorce decree had not been registered with the register office. The reported judgments herald an important shift in French procedural law and were unanimously welcomed by legal writers. Not only did the Court of Cassation interpret national civil procedural law in a manner as to align it with art. 21 (4) Brussels II Regulation. It also overcame the long criticised procedural privileges for French nationals. As the court made clear, art. 14 Code of Civil Procedure, which grants to every French national an international venue within the domestic territory, cannot be read as to inversely hinder the recognition of a foreign judgment.

Futher, this issue contains the following information:

- The new German choice of law rules as amended due to the adaptation to Regulation (EC) No. 593/2008 (Rome I) which are applicable from 17 December 2009: "Das EGBGB in der ab 17.12.2009 geltenden Fassung"
- ***Erik Jayme/Carl Friedrich Nordmeier*** report on two PIL conferences held in Lausanne: "Zwanzig Jahre schweizerisches IPR-Gesetz – Globale Vergleichung im Internationalen Privatrecht"
- ***Ralf Michaels/Catherine H. Gibson*** report on the conference held at Duke Law School on 9 February 2008 titled: "The New European Choice-of-Law Revolution: Lessons for the United States?"
- ***Hilmar Krüger*** reports on the wife's right of succession under Iranian law: "Neues zum Erbrecht der überlebenden Ehefrau nach iranischem Recht"
- ***Hilmar Krüger*** reports on the recognition of foreign decisions in the field of family law in Turkey: "Zur Anerkennung familienrechtlicher Entscheidungen in der Türkei"

Publication: The University of Pennsylvania Journal of International Law

The *University of Pennsylvania Journal of International Law* (Volume 30, Number 4) has recently published a symposium in celebration of its anniversary. Private international lawyers will be interested in the following contributions:

International Litigation and Arbitration

- Gary Born, *The Principle of Judicial Non-Interference in International Arbitral Proceedings*
- Catherine A. Rogers, *Lawyers Without Borders*
- David J. McLean, *Toward a New International Dispute Resolution Paradigm: Assessing the Congruent Evolution of Globalization and International Arbitration*
- Jonathan C. Hamilton, *Three Decades of Latin American Commercial Arbitration*

Private International Law

- David P. Stewart, *Private International Law: A Dynamic and Developing Field*

Stewart's article, in particular, provides an excellent overview of the field from the perspective of a US lawyer.

Does Astreinte Belong to

Enforcement? (I)

French courts do not have contempt power. When they issue injunctions, the only available tool that they have to ensure compliance is *astreinte*. *Astreinte* is a pecuniary penalty which typically accrues per day of non-compliance. For instance, a French commercial court may order a party to do something or to refrain from doing something under a penalty of 1,000 euros per day of non-compliance.

Obviously, *astreinte* puts pressure on the defendant to comply. However, such pressure is only indirect. If the defendant does not comply, he will not be physically forced to. But he may be ordered to pay millions of euros instead, which can certainly be compelling. So this begs the question: does *astreinte* belong to enforcement? If it does, this could have a variety of consequences as far as private international international law is concerned.

In this first post, I would like to examine the interaction between *astreinte* and sovereign immunities.

If *astreinte* belongs to enforcement, this should mean that it is not admissible to use it against foreign states enjoying an immunity from enforcement. This is indeed what the Paris Court of appeal regularly rules.

I have reported earlier about a case where a private owner sought an injunction and an *astreinte* against the German state. The Paris Court of appeal had held that it could not possibly grant the astreinte, as it was not compatible with the immunity from enforcement of the German state. The *Cour de cassation* reversed, but on the ground that the claim fell outside of Germany's immunity. As usual, it is hard to say whether this means that the French supreme court implicitly endorsed the part of the ruling of the Court of appeal holding that *astreinte* and immunity are incompatible.

