Round-Up of Canadian Conflicts Publications

Readers of this web site might find some of the following publications to be of interest. I have tried to gather togther recent work by Canadian conflicts scholars. Please post a comment if you are aware of another piece.

Vaughan Black & Angela Swan, "Concurrent Judicial Jurisdiction: A Race to the Court House or to Judgment?" (2008) 46 C.B.L.J. 292

Joost Blom, "Concurrent Judicial Jurisdiction and Forum Non Conveniens – What is to be Done?" (2009) 47 C.B.L.J. 166

Wayne Gray & Robert Wisner, "The Russians are Coming, But Can They Enforce their Foreign Arbitral Award?" (2009) 47 C.B.L.J. 244

Jacqueline King & Andrew Valentine, "The Structure of Jurisdictional Analysis" (2008) 34 Adv. Q. 416

Kenneth C. MacDonald, *Cross-Border Litigation: Interjurisdictional Practice and Procedure* (Aurora: Canada Law Book, 2009)

James Mangan, "The Need for Cross-Border Clarity: Recognizing American Class Action Judgments in Canada" (2009) 35 Adv. Q. 375

Tanya Monestier, "Lepine v. Canada Post: Ironing Out Wrinkles in the Interprovincial Enforcement of Class Judgments" (2008) 34 Adv. Q. 499

Austen Parrish, "Comity and Parallel Foreign Proceedings: A Reply to Black and Swan" (2009) 47 C.B.L.J. 209

Nicholas Pengelley, "Alberta Says Nyet! Limitation Act Declares Russian Arbitral Award DOA" (2009) 5 J.P.I.L. 105

Stephen Pitel, "Rome II and Choice of Law for Unjust Enrichment" in John Ahern & William Binchy, *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations* (Leiden: Martinus Nijhoff Publishers, 2009) 231

Stephen Pitel, "Choice of Law for Unjust Enrichment: Rome II and the Common

Law" [2008] Nederlands Internationaal Privaatrecht 456

Antonin Pribetic, "Staking Claims Against Foreign Defendants in Canada: Choice of Law and Jurisdictional Issues Arising from the In Personam Exception to the Mocambique Rule for Foreign Immovables" (2009) 35 Adv. Q. 230

Prasanna Ranganathan, "Survivors of Torture, Victims of Law: Reforming State Immunity in Canada by Developing Exceptions for Terrorism and Torture" (2008) 71 Sask. L. Rev. 343

Geneviève Saumier, "Transborder Litigation and Private International Law: The View from Canada" in F. Cafaggi & H.-W. Micklitz, eds., *New Frontiers of Consumer Protection: The Interplay between Private and Public Enforcement* (Antwerp: Intersentia, 2009) 361

Janet Walker, "Recognizing Multijurisdictional Class Action Judgments Within Canada: Key Questions – Suggested Answers" (2008) 46 C.B.L.J. 450

Janet Walker, "Teck Cominco and the Wisdom of Deferring to the Court First Seised, All Things Being Equal" (2009) 47 C.B.L.J. 192

Summer Seminar in Urbino

The Faculty of Law of the University of Urbino will host this summer its 51st Seminar of European Law.

The majority of the courses taught over the two weeks of the seminar (17-29 August) will deal with conflict issues, in particular European regulations. Although courses can be taught in English, this is a franco-italian seminar where courses are typically taught in French or Italian, with a translation in the other language.

This year, speakers will come from France, Italy, Portugal or Lebanon, and include Horatia Muir Watt, Bertrand Ancel, Luigi Mari, and Tito Ballarino.

The full program can be found here.

ECJ: Recent Judgments and References on Brussels I and Brussels II bis

I. Judgments on Brussels I:

1. SCT Industri AB i likvidation v. Alpenblume AB (C-111/08)

The *Högsta domstolen* (Sweden) had referred the following question to the ECJ for a preliminary ruling:

> *Is the exclusion under Article 1(2)(b) of Regulation [No 44/2001] of bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings from the scope of that regulation to be interpreted as meaning that it covers a decision given by a court in one Member State (A) regarding registration of ownership of shares in a company having its registered office in Member State A, the shares having been transferred by the liquidator of a company having its registered office in another Member State (B), where the court based its decision on the fact that, in the absence of an international agreement on the mutual recognition of insolvency proceedings, Member State A does not recognise the liquidator's powers to dispose of property situated in Member State A?*

The ECJ now held:

> *The exception provided for in Article 1(2)(b) of Council Regulation No 44/2001 (EC) of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as applying to a judgment of a court of Member State A regarding registration of ownership of*

shares in a company having its registered office in Member State A, according to which the transfer of those shares was to be regarded as invalid on the ground that the court of Member State A did not recognise the powers of a liquidator from a Member State B in the context of insolvency proceedings conducted and closed in Member State B.

