


Publication: Hill & Chong on International Commercial Disputes

The fourth edition of J Hill & (now) A Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* has just been published by Hart. Here's the blurb: 

This is the fourth edition of this highly regarded work on the law of international commercial litigation as practised in the English courts. As such it is primarily concerned with how commercial disputes which have connections with more than one country are dealt with by the English courts. Much of the law which provides the framework for the resolution of such disputes is derived from international instruments, including recent Conventions and Regulations which have significantly re-shaped the law in the European Union. The scope and impact of these European instruments is fully explained and assessed in this new edition.

The work is organised in four parts. The first part considers the jurisdiction of the English courts and the recognition and enforcement in England of judgments granted by the courts of other countries. This part of the work, which involves analysis of both the Brussels I Regulation and the so-called traditional rules, includes chapters dealing with jurisdiction in personam and in rem, anti-suit injunctions and provisional measures. The work's second part focuses on the rules which determine whether English law or the law of another country is applicable to a given situation. The part includes a discussion of choice of law in contract and tort, with particular attention being devoted to the recent Rome I and Rome II Regulations. The third part of the work includes three new chapters on international aspects of insolvency (in particular, under the EC Insolvency Regulation) and the final part focuses on an analysis of legal aspects of international commercial arbitration. In particular, this part examines: the powers of the English courts to support or supervise an arbitration; the effect of an arbitration agreement on the jurisdiction of the English courts; the law which governs an arbitration agreement and the parties' dispute; and the recognition and enforcement of foreign arbitration awards.

This is a book I have eagerly been waiting for (the 2005 edition is excellent), and it's highly recommended. Get it for **£50 from Hart Publishing**, or **£47.50 from Amazon UK**.

Latest Issue of “Praxis des Internationalen Privat- und Verfahrensrechts” (6/2010)

Recently, the November/December issue of the German law journal “Praxis des Internationalen Privat- und Verfahrensrechts” (**IPRax**) was published.

Here is the contents:

- **Anne Röthel/Evelyn Woitge:** “Das Kollisionsrecht der Vorsorgevollmacht” - the English abstract reads as follows:

Various European national laws have recently implemented powers of representation granted by an adult to be exercised when he or she is not in a position to protect his or her interests. The authors show the existence and scope of these powers of representation within Europe and identify the need for conflict norms for this legal institution. Based on an analysis of the respective rules in the Hague Convention on the international protection of adults, the authors highlight the need to find a national solution that acknowledges the special interests of incapable adults. They suggest a regulation for powers of representation in autonomous international private law that adapts the concept of the Hague Convention.

- **Stefanie Sendmeyer:** “Die Rückabwicklung nichtiger Verträge im Spannungsfeld zwischen Rom II-VO und Internationalem Vertragsrecht” - the English abstract reads as follows:

In private international law, it is highly disputed whether the law applicable to

claims aiming to reverse enrichment in case of a void contract is determined by Art. 10 (1) lit. e) Rome II Regulation or by Art. 10 (1) lit. e) Rome Convention or Art. 12 (1) lit. e) Rome I Regulation respectively. After a short analysis of the current state of discussion, it is shown that the argument emanates from the erroneous assumption that the question of restitution in such cases is a matter of unjust enrichment according to Art. 10 Rome II Regulation as well as a topic of private international law concerning contractual obligations. In fact, the question has to be solved by clearly differentiating between contractual and non-contractual obligations and, therefore, between the scope of the Rome II Regulation and the scope of the instruments of private international law dealing with contractual obligations. In consistence with European international procedural law, restitution in case of a void contract is considered a contractual obligation and, therefore, the applicable law is determined by Art. 10 (1) lit. e) Rome Convention or Art. 12 (1) lit. e) Rome II Regulation respectively.

- **Anatol Dutta:** “Grenzüberschreitende Forderungsdurchsetzung in Europa: Konvergenzen der Beitreibungssysteme in Zivil- und Verwaltungssachen?” (on ECJ, 14.1.2010 – C-233/08 – Milan Kyrian ./ Celní úrad Tabor) - the English abstract reads as follows:

The dogma that claims of the State based on its penal, revenue or other public law are not enforceable abroad – a doctrine also known as the revenue rule – is more and more displaced by European instruments obliging the Member States to collect public law claims of their fellow Member States. One example for this development is the Tax Recovery Directive 76/308/EC (later: 2008/55/EC, now: 2010/24/EU) on the mutual assistance for the recovery of claims relating to taxes, duties and other measures – an instrument, which has been gradually extended to all taxes levied by the Member States. The present article, which discusses a recent decision of the European Court of Justice interpreting the Tax Recovery Directive, attempts to highlight some similarities between the European enforcement rules for public law claims and those for private law claims. These similarities do not only allow fertilisation across the public-private law border when applying and interpreting the different enforcement rules, but once more demonstrate that the revenue rule should be reconsidered.

- **Sebastian Mock:** “Internationale Streitgenossenzuständigkeit” - the

English abstract reads as follows:

The international jurisdiction for claims against several defendants at the domicile of one of the defendants as today established by Art. 6 No. 1 Brussels I Regulation is unknown in several member states and consequently causes general doubts due to the existing possibilities of manipulation in this context. Although the European Court of Justice reflected these doubts by establishing the additional need of the risk of irreconcilable judgments resulting from separate proceedings in the application of Art. 6 No. 1 Brussels Convention and Art. 6 No. 1 Lugano Convention - which was later recognized by the European legislator in the drafting of Art. 6 No. 1 Brussels I Regulation - the determination of this additional requirement is still left unclear. In its recent decision the German Federal Court of Justice delivered a rather broad understanding of this requirement. The court held that the jurisdiction under Art. 6 No. 1 Lugano Convention/Art. 6 No. 1 Brussels I Regulation does not require that all defendants have to be sued at the same time. Moreover the court held that the violation of a duty of a member of the board of directors is sufficient to establish a jurisdiction under Art. 6 No. 1 Lugano Convention/Art. 6 No. 1 Brussels I Regulation for a claim against the member of the board of directors when the plaintiff already filed a claim against the company of the director. However, the author doubts that this ruling can be considered as a general principle in the application of Art. 6 No. 1 Lugano Convention/Art. 6 No. 1 Brussels I Regulation and shows that the ruling has to be seen in context with a special provision of the applicable Swiss corporate law.

- **Martin Schaper:** “Internationale Zuständigkeit nach Art. 22 Nr. 2 EuGVVO und Schiedsfähigkeit von Beschlussmängelstreitigkeiten - Implikationen für den europäischen Wettbewerb der Gesellschaftsrechte”
- the English abstract reads as follows:

Art. 22 (2) Brussels I Regulation establishes an exclusive jurisdiction of a Member State’s court for proceedings which have as their object, among others, the nullity or the dissolution of companies and the validity of the decisions of their organs. This jurisdiction depends on where the company’s seat is located. For determining this seat the court has to apply its rules of International Private Law (lex fori). Although Germany generally adheres to the real seat theory, the OLG Frankfurt a.M. (Higher Regional Court) decided that a

private limited company's statutory seat is the relevant factor for determining the exclusive jurisdiction.

Since the freedom of establishment, as interpreted by the Court of Justice of the European Union, promoted corporate mobility there is an increasing demand for settling disputes not in the state of incorporation, but in the country where the major business operations take place. Therefore, the article examines the possibility of arbitration proceedings on the nullity and avoidance of decisions taken by shareholders' meetings in an international context.

Finally, based on the experience with the state competition for corporate charters in the USA, the impact of a jurisdiction's courts and the admissibility of arbitration proceedings is analysed within the context of regulatory competition in company law in Europe.

- **Veronika Gärtner:** "Internationale Zuständigkeit deutscher Gerichte bei isoliertem Versorgungsausgleichsverfahren" - the English abstract reads as follows:

Until recently, German law did not know an explicit rule on international jurisdiction with regard to proceedings dealing with the adjustment of pension rights between divorced spouses. The Federal Court of Justice held in several judgments that international jurisdiction with regard to the adjustment of pension rights followed - also in cases where those proceedings are initiated independently from divorce proceedings - the rules of international jurisdiction with regard to the divorce proceedings due to the strong link between both issues.

With reference to this case law, the Regional Court of Karlsruhe held in its decision of 17 August 2009 (16 UF 99/09) that German courts lacked international jurisdiction with regard to (independent) proceedings on the adjustment of domestic pension rights between two Portuguese divorced spouses habitually resident in Portugal, based on the argumentation that Art. 3 Brussels II bis Regulation had to be applied analogously with regard to the question of international jurisdiction. Due to the fact that the requirements of this provision were not met, German courts were - according to the Higher

Regional Court Karlsruhe - not competent to rule on the adjustment of the (German) pension rights.

This result is undoubtedly incorrect under the present legal situation: With effect of 1 September 2009 - in the course of a general revision of the procedural rules in family law and non-contentious cases - a new rule has been introduced stating explicitly that German courts have international jurisdiction with regard to proceedings on the adjustment of pension rights inter alia in cases concerning domestic (pension) rights (§ 102 Nr. 2 FamFG).