This was not an issue of first impression for the Paris Court of appeal. In a judgment of July 1, 2008, the Court had already ruled that *astreinte* could not be used against a foreign state (enjoying its immunity). In this case, a cleaning lady had been fired by the Embassy of Qatar in Paris. She sued before the Paris labour court. She claimed for payment of unpaid wages, but also for an injunction to produce a variety of documents related to her employment, under the penalty

of an *astreinte*.

The Court held that Qatar did not enjoy an immunity from being sued and could therefore be ordered to pay unpaid wages. This is because the immunity from being sued only covers *de iure imperii* actions of foreign states, and recruiting (or firing) a secretary was not one of them. However, the Court held that the foreign state did enjoy its immunity from enforcement and therefore could not be sentenced under a penalty of *astreinte*. Qatar was eventually ordered to pay € 70,000 and to hand down the relevant documents, but the claim for the grant of an *astreinte* was dismissed.

As far as sovereign immunities are concerned, therefore, it seems clear that *astreinte* is perceived as belonging to enforcement.

Sovereign Immunity over French Buildings

On November 19, 2008, the French Supreme Court for private matters (*Cour de cassation*) delivered an interesting judgment on the scope of the sovereign immunity of foreign states in France.

The German state was the owner of a building which had been used in the past for the purpose of hosting first a NATO unit (possibly NATO headquarters), then a social facility for German soldiers seconded in France. Since 2002, however, at least part of the building was not used anymore, as a wall was in a very bad condition. It seems that it was necessary to actually rebuild the wall, but Germany did not intend to. The problem was that the wall was shared with a private owner who did want to wall to be repaired. She sued before French courts.

The private owner sought a variety of remedies. First, she wanted Germany to be held responsible for the damage. Secondly, she claimed damages on the basis of liability for fault (article 1382 of the French Civil Code). Thirdly, she sought an injunction to repair the wall under a financial penalty of a certain sum

per day of non-compliance (*astreinte*).

The first instance court and the Paris Court of appeal did find that Germany was responsible for the damage. However, it dismissed all other claims on the ground that Germany was protected by its sovereign immunities. More precisely, it held that Germany's immunity from being sued (*immunité de juridiction*) protected it from being sued in damages, as it covered all de iure imperii actions of foreign states, and as this included managing a building for the purpose of a foreign public service. It further held Germany's immunity of enforcement (*immunité d'exécution*) protected it from being ordered anything under a financial penalty, as the property was used for public purposes.

The *Cour de cassation* reversed.

As far as the immunity of being sued is concerned, it held that the relevant action was Germany's refusal to break down a wall and to rebuild it, and that this was not a *de iure imperii* action, especially since the property was not used anymore. The claim for damages was thus admissible.

As far as the immunity from enforcement is concerned, it held that the purchase of real property in France belongs to private law, and that so does mananging the property. As a consequence, the grant of the injunction under a financial penalty was also admissible. It must be emphasized that the traditional rule under French law (since the mid-1980s) has not been that assets belonging to foreign states are only covered by a sovereign immunity (of enforcement) if they are dedicated to a public law activity. Assets dedicated to a private law activity are also protected, unless the debt which is enforced arose out of that very private law activity. This means that the reason why Germany could not raise its immunity was that the neighbour was seeking to enforce an obligation (i.e. repair the wall) on an asset (i.e. the property) which was directly related to the said obligation.

French Court Denies Recognition to American Surrogacy Judgement

On 26 February 2009, the Paris Court of Appeal denied recognition to a couple of American judgments which had sanctioned a surrogacy. The Court held that it was contrary to French international public order.



In this case, a French couple had found a surrogate mother in Minnesota who had accepted to carry their child. After Ben was born, the parties had obtained on 4 June 2001 two judgments from a Minnesota court, the first finding that that the child had been abandonned by the American surrogate mother, the second ruling that he was adopted by the French couple. A birth certificate had then been delivered by the relevant Minnesota authorities.