See with regard to this case also our previous post on the reference which can be found here.

2. Peter Rehder v. Air Baltic Corporation (Case C-204/08)

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

1. Is the second indent of Article 5(1)(b) of Regulation [No 44/2001] to be interpreted as meaning that in the case also of journeys by air from one Member State to another Member State, the single place of performance for all contractual obligations must be taken to be the place of the main provision of services, determined according to economic criteria?

2. Where a single place of performance is to be determined: what criteria are relevant for its determination; is the single place of performance determined, in particular, by the place of departure or the place of arrival of the aircraft?

The ECJ now held:

The second indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in the case of air transport of passengers from one Member State to another Member State, carried out on the basis of a contract with only one airline, which is the operating carrier, the court having jurisdiction to deal with a claim for compensation founded on that transport contract and on Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, is that, at the applicant's

choice, which has territorial jurisdiction over the place of departure or place of arrival of the aircraft, as those places are agreed in that contract.

See with regard to this case also our previous post on the reference which can be found here.

II. References: Further, several questions on the interpretation of Brussels I – as well as one reference on Brussels II *bis* – have been referred to the ECJ for a preliminary ruling:

1. Ceská podnikatelská pojišt'ovna, a.s., Vienna Insurance Group v Michal Bílas(Case C-111/09)

The *Okresní Soud v Cheb* (Czech Republic) has referred the following questions to the ECJ for a preliminary ruling:

Should Article 26 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('the Regulation') be interpreted as not authorising a court to review its international jurisdiction where the defendant partipates in the proceedings, even when the case is subject to the rules on compulsory jurisdiction under Section 3 of the Regulation and the application is brought contrary to those rules?

Can the defendant, by the fact that he partipates in the proceedings, establish the international jurisdiction of the Court within the meaning of Article 24 of the Regulation even where the proceedings are otherwise subject to the rules of compulsory jurisdiction in Section 3 of the Regulation and the application is brought contrary to those rules?

If the answer to question (2) is in the negative, may the fact that the defendant participates in the proceedings before a court which otherwise under the Regulation does not have jurisdiction in a case concerning insurance, be regarded as an agreement on jurisdiction within the meaning of Article 13(1) of the Regulation?

***2*.Hotel Alpenhof GesmbH v. Oliver Heller (Case)C-144/09)**

The *Oberster Gerichtshof* (Austria) has referred the following question to the ECJ for a preliminary ruling:

Is the fact that a website of the party with whom a consumer has concluded a contract can be consulted on the internet sufficient to justify a finding that an activity is being 'directed', within the terms of Article 15(1)(c) of Regulation (EC) No 44/2001 ('the Brussels I Regulation')?

3. Ronald Seunig v. Maria Hölzel (Case C-147/09)

The *Oberlandesgericht Wien* (Austria) has referred the following quesitons to the ECJ for a preliminary ruling:

1. (a) Is the second indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Regulation No 44/2001') applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?

If the answer to that question is in the affirmative,

Should the provision referred to be interpreted as meaning that

(b) the place of performance of the obligation that is characteristic of the contract must be determined by reference to the place where the service provider's centre of business is located, which is to be determined by reference to the amount of time spent and the importance of the activity;

(c) in the event that it is not possible to determine a centre of business, an action in respect of all claims founded on the contract may be brought, at the applicant's choice, in any place of performance of the service within the Community?

2. If the answer to the first question is in the negative,

Is Article 5(1)(a) of Regulation No 44/2001 applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?

4. Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG (C-585/08)

This reference, made by the *Oberster Gerichtshof* (Austria) concerns first the

interpretation of “a contract which, for an inclusive price, provides for a combination of travel and accomodation” in terms of Art. 15 No. 3 Brussels I and second the question whether it is sufficient to assume that activities are “directed” to a certain Member State if a website can be consulted via the internet.

Those questions have arisen in this case between a claimant domiciled in Austria and a company having its seat in Germany. The claimant booked a sea voyage on a freighter with the sued company via the website of an agent seated in Germany. As submitted by the claimant, the offer should – according to the agent’s website – include inter alia a cabin for two persons with bath room, separate living room, TV, further a gym and a swimming pool. In addition, several shore leaves should be encompassed as well. According to the claimant’s submission, most of these statements were incorrect why the claimant declined to start the journey and sues for repayment before Austrian courts.