However, the author argues that also before the entry into force of this new rule, the Regional Court of Karlsruhe should have answered the question of international jurisdiction in the affirmative: First, it is argued that the court's reference to Art. 3 Brussels II bis Regulation was misplaced since - as Recital No. 8 of the Brussels II bis Regulation illustrates - "ancillary measures" - and therefore also proceedings on the adjustment of pension rights of divorced spouses - are not included into the scope of application of Brussels II bis.

Further, the author argues that the negation of international jurisdiction in cases concerning domestic (pension) rights leads to a denial of justice. Therefore it is argued that international jurisdiction could - and should - have been assumed on the basis of general principles of jurisdiction.

- **Gerhard Hohloch/ Ilka Klöckner:** "Versorgungsausgleich mit Auslandsberührung - vom alten zum neuen Recht - Korrektur eines Irrwegs" - the English abstract reads as follows:

On the 11th of February 2009, the Federal Supreme Court of Justice has had its first opportunity to decide whether or not the Dutch provisions on pension rights adjustment were to be regarded as equivalent to the German "Versorgungsausgleich" (VA) in the matter of Art. 17 III 1 EGBGB. Though until then this was generally accepted, the Court decided to deviate from the established opinion. In the course of the 2009 Reform, Art. 17 III EGBGB was revised and significantly restricted regarding its field of application. According to this new regulation, German law must now be applicable in order for the plaintiff to successfully be able to claim an adjustment of pension rights in Germany. Starting off with a critical examination of the Supreme Court's

decisions, the authors then point out the impact of the Court's adjudication on the interpretation and the application of the new Art. 17 III EGBGB.

- **Pippa Rogerson:** Forum Shopping and Brussels II bis (on: High Court of Justice, 19.4.2010 - [2010] EWHC 843 (Fam) - JKN v JCN)

Sometimes real life cases focus academic attention on important issues of principle. In JKN v JCN a husband and wife from New York had been living in London for 12 years and had four young children together. Then they returned to New York where they are all now residing for the foreseeable future. The marriage has broken down and a divorce, financial settlement and arrangements for the children are required. Which court should deal with these matters? The wife commenced proceedings in England under Brussels II bis and the husband in New York. The parties had both UK and US citizenship and the husband at that time was still resident in England. Both parties were pursuing proceedings in a court which provided that party with some advantages. Ideally, the parties should come to a settlement without needing the court's determination. If not, preferably a single court should adjudicate matters. This is achieved within the EU by the lis pendens rule in Brussels II bis. However, there is no similar regime operating with non-Member States. A proliferation of judgments over the same matter is wasteful of the parties' time and assets as well as of the courts' resources. It also leads to problems of enforcement of possibly irreconcilable judgments.

- **Axel Kunze/ Dirk Otto:** "Internationale Zwangsvollstreckungszuständigkeit, rechtliche Grenzen und Gegenmaßnahmen" (on: New York Court of Appeals, Opinion v. 4.6.2009) - the English abstract reads as follows:

A New York Court recently ruled that courts in New York have international competence to order the cross-border attachment of rights and securities held by a foreign party with a foreign bank abroad as long as the foreign bank carries out business in the state of New York. This decision potentially exposes foreign banks operating in New York state to attachment disputes. The article describes the impact of the decision and compares it with the legal situation in Germany and other EU countries. The authors come to the conclusion that under German law, EU law as well as under the Lugano Convention a court may

not order the attachment of claims located in other countries. In order to limit the risk for banks from being caught in the middle, the authors suggest contractual arrangements that would enable banks to “vouch in” customers into disputes before U.S. courts to ensure that banks are not liable if they comply with U.S. rulings. On the other hand customers could initiate legal steps in their home jurisdiction to prevent a bank from transferring assets/securities abroad; such an injunction would also be recognized by U.S. courts.

- **Bartosz Sujecki:** “Zur Anerkennung und Vollstreckung von deutschen Kostenfestsetzungsbeschlüssen für einstweilige Verfügungen in den Niederlanden” - the English abstract reads as follows:

The Dutch Supreme Court (Hoge Raad) had to give an answer to the question whether a German decision on the amount of cost (Kostenfestsetzungsbeschluss) related to an interim injunction (einstweilige Verfügung) can be recognized and enforced in the Netherlands. Since the German interim injunction was given in an ex parte procedure and the cost decision was not contested by the defendant, the question arose whether such an uncontested decision can be qualified as a “decision” according to article 32 of the Brussels I Regulation and can be enforced in the Netherlands. This paper discusses and analyzes the decision of the Dutch Supreme Court.

- **Gerhard Hohloch:** “Feststellungsentscheidungen im Eltern-Kind-Verhältnis - Zur Anwendbarkeit von MSA, KSÜ und EuEheVO” - the English abstract reads as follows:

The article discusses the Austrian Supreme Court’s order issued on May 8th 2008, concerning the applicability of the 1961 Hague Convention “[...] on the protection of minors” on declaratory actions in statutory custody cases. It refers to the international jurisdiction rules (including “Regulation Brussels IIa”) as well as to the conflict of law rules. As the significance of the Court’s assessment extends beyond the Austrian-German border, the main emphasis is put on how the problems of the case at issue are to be treated in Germany, and furthermore on the impact the 1996 Hague Convention “[...] on the protection of Children” - which is expected to come into force soon - will have on the legal situation in Germany and in Austria.

- **Oliver L. Knöfel:** “Nordische Zeugnispflicht – Grenzüberschreitende Zivilrechtshilfe à la scandinave” – the English abstract reads as follows:

The article gives an overview of the mechanisms of judicial assistance in the taking of evidence abroad in civil matters as maintained by the five Nordic Countries (Denmark, Finland, Iceland, Norway, Sweden). In Central and Western Europe, it is little-known that the Nordic Countries have, since the 1970s, erected an autochthonous system of judicial assistance differing quite significantly from the long-standing habits of taking evidence abroad as established by the Hague Conference or recently by the European Union. According to specific reciprocal legislation, Nordic residents are obliged to appear before the courts of any Nordic country, and to give evidence. Thus, there is hardly any need to have a foreign Nordic witness examined by her home court according to a letter rogatory, or to take evidence directly on foreign soil. The article aims at exploring this extraordinary mode of international judicial co-operation with special reference to Swedish procedural law. It is shown that the Nordic mechanism is a product of a very high level of convergence in the field of civil procedure, and that this is due to a common core of Nordic legal cultures.

- **Reinhard Giesen** on a decision of the Norwegian Supreme Court on the applicable law with regard to defamation: “Das Recht auf freie Meinungsäußerung und der Schutz der persönlichen Ehre im Kontext unterschiedlicher Kulturen” (on: Norges Høyesterett, 2.12.2009 – HR-2009-2266-A)
- **Kurt Siehr** on the Austrian Supreme Court’s decision of 18 September 2009 dealing with the question of the applicability of Brussels II bis with regard to the return of abducted children – in particular in cases where the child is over 16 years old : “Zum persönlichen Anwendungsbereich des Haager Kindesentführungsübereinkommens von 1980 und der EuEheVO “Kind“ oder “Nicht-Kind“ – das ist hier die Frage!” (on: Austrian Supreme Court, 18.9.2009 – 6 Ob 181/09z)
- **Erik Jayme** on the inaugural lecture held by Professor Martin Gebauer in Tübingen on 16 July 2010

Issue 2010/2 Netherlands Internationaal Privaatrecht

The second issue of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* (www.nipr-online.eu) includes the following contributions on Party autonomy in Rome I and II; Art. 5(3) Brussels I (Zuid-Chemie case); Scope of the Service Regulation; Enforcement in the Netherlands; and Implementation of the European Order for Payment Procedure in the Netherlands:

- Symeon C. Symeonides, Party autonomy in Rome I and II: an outsider's perspective, p. 191-205. The introduction reads:

The principle that contracting parties should be allowed, within certain limits, to pre-select the law governing their contract (party autonomy) is almost as ancient as private international law itself, dating back at least to Hellenistic times. Although this principle has had a somewhat checkered history in the United States, it has been a gravamen of continental conflicts doctrine and practice, at least since the days of Charles Dumoulin (1500-1566). The latest codified expression of party autonomy in European private international law is found in the European Union's Rome I Regulation of 2008 on the Law Applicable to Contractual Obligations, which replaced the 1980 Rome Convention, as well as in the Rome II Regulation of 2007 on the Law Applicable to Non-Contractual Obligations. In the meantime, most other legal systems have recognized the principle of party autonomy, making it 'perhaps the most widely accepted private international rule of our time'. Nonetheless, disagreements remain in defining the modalities, parameters, and limitations of this principle. These disagreements include questions such as: (1) the required or permissible mode of expression of the contractual choice of law; (2) whether the chosen state must have a specified factual connection with the parties or the transaction; (3) which state's law should define the substantive limits of party autonomy; (4) whether the choice must be limited to the law of a state or whether it can also include non-state norms; and (5) whether the choice may encompass non-contractual issues. This essay offers an outsider's limited textual assessment of some of the modalities and limitations of party autonomy under the Rome I and Rome II Regulations and a comparison with the prevailing practice in the United States.