When the couple came back to France, they tried to have the child registered as theirs on the relevant French registry. The French public prosecutor initiated proceedings to have this registration cancelled.

Both the French first instance court and the Paris Court of Appeal ruled against the couple. The debate focused on whether the American judgments could be recognised in France (it does not seem that the issue of whether the birth certificate could be recognised was raised). The Paris Court of appeal noticed that there were no international convention between the U.S. and France on the recognition of foreign judgments, and that it followed that the French common law of judgments as laid down by the *Cour de cassation* in *Avianca* applied.

The Court only explored whether one of the conditions was fulfilled, namely whether the foreign judgments comported with French international public order. It simply held that it did not, as the Civil code provide that surrogacy is forbidden in France (Article 16-7 of the Civil Code), and that the rule is mandatory (*d'ordre public*: see Article 16-9 of the Civil Code). In truth, the Code certainly provides that the rule is mandatory in France, but it does not say whether the rule is also internationally mandatory. The Court rejected arguments to the effect that Article

8 ECHR or the superior interest of the child commanded a different outcome.

I had reported earlier about another judgment of the same Paris Court of Appeal (indeed, the same division of the court, which is specialized in private international law matters) which had accepted to recognize a Californian judgment. This decision had been overruled by the *Cour de cassation*, but on an issue of French civil procedure which was unrelated.

Petition Granted in Abbott v. Abbott

This morning, the United States Supreme Court granted the Petition for Writ of Certiorari in *Abbott v. Abbott*, a case concerning the role of *ne exeat* clauses in the Hague Abduction Convention. The grant was urged not only by the petitioner, but also by the Solicitor General on the Court's invitation. Previous coverage of the case on this site can be found here, and here. This will be the first time in nearly two decades that the Supreme Court has considered a Hague Convention case on the merits. We will post the parties briefs, as well as any amici, as they become available in the coming months.

Anuario Español de Derecho Internacional Privado, vol VIII (2008)

The Anuario de Derecho Internacional Privado Español,vol. VIII, 2008 has just been released. These are its contents:

Manuel Díez de Velasco Vallejo,
“Adolfo Miaja de la Muela y el Derecho Internacional Privado español. A propósito de su centenario”

DOCTRINA

Andrea Bonomi
“El Reglamento Roma II y las relaciones con terceros Estados”
Pedro J. Martínez-Fraga
“Estudio de los efectos del Convenio de Nueva Cork y la doctrina de manifiesta indiferencia de la ley sobre el arbitraje internacional: análisis de dos paradigmas afirmativos y defensivos”
Nuria Marchal Escalona
“Disolución de la adopción en Derecho Internacional Privado español”

JORNADAS SOBRE LA COOPERACIÓN INTERNACIONAL DE AUTORIDADES: ÁMBITOS DE FAMILIA Y DEL PROCESO CIVIL, BARCELONA 2 Y 3 DE OCTUBRE DE 2008 (reproduction of papers) :

Alegría Borrás
“La cooperación internacional de autoridades: en particular, el caso del cobro de alimentos en el extranjero”
Joaquim J. Forner Delaygua
“La cooperación en materia de notificación y obtención de pruebas: cooperación internacional de autoridades; problemas generales de cooperación”
Cristina González Beilfuss
“La cooperación internacional de autoridades: articulación del Derecho Internacional Privado interno y el Derecho internacional privado comunitario”
Ramón Viñas Farre
“La cooperación internacional de autoridades en Latinoamérica”
Carmen Parra Rodríguez
“De la cooperación administrativa a la era de los formularios”
Georgina Garriga Suau
“La creciente potencialidad de la red judicial europea en materia civil y mercantil en la construcción del espacio judicial europeo”

III SEMINARIO INTERNACIONAL: AUTORREGULACIÓN Y UNIFICACIÓN DEL DERECHO DE LOS CONTRATOS INTERNACIONALES, MADRID, 5 y 6 DE

