Dirty Dancing and Stays of Proceedings

A recent judgment of the NSW Supreme Court is as noteworthy for its name and subject-matter as it is for the legal principles involved; namely stay of proceedings on the basis of a foreign exclusive jurisdiction clause.

Dance With Mr D Limited v Dirty Dancing Investments Pty Ltd [2009] NSWSC 332 concerned a dispute between producers of, and investors in, the musical "Dirty Dancing" (based on the film of the same name). The dispute turned on the interpretation of two contracts, one of which contained English choice of law and exclusive jurisdiction clauses; the other containing an Australian arbitration clause, the interpretation of which was also in dispute.

In granting a stay, the judge observed that:

> *"Where parties to a contract have agreed by an exclusive foreign jurisdiction clause to submit to the exclusive jurisdiction of a foreign court, such a clause does not operate to exclude the forum court's jurisdiction. However, the courts of this country will hold the parties to their bargain, and grant a stay of proceedings, unless the party seeking that the proceedings be heard can show that there are strong reasons against doing so. In considering such an application the court should take into consideration all the circumstances of the particular case, but the application is not to be assimilated to cases where a stay is sought on the principle of forum non conveniens, nor is it a matter of mere convenience. See Huddart Parker Ltd v The Ship "Mill Hill" (1950) 81 CLR 502 at 508 – 509; Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197; FAI General Insurance v Ocean Marine Mutual Protection and Indemnity Association; Akai Pty Ltd v People's Insurance Co; Incitec Ltd v Alkimos Shipping Corporation and Anor; Owners of cargo on vessel Eleftheria v Owners of Ship Eleftheria [1969] 2 All ER 641 at 645."*

The Dirty Dancing decision is especially noteworthy in light of the reluctance of Australian courts to stay proceedings on forum non conveniens grounds. It also seems to stand in contrast to the apparently more tepid attitude towards the grant of stays exhibited the High Court in Akai Pty Ltd v People's Insurance Co.

The Australian newspaper has more details of the commercial and personal background of the dispute here.

Australian Lawyers and Overseas Clients

An interesting and unusual case before the State Administrative Tribunal of Western Australia contains a significant discussion of the professional obligations of Australian lawyers—especially regarding confidentiality and privilege—while representing overseas clients. In so doing, the Tribunal considered, among other things, (1) the extra-territorial legislative and regulatory competence of the State of Western Australia, (2) the proper law of contracts of retainer and, it would seem, extra-contractual obligations of confidence, and (3) burdens of proof regarding foreign law.

The case concerned a Western Australian QC who was engaged by the Commonwealth government of Australia to advise Schapelle Corby, an Australian citizen, after her arrest for drug offenses on the Indonesian island of Bali. The Tribunal found that the QC had committed unprofessional conduct by revealing, in statements to the Australian media, confidential information that had been imparted to him in Indonesia.

Legal Practitioners Complaints Committee and Trowell [2009] WASAT 42 (13 March 2009)

Heightened Pleading Standards in US Private International Law Cases

On Monday, the United States Supreme Court decided the case of *Ashcroft v. Iqbal*, which concerned whether current and former federal officials, including FBI Director Robert Mueller and former Attorney General John Ashcroft, are entitled to qualified immunity against allegations they knew of or condoned racial and religious discrimination against individuals detained in the wake of the September 11 attacks. The case presented the following legal issue: "Whether a conclusory allegation that a cabinet level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*." Pet. for Cert. I. The Court concluded in an opinion authored by Justice Kennedy, that, among other things, Iqbal failed to comply with the pleading standards of the Federal Rules of Civil Procedure because the complaint failed to plead sufficient facts to state a claim for purposeful and unlawful discrimination. Slip op. at 23.

Outside of its specific *Bivens* context, this case is important generally for private international law cases in the United States. The five-member majority in *Iqbal* (Justice Kennedy joined by Chief Justice Roberts and Justices Scalia, Thomas, & Alito) has made clear that the heightened standards of pleading announced in 2007 in *Bell Atlantic v. Twombly* should be applied in cases beyond the antitrust context. In *Twombly*, the Court held that to comply with Federal Rule of Civil Procedure 8(a)(2) (requiring that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief") that a complaint must contain "enough facts to state a claim to relief that is plausible on its face." There had been some confusion in the lower federal courts as to whether that heightened pleading standard of plausibility applied in cases outside of the antitrust context. The Court in *Iqbal* has now answered that question in the affirmative, generally requiring all civil plaintiffs to meet the following standard: "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Slip op. at 14. As such, enough facts must be plead to allow "the court to draw

the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. A complaint must therefore show more than "a sheer possibility that the defendant has acted unlawfully." *Id*.