- H. Duintjer Tebbens, Het 'forum delicti' voor professionele productaansprakelijkheid en het Europese Hof van Justitie: een initieel antwoord over initiële schade, Hof van Justitie EG 16 juli 2009, zaak C-189/08 (*Zuid-Chemie/Philippo's Mineralenfabriek*), p. 206-209. The English abstract reads:

The author offers a critical analysis of the latest judgment of the European Court of Justice in a line of cases concerning the proper interpretation of 'the place where the harmful event occurred' (here: the initial damage) for the purposes of the allocation of jurisdiction in tort under Article 5(3) of the Brussels Convention and its successor, the Brussels I Regulation. In Zuid-Chemie v. Filippo's Mineralenfabriek, C-189/08, on a reference by the Dutch Hoge Raad, the Court had to answer the principal question whether, in a dispute between commercial parties concerning liability arising out of a contaminated chemical product used for the production of fertilizer, the place where the initial damage occurred was where the product was delivered or the place where, as a result of the normal use of the product, (material) damage was caused to the fertilizer. The referring court further asked whether, if the second alternative was correct, this would also extend to the hypothesis that the initial damage consisted of pure economic loss. As to the procedural treatment of this reference the Note questions the wisdom of having resort in the present case to the accelerated procedure for preliminary rulings, which implies that the Advocate General does not deliver an Opinion. On the principal question concerning interpretation of Article 5(3), the author agrees with the decision of the European Court which further develops earlier case law, in particular its ruling in Marinari, C-364/93. Nevertheless, he criticizes some parts of the reasoning of the Court as well as certain points of terminology. He notes that the European Court made its own assessment of what kind of damage was at issue in the case, i.e. material damage to the fertilizer produced by the claimant, which did not completely match the findings of fact by the Hoge Raad. This explains why the European Court did not deal with the second question referred by the Dutch court whose point of departure was that the initial damage consisted of pure economic loss. The author concludes that it is still an open question whether Article 5(3) offers a forum if the initial damage is purely of a pecuniary nature, for example in the case of losses from financial transactions.

- Chr.F. Kroes, Kantoorbetekening zet de Bet.-Vo. buiten spel oordeelt de Hoge Raad, Enige kanttekeningen bij Hoge Raad 18 december 2009, nr. 09/03464 (*Demerara/Karl Heinz Haus*), p. 210-214. The English abstract reads:

On December 18, 2009, the Supreme Court handed down a decision that will be dear to the hearts of pragmatists. The Supreme Court found that the possibility of service pursuant to Article 63(1) of the Code of Civil Procedure renders the Service Regulation (EC 1393/2007) inapplicable. The Supreme

Court's decision is based on one of the recitals of the Service Regulation and information in the parliamentary papers that accompanied the proposal for the Dutch Execution Act on the new Service Regulation. Therefore, its judgment seems to fail to take into account the case law of the ECJ. Pursuant to that case law, the Service Regulation should be interpreted autonomously. Statements of the Council may not be used to interpret the Service Regulation, if they are not reflected in the provisions of the Regulation itself. The recitals may not be used to arrive at a restrictive interpretation of the scope of application of the Regulation. Therefore, it is difficult to see how information in the Dutch parliamentary papers supports an interpretation that restricts the application of the Service Regulation.

- Niek Peters, *Bevoegdheid van de Nederlandse rechter bij een exequaturprocedure en een actio iudicati*, p. 215-222. The English abstract reads:

In the Netherlands it is not possible for a creditor to simply enforce a foreign monetary judgment against a debtor. A creditor must first of all obtain a Dutch enforcement order. For this purpose, he must either file an application for leave for enforcement (exequatur) – pursuant to Articles 38 et seq. Brussels I Regulation and Articles 985 et seq. DCCP respectively – or alternatively file a claim pursuant to Article 431 paragraph 2 DCCP. However, the jurisdiction of the Dutch courts over such an application or claim is not necessarily ensued, when a debtor has his place of domicile outside of the Netherlands. This is essentially due to the fact that a Dutch court may not assume jurisdiction if a creditor merely states that the enforcement will (or could) be required in his district. For instance, in a procedure for ordering enforcement (exequatur procedure), a creditor must make a plausible argument that a debtor has, or could have, assets in said district. In case of a claim pursuant to Article 431 paragraph 2 DCCP, a Dutch court may not have jurisdiction until after a prejudgment attachment has been (successfully) levied. As a consequence, it is possible that a creditor cannot obtain an enforcement order in the Netherlands, even though he may have a justifiable interest in obtaining such order. Therefore, it would be recommendable if there is at least a court that has jurisdiction over an application for leave of enforcement or, respectively, a claim pursuant to Article 431 paragraph 2 DCCP.

- Mirjam Freudenthal, *Perikelen rond de uitvoering van de Verordening van een Europees betalingsbevel*, p. 223-225. The English abstract reads:

The Netherlands 2009 Act adapting Dutch civil procedure to the Regulation for a European Order for Payment did not include an effective provision on the referral of the order for payment procedure to a regular court procedure once the order for payment was objected to by the defendant. Recently the government published a Bill with adjustments to the 2009 Act, in which it proposed to

concentrate all order for payment procedures in the The Hague court and a new provision was introduced regulating all aspects of this referral of the ex parte order for payment procedure to the regular court. In this article the consequences of the Bill's proposals are discussed and measures to improve the referral procedure are suggested.

If you are interested in contributing to this journal, please contact the editing assistant Wilma van Sas-Wildeman, w.van.sas-wildeman@asser.nl, or the editor-in-chief Xandra Kramer, kramer@frg.eur.nl

European Parliament Resolution on Brussels I

On September 7th, the European Parliament adopted a Resolution on the Implementation and the Review of the Brussels I Regulation.

The Resolution addresses many issues. On whether to abolish exequatur, the Parliament:

2. Calls for the requirement for exequatur to be abolished, but considers that this must be balanced by appropriate safeguards designed to protect the rights of the party against whom enforcement is sought; takes the view therefore that provision must be made for an exceptional procedure available in the Member State in which enforcement is sought; considers that this procedure should be available on the application of the party against whom enforcement is sought to the court indicated in the list in Annex III to the Regulation; takes the view that the grounds for an application under this exceptional procedure should be the following: (a) that recognition is manifestly contrary to public policy in the Member State in which recognition is sought; (b) where the judgment was given in default of appearance, that the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; (c) that the judgment is

irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought, and (d) that the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; further considers that an application should be able to be made to a judge even before any steps are taken by way of enforcement and that if that judge rules that the application is based on serious grounds, he or she should refer the matter to the court indicated in the list in Annex III for examination on the basis of the grounds set out above; advocates the addition of a recital in the preamble to the effect that a national court may penalise a vexatious or unreasonable application, inter alia , in the order for costs;

3. Encourages the Commission to initiate a public debate on the question of public policy in connection with private international law instruments;

4. Considers that there must be a harmonised procedural time-frame for the exceptional procedure referred to in paragraph 2 so as to ensure that it is conducted as expeditiously as possible, and that it must be ensured that the steps which may be taken by way of enforcement until the time-limit for applying for the exceptional procedure has expired or the exceptional procedure has been concluded are not irreversible; is particularly concerned that a foreign judgment should not be enforced if it has not been properly served on the judgment debtor;

5. Argues not only that there must be a requirement for a certificate of authenticity as a procedural aid so as to guarantee recognition, but also that there should be a standard form for that certificate; considers, to this end, that the certificate provided for in Annex V should be refined, while obviating as far as possible any need for translation;

6. Believes that, in order to save costs, the translation of the decision to be enforced could be limited to the final order (operative part and summary grounds), but that a full translation should be required in the event that an application is made for the exceptional procedure;

Full text of the resolution after the break.

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

European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI))

The European Parliament, - having regard to Article 81 of the Treaty on the Functioning of the European Union, - having regard to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters(1) (hereinafter "the Brussels I Regulation" or "the Regulation"), - having regard to the Commission's report on the application of that regulation (COM(2009)0119), - having regard to the Commission's Green Paper of 21 April 2009 on the review of the Brussels I Regulation (COM(2009)0175), - having regard to the Heidelberg Report (ILS/2004/C4/03) on the application of the Brussels I Regulation in the Member States and the responses to the Commission's Green Paper,

- having regard to its resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council - An area of freedom, security and justice serving the citizen - Stockholm programme(2), specifically the sections "Greater access to civil justice for citizens and business" and "Building a European judicial culture",

- having regard to the Union's accession to the Hague Conference on private international law on 3 April 2007,

- having regard to the signature, on behalf of the Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements on 1 April 2009,

- having regard to the case law of the Court of Justice, in particular Gambazzi v. DaimlerChrysler Canada (3), the Lugano opinion(4), West Tankers (5), Gasser v. MSAF (6), Owusu v. Jackson (7), Shevill (8), Owens Bank v. Bracco (9), Denlaue (10), St Paul Dairy Industries (11) and Van Uden (12);

- having regard to the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters(13), Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims(14), Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure(15), Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure(16), Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations(17) and Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000(18),

- having regard to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)(19),

- having regard to the opinion of the European Economic and Social Committee of 16 December 2009,

- having regard to Rules 48 and 119(2) of its Rules of Procedure,

- having regard to the report of the Committee on Legal Affairs (A7-0219/2010),

A. whereas Regulation No 44/2001, with its predecessor the Brussels Convention, is one of the most successful pieces of EU legislation; whereas it laid the foundations for a European judicial area, has served citizens and business well by promoting legal certainty and predictability of decisions through uniform European rules - supplemented by a substantial body of case-law - and avoiding parallel proceedings, and is used as a reference and a tool for other instruments,