FEBRERO DE 2009 (all papers presented at the seminar are reproduced; see more information under my post III International Seminar on Private International Law)

VARIA

Pilar Rodrígez Mateos
“El Convenio entre España y Vietnam sobre cooperación en materia de adopción”
Carmen Otero García-Castrillón
“Efecto directo y aplicación retroactiva del acuerdo sobre los derechos de propiedad intelectual relacionados con el comercio: el problema de las patentes europeas de medicamentos en España”
Nerea Magallón Elósegui
“La Disposición Adicional séptima de la Ley de Memoria Histórica: otra ampliación de los sujetos con derecho de opción a la nacionalidad española”

TEXTOS LEGALES (2008’s PIL Community Regulations, Directives, Decisions and Preparatory works; also International Agreements and Spanish Legislation)

JURISPRUDENCIA (exhaustive collection of 2008’s Spanish case law concerning Private International Law; most cases are commented)

MATERIALES DE LA PRÁCTICA ESPAÑOLA (reports, legislative preparatory works from different Spanish organisations; printout of the jurisprudence from the Dirección General de los Registros y el Notariado, mostly commented)

FOROS INTERNACIONALES (compte-rendu of meetings and activities carried out by different inter-governmental organisations/community bodies in 2008)

Alegría Borrás
“La Conferencia de La Haya de Derecho Internacional Privado (2008)”
Nuria Marchal Escalona
“El Reglamento (CE) nº 1393/2007: ¿una solución o más problemas?”
Aurelio López-Tarruella Martínez
“Las actividades de la Comisión Europea en materia de Derecho Internacional Privado en el período junio 2008-marzo 2009”
José Joaquín Vara Parra
“Dos regulaciones internacionales sobre alimentos: el Reglamento (CE) nº 4/2009de 18 de diciembre de 2008 y el Convenio de La Haya de 23 de noviembre

de 2007”

NOTICIAS (short reference to academic activities held at a national level in 2008/2009)

BIBLIOGRAFÍA (both Spanish and foreign; review of reviews)

C-14/08 Roda Golf v Beach Resort

The service of a notarial act, in the absence of legal proceedings, falls within the scope of the judicial and extrajudicial documents Reg (EC 1348/2000) according to the ECJ in C-14/08 *Roda Golf*.

Brussels I Review – Illmer and Steinbruck on the Interface Between Brussels I and Arbitration

Martin Illmer and Ben Steinbrück are research fellows at the Max Planck Institute for Comparative and International Private Law, Hamburg. They have both published in the area of international arbitration (including their Ph.D. theses).

In our brief discussion of the interface between Regulation (EC) No 44/2001 (Brussels I) and arbitration we will focus on the proposals in the Heidelberg Report to include a new Art. 22(6) and a new Art. 27A.

Exclusive Jurisdiction for State Court Support (Art. 22(6))

1. The suggestion that exclusive jurisdiction for state court proceedings in support of arbitration be granted to the courts of the place (or seat) of the arbitration triggers problems in several areas.

2. An exclusive jurisdiction rule is only appropriate for a limited number of supportive measures, such as the appointment of an arbitrator. In this case, support by one single court is usually sufficient in order to set up the arbitral tribunal. Indeed, any other jurisdictional regime could lead to parallel ancillary proceedings that might produce conflicting decisions. The courts at the arbitral seat are well suited to assist in the establishment of the tribunal at the beginning of the arbitration since in most cases the lex arbitri, governing the arbitral proceedings, will be the law of the arbitral seat. Thus, the appointment procedure will usually fulfil the requirements set out by Art. V(1)(d) of the New York Convention. It follows that, at least in this respect, the future enforcement of the arbitral award is guaranteed.

3. It appears that most national arbitration laws in the EU provide for this kind of state court support. Thus, a party to an arbitration agreement will usually find its juge d'appui at the seat of the arbitration if the opponent is refusing to cooperate in the establishment of the tribunal. Hence there is no need for a harmonised mandatory rule to this effect in the Brussels I Regulation.