Thus, the first question arising in this case is the question of international jurisdiction of Austrian courts. Art. 15 No. 3 Brussels I, however, states that Section 4 – which would, in principle, be relevant due to the existence of a consumer contract – is not applicable to contracts of transport other than a contract which, for an inclusive price, provides for a combination of travel and accomodation. Consequently, Section 4 is applicable with regard to package travel – which raises the question whether the present contract can be regarded as package travel.

Since the Austrian Supreme Court had doubts as to whether the present contract can be compared with a cruise – which is classified as package travel by the predominant opinion – it has referred the following question to the ECJ:

> *Does a ‘voyage by freighter’ constitute package travel for the purposes of Article 15(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters?*

In case the ECJ should answer this first question in the affirmative, a second issue would need clarification – the question of whether it can be regarded as sufficient for the application of Art. 15 No. 1 (c) Brussels I if a website can be consulted on the internet in another Member State. With regard to this question, the Supreme

Court emphasises – with reference to the Joint Council and Commission Statement on Articles 15 and 73 (14139/00) – that the mere fact that a website is accessible is not sufficient for the application of Art. 15. Rather it is necessary that the website solicits the conclusion of distance contracts and that a contract has actually been concluded.

Since, according to the Supreme Court, the requirements of "directed" in terms of Art. 15 No. (c) Brussels I need clarification, the court referred also the following question to the ECJ for a preliminary ruling:

> *If the answer to Question 1 is in the affirmative: Is the fact that an agent's website can be consulted on the internet sufficient to justify a finding that activities are being 'directed' within the terms of Article 15(1)(c) of Regulation No 44/2001?*

The referring decision of the Austrian OGH can be found (in German) here.

5. Wood Floor Solutions Andreas Domberger GmbH v. Silva Trade, SA (C-19/09)

Futher, the *Oberlandesgericht Wien* (Austria) has referred to the ECJ interesting questions on the interpretation of Art. 5 No. 1 (b) Brussels I with regard to cases where the services are provided in several Member States:

> *1. (a) Is the second indent of Article 5(1)(b) of Council Regulation (EC) No 44/201 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Regulation No 44/2001') applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?*
>
> *If the answer to that question is in the affirmative,*
>
> *Should the provision referred to be interpreted as meaning that*
>
> *(b) the place of performance of the obligation that is characteristic of the contract must be determined by reference to the place where the service provider's centre of business is located, which is to be determined by reference to the amount of time spent and the importance of the activity;*

(c) in the event that it is not possible to determine a centre of business, an action in respect of all claims founded on the contract may be brought, at the applicant's choice, in any place of performance of the service within the Community?

2. If the answer to the first question is in the negative: Is Article 5(1)(a) of Regulation No 44/2001 applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?

6. German Reference on Brussels II *bis*

Further, the *Bundesgerichtshof* has referred with decision of 10 June 2009 a question on the interpretation of Brussels II *bis* to the ECJ for a preliminary ruling: The case concerns the question whether provisional measures in terms of Art. 20 Brussels II *bis* constitute "judgments" in terms of Art. 2 No. 4 Brussels II *bis* and thus whether provisional measures can be recognised under Artt. 21 Brussels II *bis* et seq.

As stated by the *Bundesgerichtshof*, this question is debated controversially by legal writers and there is no constant jurisdiction so far. Consequently, the Bundesgerichtshof decided to refer the following question to the ECJ:

Are Articles 21 et. seq. Regulation (EC) No. 2201/2003 (Brussels II bis) also applicable with regard to provisional measures concerning the rights of custody in terms of Art. 20 Brussels II bis?

(Approximate translation from the German decision. The case is apparently not available at the ECJ's website so far, but can be found (in German) under XII ZB 182/08 at the website of the Federal Court of Justice).

Many thanks to Jens Karsten (Brussels) for the tip-off with regard to several of these cases.

***Update**: As we have been kindly informed by Professor Christian Kohler, the reference has been received by the ECJ in the meantime and is pending under C-256/09 (Purrucker).*

Publication: Rossolillo, “Identità personale e diritto internazionale privato”

A very interesting book on conflict issues arising out of personal identity and name has been recently published by the Italian publishing house CEDAM.
The volume, “**Identità personale e diritto internazionale privato**“, is authored by Prof. ***Giulia Rossolillo*** (University of Pavia). Prof. *Rossolillo* carries on a thorough analysis of PIL issues relating to name, both in its “private” and “public” dimension, taking into account legislation, legal scholarship and caselaw from various national jurisdictions and from the ECJ and the European Court of Human Rights.