B. whereas, notwithstanding this, it has been criticised following a number of rulings of the Court of Justice and is in need of modernisation,

C. whereas abolition of exequatur - the Commission's main objective - would expedite the free movement of judicial decisions and form a key milestone in the building of a European judicial area,

D. whereas exequatur is seldom refused: only 1 to 5% of applications are appealed and those appeals are rarely successful; whereas, nonetheless, the time and expense of getting a foreign judgment recognised are hard to justify in the single market and this may be particularly vexatious where a claimant wishes to seek enforcement against a judgment debtor's assets in several jurisdictions,

E. whereas there is no requirement for exequatur in several EU instruments: the European payment order, the European small claims procedure and the maintenance obligations regulation(20),

F. whereas abolition of exequatur should be effected by providing that a judicial decision qualifying for recognition and enforcement under the Regulation which is enforceable in the Member State in which it was given is enforceable throughout the EU; whereas this should be coupled with an exceptional procedure available to the party against whom enforcement is sought so as to guarantee an adequate right of recourse to the courts of the State of enforcement in the event that that party wishes to contest enforcement on the grounds set out in the Regulation; whereas it will be necessary to ensure that steps taken for enforcement before the expiry of the time-limit for applying for review are not irreversible,

G. whereas the minimum safeguards provided for in Regulation No 44/2001 must be maintained,

H. whereas officials and bailiffs in the receiving Member State must be able to tell that the document of which enforcement is sought is an authentic, final judgment from a national court,

I. whereas arbitration is satisfactorily dealt with by the 1958 New York Convention and the 1961 Geneva Convention on International Commercial Arbitration, to which all Member States are parties, and the exclusion of arbitration from the scope of the Regulation must remain in place,

J. whereas the rules of the New York Convention are minimum rules and the law of the Contracting States may be more favourable to arbitral competence and arbitration awards,

K. whereas, moreover, a rule providing that the courts of the Member State of the seat of the arbitration should have exclusive jurisdiction could give rise to considerable perturbations,

L. whereas it appears from the intense debate raised by the proposal to create an exclusive head of jurisdiction for court proceedings supporting arbitration in the civil courts of the Member States that the Member States have not reached a common position thereon and that it would be counter-productive, having regard to work in progress in this area, to try to force this head,

M. whereas the various national procedural devices developed to protect arbitral jurisdiction (anti-suit injunctions so long as they are in conformity with free movement of persons and fundamental rights, declaration of validity of an arbitration clause, grant of damages for breach of an arbitration clause, the negative effect of the 'Kompetenz-Kompetenz' principle, etc.) must continue to be available and the effect of such procedures and the ensuing court decisions in the other Member States must be left to the law of those Member States as was the position prior to the judgment in West Tankers,

N. whereas party autonomy is of key importance and the application of the *lis pendens* rule as endorsed by the Court of Justice (e.g. in Gasser) enables choice-of-court clauses to be undermined by abusive "torpedo" actions,

O. whereas third parties may be bound by a choice-of-court agreement (for instance in a bill of lading) to which they have not specifically assented and this may adversely affect their access to justice and be manifestly unfair and whereas, therefore, the effect of choice-of-court agreements in respect of third parties needs to be dealt with in a specific provision of the Regulation,

P. whereas the Green Paper suggests that many problems encountered with the Regulation could be alleviated by improved communications between courts; whereas it would be virtually impossible to legislate on better communication between judges in a private international law instrument, but it can be promoted as part of the creation of a European judicial culture through training and recourse to networks (European Judicial Training Network, European Network of Councils for the Judiciary, Network of the Presidents of the Supreme Courts of the EU, European Judicial Network in Civil and Commercial Matters),

Q. whereas, as regards rights of the personality, there is a need to restrict the possibility for forum shopping by emphasising that, in principle, courts should accept jurisdiction only where a sufficient, substantial or significant link exists with the country in which the action is brought, since this would help strike a better balance between the interests at stake, in particular, between the right to freedom of expression and the rights to reputation and private life; whereas the problem of the applicable law will be considered specifically in a legislative initiative on the Rome II Regulation; whereas, nevertheless, some guidance should be given to national courts in the amended regulation,

R. whereas, as regards provisional measures, the Denlaue case-law should be clarified by making it clear that *ex parte* measures can be recognised and enforced on the basis of the Regulation provided that the defendant has had the opportunity to contest them,

S. whereas it is unclear to what extent protective orders aimed at obtaining information and evidence are excluded from the scope of Article 31 of the Regulation,

Comprehensive concept for private international law

1. Encourages the Commission to review the interrelationship between the different regulations addressing jurisdiction, enforcement and applicable law; considers that the general aim should be a legal framework which is consistently structured and easily accessible; considers that for this purpose, the terminology in all subject-matters and all the concepts and requirements for similar rules in all subject-matters should be unified and harmonised (e.g. *lis pendens*, jurisdiction clauses, etc.) and the final aim might be a comprehensive codification of private international law;

Abolition of exequatur

2. Calls for the requirement for exequatur to be abolished, but considers that this must be balanced by appropriate safeguards designed to protect the rights of the party against whom enforcement is sought; takes the view therefore that provision must be made for an exceptional procedure available in the Member State in which enforcement is sought; considers that this procedure should be available on the application of the party against whom enforcement is sought to the court indicated in the list in Annex III to the Regulation; takes the view that the grounds for an application under this exceptional procedure should be the following: (a) that recognition is manifestly contrary to public policy in the Member State in which recognition is sought; (b) where the judgment was given in default of appearance, that the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; (c) that the judgment is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought; and (d) that the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; further considers that an application should be able to be made to a judge even before any step is taken by way of enforcement and that if that judge rules that the application is based on serious grounds, he or she should refer the matter to the court indicated in the list in Annex III for examination on the basis of the grounds set out above; advocates the addition of a recital in the preamble to the effect that a national court may penalise a vexatious or unreasonable application, *inter alia*, in the order for costs;

3. Encourages the Commission to initiate a public debate on the question of public policy in connection with private international law instruments;

4. Considers that there must be a harmonised procedural time-frame for the exceptional procedure referred to in paragraph 2 so as to ensure that it is conducted as expeditiously as possible, and that it must be ensured that the steps which may be taken by way of enforcement until the time-limit for applying for the exceptional procedure has expired or the exceptional procedure has been concluded are not irreversible; is particularly concerned that a foreign judgment should not be enforced if it has not been properly served on the judgment debtor;

5. Argues not only that there must be a requirement for a certificate of authenticity as a procedural aid so as to guarantee recognition, but also that there should be a standard form for that certificate; considers, to this end, that the certificate provided for in Annex V should be refined, while observing as far as possible any need for translation;

6. Believes that, in order to save costs, the translation of the decision to be enforced could be limited to the final order (operative part and summary grounds), but that a full translation should be required in the event that an application is made for the exceptional procedure;

Authentic instruments

7. Considers that authentic instruments should not be directly enforceable without any possibility of challenging them before the judicial authorities in the State in which enforcement is sought; takes the view therefore that the exceptional procedure to be introduced should not be limited to cases where enforcement of the instrument is manifestly contrary to public policy in the State addressed since it is possible to conceive of circumstances in which an authentic act could be irreconcilable with an earlier judgment and the validity (as opposed to the authenticity) of an authentic act can be challenged in the courts of the State of origin on grounds of mistake, misrepresentation, etc. even during the course of enforcement;

Scope of the Regulation

8. Considers that maintenance obligations within the scope of Regulation No 4/2009/EC should be excluded from the scope of the Regulation, but reiterates that the final aim should be a comprehensive body of law encompassing all subject-matters;

9. Strongly opposes the (even partial) abolition of the exclusion of arbitration from the scope;

10. Considers that Article 1(2)(g) of the Regulation should make it clear that not only arbitration proceedings, but also judicial procedures ruling on the validity or extent of arbitral competence as a principal issue or as an incidental or preliminary question, are excluded from the scope of the Regulation; further considers that a paragraph should be added to Article 31 providing that a judgment shall not be recognised if, in giving its decision, the court in the Member State of origin has, in deciding a question relating to the validity or extent of an arbitration clause, disregarded a rule of the law of arbitration in the Member State in which enforcement is sought, unless the judgment of that Member State produces the same result as if the law of arbitration of the Member State in which enforcement is sought had been applied;

11. Considers that this should also be clarified in a recital;

Choice of court

12. Advocates, as a solution to the problem of "torpedo actions", releasing the court designated in a choice-of-court agreement from its obligation to stay proceedings under the *lis pendens* rule; considers that this should be coupled with a requirement for any disputes on jurisdiction to be decided expeditiously as a preliminary issue by the chosen court and backed up by a recital stressing that party autonomy is paramount;

13. Considers that the Regulation should contain a new provision dealing with the opposability of choice-of-court agreements against third parties; takes the view that such provision could provide that a person who is not a party to the contract will be bound by an exclusive choice-of-court agreement concluded in accordance with the Regulation only if: (a) that agreement is contained in a written document or electronic record; (b) that person is given timely and adequate notice of the court where the action is to be brought; (c) in contracts for carriage of goods, the chosen court is (i) the domicile of the carrier; (ii) the place of receipt agreed in the contract of carriage; (iii) the place of delivery agreed in the contract of carriage; or (iv) the port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; considers that it should further be provided that, in all other cases, the third party may bring an action before the court otherwise competent under the Regulation if it appears that holding that party to the chosen forum would be blatantly unfair;