4. An exclusive jurisdiction regime will also lead to major problems regarding other supportive measures. The most serious consequences concern the arbitral tribunal's establishment of the facts and the taking of evidence. State court support in this field has to be granted in the state where the evidence is located. In international disputes this state is usually not the state where the seat of the arbitration is located. Parties tend to choose a neutral place in a third state as the arbitral seat. The crucial evidence is often located in their home countries. If the courts at the seat of the arbitration were to have exclusive jurisdiction to assist the tribunal in the taking of evidence, the parties would not be able to directly request judicial assistance in the state where the evidence is located. They would have to apply to the courts at the seat to issue an official request for cross-border judicial assistance. Even under the Evidence Regulation such a procedure is

burdensome and time-consuming. Consequently, it is practically never used in international arbitration.

5. Being sensitive to the problem some national legislators have enacted rules that provide for cross-border court assistance in the taking of evidence. English, German and Austrian arbitration laws, to mention a few, explicitly enable their national courts to support the taking of evidence in aid of foreign arbitrations. These provisions are widely praised as promoting the efficiency of the arbitral process.

6. Other national arbitration laws should therefore adopt similar rules rather than being subjected to an out-dated regime of exclusive court jurisdiction that flies in the face of modern arbitration practice.

7. It seems that the proposed new Art. 22(6) would not affect the state courts' power to grant interim relief in relation to foreign arbitration proceedings. The need for cross-border interim measures is self-evident in international disputes. When a party is about to dissipate its assets or to create a fait accompli, a state judge will often be the only authority to grant effective relief to the other party. In most cases, these assets will not be located in the state of the arbitral seat but in other jurisdictions.

8. However, the existing case law in this field suggests that some state courts might consider applications for interim relief as "ancillary proceedings concerned with the support of arbitration" within the meaning of Art. 22(6) and thus refuse to grant interim measures to parties to a foreign arbitration. Even in jurisdictions that provide explicitly for cross-border interim relief in arbitration, courts have held that only the courts at the seat of the arbitration were competent to order these measures (OLG Nürnberg, (2005) 3 German Arbitration Journal (SchiedsVZ) 50). These decisions confuse a "neutral" arbitral seat with an "exclusive" forum for ancillary proceedings in support of the arbitral process. There is a serious threat that an enactment of the proposed Art. 22(6) would increase the number of such misconceived decisions.

9. The European Commission should therefore refrain from enacting an exclusive jurisdiction rule for supportive state court measures as proposed in the Heidelberg Report. By effectively ruling out cross-border judicial assistance, an exclusive jurisdiction rule in this field would be contrary to the interests of

international arbitration (for a detailed analysis of the topic see Steinbrück, Die Unterstützung ausländischer Schiedsverfahren durch staatliche Gerichte, Mohr Siebeck, forthcoming in July 2009).

Determination of the validity of the arbitration agreement (Art. 27A)

10. We generally support the proposal to include a new Art. 27A that would provide for a mandatory stay of proceedings on the merits before a Member State court once a court in the Member State at the place (or seat) of arbitration is seized for declaratory relief in respect of the existence, validity or scope of the arbitration agreement.

11. If the issue of the existence, validity or scope of the arbitration agreement arises in parallel proceedings, a mechanism for allocating jurisdiction is required. The issue does not call for the exclusive jurisdiction of one court ab initio but once parallel proceedings arise, one court has to be exclusively competent to decide the issue with res iudicata effect upon any other Member State court. Otherwise there would be no legal certainty for the parties to the alleged arbitration agreement from the very beginning of their dispute up until the enforcement stage. Contradicting decisions would be inevitable – a highly undesirable result.

12. The Heidelberg Report suggests that the courts at the place (i.e. seat) of the arbitration take precedence over the court first seized with binding force upon other Member States' courts achieved by way of recognition of the declaratory judgment pursuant to Art. 32 of the Regulation.