An abstract has been kindly provided by the author (the complete table of contents is available on the publisher’s website):

> *The transnational aspects of personal identity are today subject-matter not only of private international law provisions, but also of the case law of the European Court of Human Rights and of the Court of Justice of the European Communities. Through a comparative approach, this book underlines the role of the principle of continuity and stability of names in these three fields.*
>
> *As far as private international law is concerned, the two basic functions of the name (expression of one’s personality and identity, and means by which the State identifies the subjects) are mirrored in the functioning of the related private international law rules of many civil law countries. Indeed, one can distinguish conflict of laws provisions concerning the “private aspect” of the name, that is the transmission and changing of it linked to family relationships, and provisions related to the attribution and modification of the name through a public authority act. The first aspect in many continental European countries is regulated by rules referring to the national legal system of the subject as a whole and assuming its point of view, while the so called “public aspect” of the*

name is generally regulated by unilateral provisions, taking into account only the point of view of the forum State. The underlying idea of the first approach is that the assumption of the point of view of the nationality legal order can guarantee, to a certain extent, the continuity of name every time the person moves from one State to another, whereas the principle of continuity plays a weaker role as regards the second approach. The pivotal role of the principle of continuity comes out, moreover, from national provisions allowing the individual to choose the law that will be applied to his name, like the Swiss private international law provisions giving the individual the opportunity to submit his name to his national law, instead of having it regulated by the law of the State of domicile.

The attempt of balancing private and public interests and the importance of stability for the protection of the personal identity of the individual comes out also from the case law of the European Court of Human Rights. On the one hand the Court gives, in fact, a great importance to State's interests, but on the other hand these interests are overruled when the interference of the State would lead to oblige the individual to change a name that, having been used for a long time, has become an expression of his personal identity.

The Court of Justice of the European Communities seems, on the contrary, to protect personal identity in a different way: the obligation for every member State to recognize a name given by another member State, envisaged by the Court in the Grunkin-Paul judgment, is, in fact, independent of any effectiveness requirement, that is of the fact that the individual has made actual use of that name, which has become a part of his identity. State interests are, thus, always overruled by the right of the individual to obtain the recognition of his name in the whole Union.

Title: "**Identità personale e diritto internazionale privato**", by *Giulia Rossolillo*, CEDAM (Padova), 2009, XVI – 248 pages.

ISBN: 978-88-13-29065-8. Price: EUR 24,50. Available at CEDAM.

Publication: Hartley on International Commercial Litigation

Trevor Hartley (LSE) has published a new textbook entitled, *International Commercial Litigation: Text, Cases and Materials on Private International Law*, published by Cambridge University Press. Here's the blurb:

> *This carefully structured, practice-orientated textbook provides everything the law student needs to know about international commercial litigation. The strong comparative component provides a thought-provoking international perspective, while at the same time allowing readers to gain unique insights into litigation in English courts. Three important themes of the book analyse how the international element may call into question the power of the court to hear the case, whether it should exercise this power, whether foreign law applies, and whether the court should take into account any foreign judgement. Hartley provides the reader with extracts from leading cases and relevant legislation, together with an extensive reference library of further reading for those who wish to explore the topic in more detail, making this a valuable, single-source textbook. The title will benefit from a companion website, setting out all relevant case law developments for the students.*
>
> *• Substantial extracts for leading cases are set out, so students can get an insight into how judges think • Also included is other material on jurisdictions, especially the United States • Extensive reading list after each chapter • Companion website will update material to reflect most recent case law developments*

It is available in both paperback (£48.00) and hardback (£90.00) from the CUP website, *or* you can purchase it from our Amazon-powered bookshop for the bargain prices of **£45.50** and **£85.50** respectively (click on those cheaper prices to go directly to the book on the Amazon website.)

European Commission: Area of Freedom, Security and Justice serving the Citizen

The communication from the Commission to the European Parliament and the Council titled “An area of freedom, security and justice serving the citizen” (COM(2009) 262 final) mentioned already in one of our previous posts, is now available.

Of particular interest might be the following passages envisaging a communitarisation of choice of law rules in the field of company law:

> *The regulation of business law would help oil the wheels of the internal market. A variety of measures could be considered here: common rules determining the law applicable to matters of company law, insurance contracts and the transfer of claims, and the convergence of national rules on insolvency procedures for banks. (p. 15)*

> *Further efforts are needed to harmonise rules on the law applicable to insurance contracts and company law. (p. 31)*

Many thanks to Andrew Dickinson and Jan von Hein for the tip-off!

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.