Forum non conveniens

14. Suggests, in order to avoid the type of problem which came to the fore in Owusu v. Jackson, a solution on the lines of Article 15 of Regulation No 2201/2003 so as to allow the courts of a Member State having jurisdiction as to the substance to stay proceedings if they consider that a court of another Member State or of a third country would be better placed to hear the case, or a specific part thereof, thus enabling the parties to bring an application before that court or to enable the court seized to transfer the case to that court with the agreement of the parties; welcomes the corresponding suggestion in the proposal for a regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession(21);

Operation of the Regulation in the international legal order

15. Considers, on the one hand, that the question whether the rules of the Regulation should be given reflexive effect has not been sufficiently considered and that it would be premature to take this step without much study, wide-ranging consultations and political debate, in which Parliament should play a leading role, and encourages the Commission to initiate this process; considers, on the other hand, that, in view of the existence of large numbers of bilateral agreements between Member States and third countries, questions of reciprocity and international comity, the problem is a global one and a solution should also be sought in parallel in the Hague Conference through the resumption of negotiations on an international judgments convention; mandates the Commission to use its best endeavours to revive this project, the Holy Grail of private international law; urges the Commission to explore the extent to which the 2007 Lugano Convention(22) could serve as a model and inspiration for such an international judgments convention;

16. Considers in the meantime that the Community rules on exclusive jurisdiction with regard to rights in rem in immovable property or tenancies of immovable property could be extended to proceedings brought in a third State;

17. Advocates amending the Regulation to allow reflexive effect to be given to exclusive choice-of-court clauses in favour of third States' courts;

18. Takes the view that the question of a rule overturning Owens Bank v. Bracco should be the subject of a separate review;

Definition of domicile of natural and legal persons

19. Takes the view that an autonomous European definition (ultimately applicable to all European legal instruments) of the domicile of natural persons would be desirable, in order in particular to avoid situations in which persons may have more than one domicile;

20. Rejects a uniform definition of the domicile of companies within the Brussels I Regulation, since a definition with such far-reaching consequences should be discussed and decided within the scope of a developing European company law;

Interest rates

21. Considers that the Regulation should lay down a rule so as to preclude an enforcing court from declining to give effect to the automatic rules on interest rates of the court of the State of origin and applying instead its national interest rate only from the date of the order authorising enforcement under the exceptional procedure;

Industrial property

22. Considers that, in order to overcome the problem of "torpedo actions", the court second seized should be relieved from the obligation to stay proceedings under the *lis pendens* rule where the court first seized evidently has no jurisdiction; rejects the idea, however, that claims for negative declaratory relief should be excluded altogether from the first-in-time rule on the ground that such claims can have a legitimate commercial purpose; considers, however, that issues concerning jurisdiction would be best resolved in the context of proposals to create a Unified Patent Litigation System;

23. Considers that the terminological inconsistencies between Regulation No 593/2008 ("Rome I")(23) and Regulation No 44/2001 should be eliminated by including in Article 15(1) of the Brussels I Regulation the definition of "professional" incorporated in Article 6(1) of the Rome I Regulation and by replacing the expression "contract which, for an inclusive price, provides for a combination of travel and accommodation" in Article 15(3) of the Brussels I Regulation by a reference to the Package Travel Directive 90/314/EEC(24) as in Article 6(4)(b) of the Rome I Regulation;

Jurisdiction over individual contracts of employment

24. Calls on the Commission to consider, having regard to the case-law of the Court of Justice, whether a solution affording greater legal certainty and suitable protection for the more vulnerable party might not be found for employees who do not carry out their work in a single Member State (e.g. long distance lorry drivers, flight attendants);

Rights of the personality

25. Believes that the rule in Shevill needs to be qualified; considers, therefore, that, in order to mitigate the alleged tendency of courts in certain jurisdictions to accept territorial jurisdiction where there is only a weak connection with the country in which the action is brought, a recital should be added to clarify that, in principle, the courts of that country should accept jurisdiction only where there is a sufficient, substantial or significant link with that country; considers that this would be helpful in striking a better balance between the interests at stake;

Provisional measures

26. Considers that, in order to ensure better access to justice, orders aimed at obtaining information and evidence or at preserving evidence should be covered by the notion of provisional and protective measures;

27. Believes that the Regulation should establish jurisdiction for such measures at the courts of the Member State where the information or evidence sought is located, in addition to the jurisdiction of the courts having jurisdiction with respect to the substance;

28. Finds that "provisional, including protective measures" should be defined in a recital in the terms used in the St Paul Dairy case;

29. Considers that the distinction drawn in Van Uden, between cases in which the court granting the measure has jurisdiction over the substance of the case and cases in which it does not, should be replaced by a test based on the question of whether measures are sought in support of proceedings issued or to be issued in that Member State or a non-Member State (in which case the restrictions set out in Article 31 should not apply) or in support of proceedings in another Member State (in which case the Article 31 restrictions should apply);

30. Urges that a recital be introduced in order to overcome the difficulties posed by the requirement recognised in Van Uden for a "real connecting link" to the territorial jurisdiction of the Member State court granting such a measure, to make it clear that in deciding whether to grant, renew, modify or discharge a provisional measure ordered in support of proceedings in another Member State, Member State courts should take into account all of the circumstances, including (i) any statement by the Member State court seized of the main dispute with respect to the measure in question or measures of the same kind, (ii) whether there is a real connecting link between the measure sought and the territory of the Member State in which it is sought, and (iii) the likely impact of the measure on proceedings pending or to be issued in another Member State;

31. Rejects the Commission's idea that the court seized of the main proceedings should be able to discharge, modify or adapt provisional measures granted by a court from another Member State since this would not be in the spirit of the principle of mutual trust established by the Regulation; considers, moreover, that it is unclear on what basis a court could review a decision made by a court in a different jurisdiction and which law would apply in these circumstances, and that this could give rise to real practical problems, for example with regard to costs;

Collective redress

32. Stresses that the Commission's forthcoming work on collective redress instruments may need to contemplate special jurisdiction rules for collective actions;

Other questions

33. Considers, on account of the special difficulties of private international law, the importance of Union conflicts-of-law legislation for business, citizens and international litigators and the need for a consistent body of case-law, that it is time to set up a special chamber within the Court of Justice to deal with references for preliminary rulings relating to private international law;

34. Instructs its President to forward this resolution to the Council and the Commission.

Latest Issue of “Praxis des Internationalen Privat- und Verfahrensrechts” (5/2010)

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

Here is the contents:

- **Peter Mankowski:** “Ausgewählte Einzelfragen zur Rom II-VO: Internationales Umwelthaftungsrecht, internationales Kartellrecht, renvoi, Parteiautonomie” - the English abstract reads as follows:

The Rome II Regulation is up for regular review in the near future. Some of its rules deserve closer consideration. This relates in particular to Art. 7 on environmental liability which does not address the paramount question to which extent permissions granted by one Member State influence liability. Insofar a detailed solution by way of recognition is proposed. Another field open for reform is party autonomy under Art. 14. Insofar a number of proposals is submitted generally attempting to bring Art. 14 better in line with other rules of Community law. A systematic restructuring of Art. 6 (3) on competition law is advocated for, too. In contrast, it does not appear to alter anything with regard to the exclusion of renvoi.

- **Beate Gsell/Felix Netzer:** “Vom grenzüberschreitenden zum potenziell grenzüberschreitenden Sachverhalt - Art. 19 EuUnterhVO als Paradigmenwechsel im Europäischen Zivilverfahrensrecht” - the English abstract reads as follows:

This article sheds light on a new development in European Civil Procedure Law caused by Article 19 Regulation (EC) No 4/2009 of 18 December 2008 on maintenance obligations. It illustrates the differences between Article 19 Regulation (EC) No 4/2009 and related Articles in the Regulations on the

*European enforcement order for uncontested claims, the European order for payment procedure and the European small claims procedure. The authors demonstrate that Article 19 (EC) No 4/2009 provides the defendant with an autonomous right to apply for a review of a national court's decision in order to compensate the abolition of the *exequatur*. Thereby European Civil Procedure Law does not confine its scope to cross-border cases, but, on the grounds of an only potential Europe-wide recognition and enforcement of judgements, intervenes in merely national procedures as well. After discussing the consequences of this principle change in European Civil Procedure Law, the authors doubt the EU's competence under Article 65 EC or Article 81 TFEU to intervene in national procedure law as regulated in Article 19 (EC) No 4/2009.*

- **Anne Röthel/Evelyn Woitge:** “Das ESÜ-Ausführungsgesetz - effiziente Kooperation im internationalen Erwachsenenschutz” - the English abstract reads as follows:

The coming into force of the Hague Convention on the International Protection of Adults on 1 January 2009 gives reason to examine the German Implementation Act. Its purpose is to include the regulations of the Convention into the internal German system for the protection of adults who are suffering from an impairment or an insufficiency in their personal facilities and therefore are not able to safeguard their own interests. In this article, the authors show the major content of the Implementation Act and discuss how the rules on jurisdiction, applicable law and international recognition and enforcement of protective measures laid down by the Convention fit into existing German law. Also, they highlight the concept of administrative co-operation between member states drawn up by the Convention and put into effect by national law.