13. In our view this mechanism is superior to the other two possibilities for the allocation of jurisdiction: neither a lis pendens rule giving priority to the foreign court seized in breach of the arbitration agreement nor the French doctrine of the negative effect of Kompetenz-Kompetenz is as effective in protecting the parties' interest in an early binding decision on the existence, validity or scope arbitration agreement.

14. If the foreign court seized in breach of the arbitration agreement were to determine the issue (other courts being barred by the lis pendens-rule of Art. 27(1) of the Regulation), there would be no remedy against torpedo proceedings.

After the ECJ has now put an end to practice of anti-suit injunctions in West Tankers if the foreign court seized is a Member State court, the threat of torpedo actions requires a solution.

15. If the arbitral tribunal were to determine the issue (barring any decision on the matter by a state court), the risk of an unenforceable arbitral award is imminent. If the arbitral award is to be enforced in another country, Art. V(1)(a) of the New York Convention provides for non-recognition if the court determining recognition regards the arbitration agreement as non-existent, invalid or as not covering the dispute in question. In the end, it will always be a state court that will have the final say on the existence, validity or scope of the arbitration agreement. Only the moment in time of such final say differs.

16. If the state court's final say is limited to the recognition phase, considerable time and money may have been wasted by the parties in obtaining a practically unenforceable award. Cross-border enforcement requires recognition, such recognition is only available through a state court and the New York Convention empowers the state court to rule on the existence, validity and scope of the arbitration agreement. Arbitration is not a purely transnational process, somehow detached from national laws. At the enforcement stage at the latest, the state courts enter the field.

17. If in contrast, the state court renders a decision on the existence, validity or scope of the arbitration agreement even before the arbitral process was initiated, legal certainty and procedural economy are fostered. State court intervention is indispensable in the West Tankers scenario – the earlier, the more convenient, faster and cheaper it is for the parties.

18. If the courts at the place of arbitration were to determine the issue exclusively (once seized for declaratory relief) and if this court's decision was to be recognized by the courts of the other Member States under the Regulation's scheme of recognition, as it is suggested by the Heidelberg Report, the torpedo scenario would be addressed very practically and the difficulties and inconvenience of the French doctrine of the negative effect of Kompetenz-Kompetenz would also be avoided.

19. The advantages of the declaratory relief mechanism are numerous: (i) The court first seized in breach of the arbitration agreement has to stay its

proceedings (according to the proposed Art. 27A in order to ensure exclusive jurisdiction of the courts at the arbitral seat) so that there is no risk of contradicting decisions. (ii) It is widely accepted internationally that the courts at the seat of the arbitration are the natural forum for supervisory jurisdiction (in contrast to supportive jurisdiction, see under I). (iii) The parties achieve legal certainty at an early stage saving time and costs. (iv) The application will usually be dealt with much faster than an application to set aside the arbitral award afterwards which will often include other grounds for non-recognition prolonging the setting aside proceedings. (v) Excluding an appeal against the state court decision might even speed up the process. (vi) If the proceedings before the foreign court first seized were not initiated as a torpedo in bad faith, this court would still be competent to determine the existence, validity and scope of the arbitration agreement. This is because the scenario of parallel proceedings is unlikely to arise. The other party will usually not seise another court for declaratory relief since it can rely on the foreign court first seized to determine the issue in a reasonable time and with due care. Therefore, he will rather invoke the defence of the existing arbitration agreement and plead its validity before the foreign court.