- **Jörn Griebel:** “Einführung in den Deutschen Mustervertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen von 2009” - the English abstract reads as follows:

The article comments on the new German Model BIT (bilateral investment treaty) of 2009. After a general description of its content, some changes of the new model in comparison to its predecessors are addressed. Against the background of various models by other states, the question will be raised as to whether some necessary changes were omitted. It is also discussed to what

degree different approaches to reforming model BITs are due to political reasons and/or different approaches to treaty drafting.

- **Axel Metzger:** “Zum Erfüllungsortgerichtsstand bei Kauf- und Dienstleistungsverträgen gemäß der EuGVVO” - the English abstract reads as follows:

The Car Trim decision of the ECJ puts a spotlight on two important and yet unsettled questions regarding the jurisdiction at the place of performance in sales and service contracts under Art. 5 Nr. 1 lit. b Brussels I Regulation. The author agrees with the Court’s ruling that contracts for the supply of goods to be manufactured or produced should be characterised as sales contracts as long as the purchaser has not supplied the materials. However, the ruling should not be generalised to all types of mixed contracts with service components. The Car Trim decision is also correct in localising the place of performance in case of a sale involving carriage of goods at the place where the purchaser obtained actual power of disposal over the goods at the final destination and not at the place at which the goods are handed over to the first carrier for transmission to the purchaser. Finally, the author examines some of the general questions on autonomous interpretation of Art. 5 Nr. 1 lit. b Brussels I Regulation raised by the Court.

- **Ben Steinbrück:** “Internationale Zuständigkeit deutscher Gerichte für selbstständige Beweisverfahren in Schiedssachen” - the English abstract reads as follows:

The author comments on a decision of the Higher Regional Court Düsseldorf (7 February 2008 - I-20 W 152/07), which deals with the competence of German courts to preserve evidence for use in foreign arbitration proceedings. The court ruled that parties who agree that their dispute shall be resolved by a foreign arbitral tribunal pursuant to a foreign law derogate the German courts’ international jurisdiction to make (interim) orders in independent proceedings for the taking of evidence (“selbständiges Beweisverfahren”). This decision is not in line with German arbitration law. According to §§ 1025 Abs. 2, 1033 of the German Code of Civil Procedure German courts arbitration agreements conferring jurisdiction on a foreign arbitral tribunal do not affect the German courts’ competence to grant interim relief. It follows that these competences,

including the power to preserve evidence, can only be excluded by an explicit agreement to that effect.

- **Rolf A. Schütze** on the principle of reciprocity in relation to South Africa: “Zur Verbürgung der Gegenseitigkeit im Verhältnis zu Südafrika”
- **Peter Kindler**: “Zum Kollisionsrecht der Zahlungsverbote in der Gesellschaftsinsolvenz” - the English abstract reads as follows:

Under German law, the managing director of a company is obliged to reimburse the company any payment that has been made to a third party - e.g. a creditor or a shareholder - after the company's insolvency or over-indebtedness (see, e.g. sec. 64 of the law pertaining to private companies ltd. by shares - GmbHG).¹ The Berlin Kammergericht holds that this rule of law also applies to a managing director of a company registered abroad - in this case a British Ltd. - with its centre of main interests in Germany (sec. 3 of the EC Regulation 1346/2000 on cross border insolvency). The author welcomes this decision.

- **Fabian Wall**: “Enthält Art. 21 Abs. 1 AEUV eine „versteckte“ Kollisionsnorm?” - the English abstract reads as follows:

According to the judgment of the European Court of Justice in the case “Grunkin and Paul”, Article 21 TFEU (ex Article 18 TEC) awards the right to every citizen of the Union that each Member State has to recognise a surname which has been formerly determined and lawfully registered in a civil register of another Member State. Until now, it is uncertain how the demand of the Court of Justice can be implemented in German practice. This is demonstrated by a case decided recently by the Higher Regional Court of Munich. The legal question is whether Article 21 TFEU should be interpreted as a target which leaves the national authorities the choice of form and methods of implementation or whether Article 21 TFEU should be interpreted as a “hidden” conflict of laws rule which is directly applicable in all Member States.

- **Martin Illmer**: “La vie après Gasser, Turner et West Tankers - Die Anerkennung drittstaatlicher anti-suit injunctions in Frankreich” - the English abstract reads as follows:

The strong winds from Luxembourg blowing in the face of anti-suit injunctions have extinguished the remedy within the territorial and substantive scope of the Brussels I Regulation. Yet, anti-suit injunctions are not dead even within the European Union. Rather, the focus shifts to the remaining areas of operation. One of these areas concerns anti-suit injunctions issued by non-member state courts against parties initiating proceedings before member state courts. Since the Brussels I Regulation does not cover extra-territorial scenarios, the rationale of the ECJ's judgments in Gasser, Turner and West Tankers does not apply. Faced with such an anti-suit injunction, it is entirely up to the national law of the respective Member State whether or not to recognize it. While the Belgian and German courts had refrained to do so in the past, the French Cour de Cassation in a recent straight forward judgment has had no difficulty in recognizing and enforcing an anti-suit injunction of a US state court (Georgia).

- **Ulrich Spellenberg** on Art. 23 Brussels I Regulation: “Der Konsens in Art. 23 EuGVVO - Der kassierte Kater”
- **Carl Friedrich Nordmeier**: “Portugal: Änderungen im internationalen Zuständigkeitsrecht” - the English abstract reads as follows:

By art. 160 of law n. 52/2008 of 28 of August 2008, Portugal reformed its autonomous rules on jurisdiction, art. 65 and 65-A of the Civil Procedure Code. This contribution gives a short overview of the new rules, focussing especially on the applicability in time.

- **Christoph Benicke**: “Die Neuregelung des internationalen Adoptionsrechts in Spanien” - the English abstract reads as follows:

With the law 54/2007 of 28 December 2007 the Spanish legislator has enacted a special law on international adoption which encompasses rules on jurisdiction, applicable law and the recognition of foreign adoption decisions in Spain. The new law has the advantage that it summarizes the scattered arrangements into one piece of legislation. It also represents a step forward in that the transformation of a weak foreign adoption in a strong adoption is now possible. But the reform remains half hearted as it restricts the recognition of a weak foreign adoption to cases where none of the parties has the Spanish nationality. In addition, both the conflict of laws rule and the rules on the recognition of foreign adoption decisions are substantively implausible. Most

schemes have been taken over from the existing legal situation which had in great part been formed by decisions of the General Directorate of public registries and of the notary system (Dirección General de los Registros y del Notariado) without of systematic guideline. Significantly, there are many technical shortcomings in the legislation. Overall, the new law fails to create a modern, autonomous international adoption law. This is all the more striking since the motives express the aim to reach the standard of the Hague Adoption Convention of 1993.

- **Viviane Reding** on the European Civil Code and PIL: “Zum Europäischen Zivilgesetzbuch und IPR”
- **Rolf Wagner**: “Die zivil(verfahrens-)rechtlichen Komponenten des Aktionsplans zum Stockholmer Programm” - the English abstract reads as follows:

The “Stockholm Programme - An open and secure Europe serving and protecting the citizens” covering the period 2010-2014 defines strategic guidelines for legislative and operational planning within the area of freedom, security and justice. Recently the European Commission finalized an action plan. The action plan entails lists of measures with time limits implementing the Stockholm Programme. The article provides an overview on this action plan.

Country of Origin Versus Country of Destination and the Need for Minimum Substantive Harmonisation

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Compostela. She has taken part in several European research projects financed by the European Commission DGJustice, such as “Comparative Study on the situation in the 27 Members States as regards the law applicable to non-contractual obligations arising out of violation of Privacy and rights relation to personality”. She is co-author of the book Difamación y protección de los derechos de la personalidad: Ley aplicable en Europa, Ed. Thomson/Aranzadi-The global law collection, December 2009.

The views that are displayed below are an extract from the opinion I had occasion to rule on the so-called Mainstrat’s Study made for the Commission with my colleagues of the University of Basque Country.

The first question to be solved is whether we should continue with the process of harmonization initiated in the field of civil non-contractual obligations, taking it into the field of violations against personality rights. In case of a positive answer we have to decide which are the methods to be used; also, if harmonisation of conflict-of-laws is a workable and satisfactory solution.

Given the difficulties of reaching a formula acceptable to all involved, we should deliberate if it would be possible to develop neutral conflict rules that, being suitable for balancing the interests of the alleged author of the damage and the injured party, might thereby serve to achieve the desired consensus.

For a potential, satisfactory unified conflict-of-law rule, its workings must guarantee a sufficient level of protection for the participants in a cross-border situation, on the one hand, and that the judicial-political conditions of the market in which they operate effectively places them in a position that ensures an equal treatment for both of them, on the other hand. Only if it can be guaranteed that neither party to the process can avoid these minimum protection standards in its actions can a unification of conflict-of-law rules be produced. For this it is necessary to ensure a balance and equality between the parties, their full knowledge of the rules of working of the market, and a high level of predictability of costs and benefits of the action or case that they are going to bring. Only under such conditions unification of conflict-of-law rules may be considered a valid tool for harmonisation.

The envisaged outcome could be based on the principle of country of origin (we follow Prof. M. Virgos Soriano and Prof. Garcimartin Alferez when they explain

the meaning of “country of origin” in the European framework). The principle of country of origin starts from the assumption that market operators sell their products or render their services in accordance with their own terms. When it comes to opting for the law, they choose the most favourable one: usually, the law of their domicile or their establishment. In this way the risk and amount of costs inherent to cross-border actions fall on the other party -the buyer- who, knowing that in the event of dispute he will be subject to a foreign law, accepts it as part of the deal and is in a position to decide whether to proceed or not with the transaction. Translated into the field of infringements of personality rights or defamation by the media, this means that both parties -the injured one and the author of the injury-, should be on equal terms.

The principle of the country of origin poses difficulties when the situation of the participants is not the one that we have assumed, that is, if one of the parties is in a weaker position in relation to the other; also, when from the circumstances of the case it emerges that one of the parties does not have the same guarantees as the other - as it happens with non-contractual obligations. In this case, the party in the favourable position can succeed in choosing the applicable law considering only his/her own interests, taking advantage of the weakness or inequality of the other party: therefore, private international law designed to follow the country of origin principle fails. In the case of non-contractual obligations, if the injury’s author can choose the law applicable to potential non-contractual damage caused by his/her actions, he/she will choose the one that is most favourable, even before the damage has occurred. That means that the injured party will have to face conditions set down even before he/she became a party. In such situations, the law of the country of origin must be abandoned and the law of the country of destination should be preferred.

The logic of the law of the country of destination presupposes a difference between the parties and re-establishes a balance by choosing the law that favours the weaker party. It thereby ensures that the other party must comply at least with the minimum requirements of the law most closely linked to the injured party. The unequal position in which the parties find themselves requires that the cost of the international nature of the case fall on the party that is in the most favourable position.

This is the option chosen by the Rome II Regulation: article 4 establishes the law of the place in which the direct injury occurs or might occur. In the context of

infringements against personality rights or defamation caused by the media, the first draft of the Regulation also favoured this option by including them in article 6. Article 6 of the First Draft of the Regulation refers us back to the general rule of article 3 (current art. 4 RII). Following the logic of the law of the country of destination of article 4 R II, the law applicable will be that of the place in which the damage occurs: in cases of infringements of personality rights or defamation, the place where the injured person suffers the injury to their privacy or private life; or where the effects of this infringement are most severe. This will usually be the victim's place of residence. This does not exclude the possibility that this option will be complemented by an exception clause applicable to cases in which another law has closer links.

Amongst the advantages of the locus damni it may be highlighted that it usually coincides with the victim's residence, therefore constituting a close link for the victim which is also predictable for the person alleged to be responsible (usually the victim of defamation committed by the press will be known by the author of the damage, who can therefore easily determine where his/her residence is, and which law will be applicable in the event of dispute).

Not surprisingly, criticisms from the press associations to this conflict of law rule have been overwhelming. On the one hand, they cite the difficulty in knowing the victim's residence. Also, that it might happen that although the product complies with the laws in force in the country of the publisher's establishment, and no copy of it has been distributed in the country of residence of the victim, it may end up with the law of the victim's place of residence being applied. Nevertheless, this argument should not detain us because if no injury occurs in the victim's place of residence it does not matter which system of laws should apply.

If we follow the logic of the country of origin, as suggested by the press and the media, the costs of the international aspects of the case will be suffered by the victim of the action carried out by third parties: an action in which he/she has no negotiating capacity as he/she knows nothing about, and cannot foresee it since the person initiating the action is fully in command; the inequity of the arrangement is unquestionable. The victim cannot predict the result because he/she does not know where or whom the injury will come from. What's more: faced with this advantageous situation, the author can choose the country of origin that best suits him/her, and in which the regulations applicable to his/her activity will be the most favourable, without the victim having any saying or

decision-making power.

Given the difficulty of breaking the stalemate on this aspect, another possibility is to try and put an end to the problems inherent in the existing substantive diversity by means of harmonisation through the establishment of a few common minimum principles. And we can say that the way has begun with the Judgement of the Court of 16 December 2008, case C-73/07.

European legislation could prevent inequalities or defects in the market by establishing minima where such deficiencies are present. If all legal systems provide a satisfactory level of protection to the victim of violations against personality rights, it would not be so attractive to the perpetrator to opportunistically seek the most favourable legal system, because all of them would have adhered to the substantive minima laid down at the community level.

As a matter of fact, unification of conflict rules should not be presented as an alternative option to substantive harmonisation of the legal systems of member states, but as an additional option. The most satisfactory solution for assuring a minimum level of concordance among legal systems to prevent problems connected with the diversity of legislation is to seek the appropriate combination between mechanisms for harmonisation of conflict-of-law rules and a certain amount of minimum substantive harmonisation. Frequently, the success of measures intended to harmonise conflict-of-law rules at the European level will depend on bringing substantive legislation and the general principles of national legal systems closer together. Thus it may be advisable in non-contractual matters to coordinate the unification of the conflict-of-law rules route with initiatives on partial harmonisation. Indeed, only harmonisation of the principles or substance of national law could justify use of the criterion of country of origin instead of the country of destination, the natural conflict-of-law rule in non-contractual matters.

Hartley on The Problem of “Libel

Tourism”

Trevor Hartley is Emeritus Professor at the London School of Economics.

The problem

As Diana Wallis points out, libel tourism is now recognized as a serious problem. Finding a solution, however, is not so easy. There are a number of possibilities.

Harmonization of substantive law?

Although some people have suggested a limited measure of harmonization as regards substantive law, this would not be desirable. The law of defamation and privacy reflects the balance a particular society regards a right between two important rights: freedom of speech and protection of reputation. This is a delicate cultural matter, and the relative importance of these values differs greatly between different cultures. Even in Western Europe, there are important differences. In France, for example, the right of privacy is strongly protected; in England, it is hardly protected at all: the English feel that if something is true, you should (usually) be allowed to say it. It would be wrong for the EU to establish Union-wide norms in this area.

A uniform choice-of-law rule?

It is sometimes said that a uniform EU choice-of-law rule in this area would lead to greater predictability and certainty. This is a misconception. At present, the choice-of-law rule applicable in a case will be that of the country in which the litigation arises. In most Member States, these rules are fairly clear and easy to apply. There is no reason to believe that an EU rule would be any clearer or lead to more a predictable outcome. Indeed, the contrary is likely to be the case, since EU legislation is the product of negotiations between the Member States and it has to be based on consensus. In the case of a contentious matter – and defamation is nothing if not contentious – this is bound to lead to a complicated text. If proof of this is needed, one only has to look at the convoluted and opaque text in the Rome II Regulation on products liability. No one can say that the adoption of this measure has lead to greater certainty and predictability.

It might, however, be argued that, even if the EU measure was obscure and difficult to apply, it would at least be uniform, so that the same choice-of-law rule would apply wherever the action was brought. It might be thought that this would lead to greater predictability. Even this is wrong. The fact that the same substantive law is applied does not mean that it will be interpreted in the same way. Defamation is very much a question of value judgment, value judgment based on cultural norms. What is defamatory to a Greek might not be defamatory to a Swede. Moreover, what would constitute a justification in one country might not do so in another.

In addition to these differences of values and attitudes, there are simple questions of procedure. Whether a claimant can bring his action at all will depend on whether or not he can obtain the services of a lawyer. This may depend on whether legal aid is available or whether libel proceedings can be brought on the basis of a conditional or contingent fee agreement. The defendant may have a similar problem. The enormous fees charged by English libel lawyers can deter defendants from even fighting the case: they may simply give up and admit they were wrong, even if they know they were right.

For these reasons, a uniform choice-of-law rule is unlikely to lead to greater certainty and predictability. Moreover, its adoption would mean that references would have to be made to the ECJ. This could easily add two years to the length of time needed to obtain a final judgment.

Even if it were thought desirable to have a uniform choice-of-law rule, it is hard to see what rule would be satisfactory. At present, most Member States apply the law of the place of publication or the place where harm occurs (sometimes combined with the law of the forum). This, however, gives rise to serious problems. It is difficult to define where the harm occurs (especially in the case of the Internet), and it might not be obvious where the damage is felt.

Another possibility is the law of the claimant's domicile or habitual residence. However, this would not be acceptable without major qualification. We must remember that the Rome II Regulation applies not just where the choice of law is between the legal systems of the EU States: it also applies where the potentially applicable law is that of a non-Member State. If we adopted a rule that the law of the claimant's habitual residence applied, a dictator in a non-Member State could change the law of his country to say that any criticism of him (even if true) was

defamatory and would lead to a huge damage award. Would we want to apply such a law? If we try to solve the problem by adopting a proviso that the free-speech law of the forum will always override foreign defamation law, the practical result will be that the *lex fori* will apply in defamation cases, because all cases will be defended on freedom-of-speech grounds. This is what happens in the United States where state defamation law has been eclipsed by federal free-speech law (the First Amendment). It should be noted that a uniform rule that the law of the forum applies will lead to no greater predictability than the application of the choice-of-law rule of the forum. In both cases, you cannot know the applicable law until you know what the forum will be.