20. Approving the suggested solution of the Heidelberg Report one should stress the following point: the proposed Art. 27A does not interfere with the national arbitration laws regarding the power of the national courts to grant declaratory relief. It merely provides for an exclusive jurisdiction if the national law chooses to grant such power and gives binding force to the declaratory judgment. It is entirely and without caveat up to the Member States to determine whether they want to empower their courts to grant such declaratory relief or not (available in England and Germany, not available in France or Austria). This solution respects different systems and peculiarities of the national arbitration laws. In English law, for example, the application to the state court for a preliminary determination of the tribunal's jurisdiction depends on the permission by the other party or the tribunal (sec. 32 Arbitration Act 1996). German law, in contrast, does not provide for such a (sensible) restriction. Leaving the autonomy of national procedural laws and arbitration laws untouched it enables a competition for the best place of arbitration by means which appear to be more in line with most Member States' laws and the Regulation itself than anti-suit injunctions.

The arbitration exception in Art. 1(2)(d) – keep it or delete it?

21. A final, brief remark on the proposed deletion of the arbitration exception in Art. 1(2)(d) by the Heidelberg Report: many commentators on the Heidelberg Report have so far rejected the proposed deletion of the arbitration exception. They mainly go with the adage "If it ain't broke, don't fix it" and fear problems of unintended consequences. However, as indicated above, the system is broken with regard to the issue of parallel proceedings, in particular the West Tankers scenario. Anti-suit injunctions are no longer available; torpedo proceedings are easy to initiate for an obstructing party. Against this background active steps to remedy the situation are required. The solution proposed by the Heidelberg Report in Art. 27A with the duty to recognise a declaratory judgment by the courts at the arbitral seat is such an active step (which we endorse). Moreover, no one has come up with a better solution so far.

22. Including a new Art. 27A does, however, require opening up the arbitration exception at least to some extent. It appears possible to open only one slot in the arbitration exception with regard to the particular problems identified after five years of operation of Regulation (EC) No 44/2001 while leaving the arbitration exception as such untouched. Taking up the initially mentioned adage, we would suggest to fix it only to the extent it is broken.

Publication: Collection of Hague Conventions

- Intersentia have recently published *Recueil des Conventions / Collection of Conventions (1951-2009)*, edited by the Hague Conference. The blurb:

> *This eighth edition of the Collection of Conventions of the Hague Conference contains the most important multilateral treaties entered into under the auspices of the Hague Conference on Private International Law, which has been*

working on the progressive unification of private international law since 1893, and doing so as an intergovernmental organisation since 1955. This new edition, made necessary by a revision of the Hague Conference Statute and the adoption since 2003 of three new Conventions, reproduces the texts of the Hague Conventions in authentic versions as deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The text of the Statute is followed by 38 international Conventions concerning areas as numerous and varied as family law, trade and financial law, or administrative and judicial co-operation and international litigation. These include the most widely ratified and best known Hague Conventions such as the Hague Intercountry Adoption Convention, the Hague Child Abduction Convention, the Hague Apostille, Service, Evidence and Access to Justice Conventions, as well as the most recent Hague Conventions on Choice of Court, Child Support and Maintenance Obligations.

The first seven Conventions, adopted between 1893 and 1904, are not included in this volume as they have since been superseded by more modern instruments. They are available for consultation, however, on the Hague Conference website.

The first nine Conventions were adopted in French only, and so are not reproduced in English herein. However, unofficial translations are available in several languages, including English and Spanish, and may be consulted on the Hague Conference website, together with the references of publications containing such translations.

You can also download a full table of contents (PDF). ISBN 978-90-5095-873-8. Price: 30 EUROS. Available to purchase from the Intersentia website.

I am hesitant to recommend it, *per se*, as most will no doubt be aware that all of the Hague Conventions (including the ones that have been superseded, and so are not present in the collection) are available for free from the Hague Conference website. Much the same argument applied to the Hess/Schlosser/Pfeiffer report on Brussels I, which can be had for free from the Commission website, but costs £66 to purchase in book form. Adrian Briggs pointed to the obvious logical flaw in that model in a recent review of the Brussels I Study ([2009] LMCLQ 268), and the same can be said here. Insofar as you might wish to have a physical copy of

the Conventions on your bookshelf, however, the Collection is competitively priced.