The media of course want a uniform rule that applies the law of the defendant's place of establishment. This would be nice for them, but not so good for the citizen. British newspapers could ride roughshod over French privacy law and publish the results in France, while American media could defame public figures in Europe with impunity - telling lies about them as long as it could not be proved that they were motivated by malice.

For these reasons, no attempt should be made to adopt a uniform choice-of-law rule.

Jurisdiction

The last possibility is to do something on the jurisdictional front. Jurisdiction in libel is already covered by the Brussels I Regulation. Under this, the courts of the defendant's domicile have jurisdiction. No objection can be taken to this. If the defendant is domiciled in another Member State, Article 5(3) gives jurisdiction to the courts of the place where the harmful event occurred. In *Shevill v Presse Alliance SA*, the ECJ held that this allows the claimant to sue in the courts for the place where the material is distributed (though the claim must be limited to damage flowing from the copies of the publication distributed in the territory of the forum). It is this provision that can lead to libel tourism, since the claimant might choose a forum with which he has no connection simply because he is most likely to win there.

The material must of course be published in the territory of the forum. With the advent of the Internet, however, this requirement is almost meaningless. Since most media outlets (newspapers, magazines, and TV stations) have their own

websites, almost all defamatory material that is published in the media is also available on the Internet. So if material is regarded as published in a country if it is accessible on the Internet there, almost everything can be regarded as published everywhere.

It is suggested that it is in this area that a new legal initiative is needed at EU level. However, this must wait until the review of the Brussels I Regulation takes place.

Van Den Eeckhout on Transnational Corporate Social Responsibility

Veerle Van Den Eeckhout, who is professor of private international law at Leiden university (the Netherlands) and the University of Antwerp (Belgium), has posted International Environment Pollution and some other PIL-Issues of Transnational Corporate Social Responsibility on RefGov and on SSRN. The Article is in Dutch. The English abstract reads:

A case-study of the instrumentalisation of Private International Law in the year 2010: developments at the beginning of a new decade

On the 30th of December 2009, the court of The Hague accepted international competence in the case "Shell/Shell Nigeria". As the jurisdiction issues have been solved, legal proceedings can actually start.

During these legal proceedings it is possible that issues about applicable law will come forward. In this article, the author focuses on Private International Law Issues as related to cases like Shell, without focusing however on the PIL-issues of the specific Shell case itself.

The article focuses on the Rome II Regulation - the new European PIL-source

including rules of applicable law on torts. The crucial question is the following: in how far does the Rome II regulation allow to declare applicable - if desired by the victims - Dutch tort law in cases of “Transnational Corporate Social Responsibility” as they might be brought in future against parent companies holding their seat in the Netherlands, either before the Dutch judge or before another European judge, especially if the claim of the victims concerns Parent Corporation liability for damages occurred in developing countries.

In her attempt to answer this question, the author gives some comments on the impact of national PIL-rules of EU-Member States - e.g. national rules about “surrogate law” - and the interaction of these rules with European interference in PIL, as well as on the impact of the way issues of “qualification” are solved by the EU-Member States - e.g. the complication of the delimitation between “tort law issues” and “corporate law issues” - and the interaction thereof with European interference.

In this analysis, issues about respect for Fundamental Rights as related to Transnational Corporate Social Responsibility come forward. Particularly, the case of Transnational Corporate Social Responsibility shows how national practices of EU-Member States could lead to more - or less - respect for Fundamental Rights and, more in general, more - or less - protection of “victims”, interrelating with European interference in PIL.

It can be freely downloaded here (extensive version) and here.

Symeonides on American Federalism and Conflicts

Dean Symeon Symeonides has posted American Federalism and Private International Law on SSRN. The abstract reads:

This Article is written for readers outside the United States, especially those in

the European Union, who are interested in knowing how American federalism has affected the development of American conflicts law.

Among the topics discussed in the Article are: the constitutional allocation of law-making powers between the federal and state governments; the Supreme Court's interpretation of the constitutional clauses that have a bearing on state choice-of-law decisions; the relative insignificance of interstate as opposed to international boundaries; the development of state choice of law for interstate conflicts; and the law applicable to international conflicts between federal or state law, on the one hand, and foreign law, on the other.

The Article discusses how American conflicts law has moved: (1) from the rigidity of the First Conflicts Restatement to the total flexibility of the choice-of-law revolution; and (2) from the Supreme Court's close scrutiny of state choice-of-law decisions during the early part of the twentieth century to the laissez faire stance of the Court's recent jurisprudence. The first movement predates a parallel but much smaller move toward flexibility in Europe, while the latter movement is contrary to the recent rapid centralization of private international law exemplified in the European Union's Rome I and Rome II regulations.

The Article suggests that the preferred option is a middle course between the excessive flexibility of the American choice-of-law revolution and the European preoccupation with certainty, and between the American de facto regime of total decentralization and the European Union's rush toward centralization of private international law.

The article is forthcoming in the *Hellenic Journal of International Law* (2010). It can be freely downloaded [here](#).

First Issue of 2010's ERA Forum

The first issue of *ERA Forum* for 2010 was released recently. It includes several articles dealing with various aspects of European private law, either in English,

German or French.

Some discuss more specifically topics of private international law. Here is the relevant part of the editorial of the journal by Leyre Maiso Fontecha:

1 European civil procedure

The Brussels I Regulation lays down rules governing the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters in the Member States of the European Union. It supersedes the Brussels Convention of 1968, which was applicable between the Member States before the Regulation entered into force in 2002. The Brussels I Regulation is currently under review by the European Commission. Among the issues raised are those concerning the treatment of choice of court agreements. By an exclusive choice of court agreement, the parties designate which court will decide disputes in connection with a particular legal relationship, to the exclusion of the jurisdiction of any other courts. Two of the articles illustrate current issues dealing with choice of court agreements.

The first one concerns the admissibility of damages in case of breach of a choice of court agreement. Gilles Cuniberti and Marta Requejo explain how, in the last decade, English and Spanish Courts have awarded damages in case of a breach of this clause. Until recently, the most efficient remedy was to seek an antisuit injunction in England, an order restraining a party from commencing or continuing proceedings in a foreign jurisdiction. This was however considered incompatible with European Union law in several cases decided by the European Court of Justice. The European Commission has nevertheless suggested in the Green Paper on the review of the Brussels I Regulation that the efficiency of jurisdiction agreements could be strengthened by granting damages for breach of such agreements.

The second article by Marta Pertegás presents the Hague Convention of 30 June 2005 on Choice of Court Agreement. This instrument, not yet in force, establishes uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters. The Convention would prevail over the Brussels I Regulation in cases where one party resides in an EU Member State and the other in a non-EU Member State that is a party to the Convention. The author argues that, in order to ensure that co-ordination is

achieved between the Convention and the future revised European regulation, the Convention should serve as a source of inspiration as to possible amendments to the Brussels I Regulation with regard to choice of court clauses.

2 Private international law

The Rome Convention of 1980 on the law applicable to contractual obligations entered into force on 1 April 1991 to complement the Brussels Convention of 1968 by harmonising the rules of conflict of laws applicable to contracts. Like the Brussels Convention, the Rome Convention has been recently converted into a Community instrument. The Rome I Regulation,⁴ applicable since 17 December 2009, also modernises some of its rules. The *article of Monika Pauknerová* looks into the changes brought by the Rome I Regulation regarding mandatory rules and public policy. Mandatory rules are those which cannot be derogated by contract and which are declared binding by a legal system. In international cases, these can be “overriding” mandatory rules, which cannot be contracted out by the parties by choosing the law of another country. These must be differentiated from the public policy exception, which occurs when the application of a rule of the law of any country specified by the conflict rules may be refused if such application is manifestly incompatible with the fundamental principles of national public policy of the forum State. The author assesses positively the regulation of mandatory rules in the Rome I Regulation, which clearly distinguishes between mandatory rules and overriding mandatory rules, but notes that many issues still remain unsolved, such as the scope and conditions of application of the overriding mandatory provisions.

The conflict of law rules for non-contractual obligations have also been harmonised at EU level to complement both the Brussels I Regulation (which relates to both contractual and non-contractual obligations) and the Rome I Convention (nowadays a Regulation). The Rome II Regulation⁵ creates a harmonised set of rules within the European Union to govern choice of law in civil and commercial matters concerning non-contractual obligations. One of the fields of tort law it regulates is product liability. The *article of Guillermo Palao Moreno*, which is of high practical importance, analyses the conflict of law rule for product liability cases contained in Article 5 of the Rome II Regulation. In his thorough analysis of Article 5 of the Rome II Regulation, read in conjunction with the other provisions of the Regulation, the author points out that its application could however lead to an undesirable result. Although the

inclusion of a specific provision for product liability primarily aims at avoiding the application of the general conflict of law rule of the law of the country in which the damage occurs, Article 5 maintains those solutions present in paragraphs 2 and 3 of Article 4. Furthermore, the author calls for clarification as to the coordination of the Rome II Regulation with the Hague Convention of 2 October 1973 on the Law Applicable to Products Liability.

The last three articles are written in English. The first is written in French.