The impact on private international law cases in the US federal courts will be profound. Indeed, plaintiffs in such cases will now have to allege not simply a short and plain statement of alleged illegal activities, but enough specific facts so that a court may determine that the complaint is beyond the realm of mere possibility. General recitations of alleged illegal conduct and hopes for discovery to make out claims looking towards summary judgment will now no longer be enough to allow cases to go forward in US federal district court. As such, the preliminary motion to dismiss has now been converted in most cases to a motion for summary judgment. At bottom, plaintiffs will now find it harder to stay in federal district court, and defendants will now be armed with another defensive weapon, in many cases dispositive, in resisting private international litigation.

It should be asked whether this shift from the simple notice pleading countenanced by the Federal Rules to a form of heightened pleading is a good thing. The Court appears to be taken with the belief that US courts are being deluged with frivilous claims. As such, plaintiffs should be required to plead more than the possible to stay in federal court. But, the Federal Rules themselves seem to contemplate that most cases will proceed on to summary judgement and/or trial. The Court's rule will be especially problematic in private international law cases. Such cases often require extensive discovery to make out claims, as the acts and/or occurrences allegedly giving rise to unlawful activity occur outside the borders of the United States and present unique problems of factual development given their transnational dimension. Under *Iqbal*, private international plaintiffs will not be able to depend on access to such discovery simply by filing a complaint.

In sum, surviving a motion to dismiss in private international law cases in US federal courts is now much harder and plaintiffs would be well served to conduct extensive and, to be sure, expensive fact development in advance of filing their complaint.

Tokyo symposium papers on IP available for download

The formerly announced international symposium in Tokyo on the topic of “Intellectual Property and International Civil Litigation” was held some ten days ago and several contributions from the speakers are accessible for download from the official website.

The available papers include:

1. Joinder of Jurisdiction, Provisional Measures, and International Parallel Litigation by *Professor Dai Yokomizo*
2. Legislative Proposal on Jurisdiction by *Professor Shigeki Chaen*
3. International Jurisdiction in Intellectual Property Rights Infringement Cases by *Associate Professor Tatsuhiro Ueno*
4. Applicable Law in Intellectual Property Infringement by *Associate Professor Ryu Kojima*
5. The Governing Law of Contracts for the Transfer or Licensing of Intellectual Property Rights by *Associate Professor Mari Nagata*
6. The Governing Law of Aspects of Intellectual Property Rights including Validity by *Professor Ryo Shimanami*
7. Recognition and Enforcement of Foreign Judgments Relating to Intellectual Property by *Professors Toshiyuki Kono and Nozomi Tada and Dr. Miho Shin*
   In addition, there are contributions presenting the provisional text of CLIP Principles in the part dealing with international jurisdiction and recognition/enforcement of foreign decisions in IP cases by two CLIP members, *Dr. Christian Heinze* and *Professor Pedro A. De Miguel Asensio*, respectively.

French Conference on Intellectual Property and PIL

Professors Cyril Nourissat and Edouard Treppoz will organize a conference at the Faculty of Law of Lyon 3 University on Private International and Intellectual Property (*Droit international privé et propriété intellectuelle*) on June 4.

The morning will be dedicated to choice of law, while the afternoon will address jurisdictional issues. Speakers will be a mix of academics and practitioners.

The programme of the conference can be found here, and after the jump.

PROGRAMME

9h10–9h30 Rapport introductif : De nouveaux outils communautaires pour le droit international privé de la propriété intellectuelle – C. NOURISSAT, Professeur agrégé des Facultés de droit, Université Jean Moulin-Lyon 3

LA LOI APPLICABLE : QUELLES STRATEGIES METTRE EN PLACE AUJOURD'HUI ?
(9h30 – 10h45)

Président de séance :
THIERRY SUEUR
Président du Groupe français de l'AIPPI
Directeur de la PI du Groupe Air Liquide

• Le principe de territorialité et la propriété intellectuelle
J.-S. BERGE, Professeur agrégé des Facultés de droit, Université Nanterre La Défense – Paris X
• Quelle loi en matière de contrats de propriété intellectuelle ?
B. UGHETTO, Avocat à la Cour, Cabinet Ratheaux, Chargé d'enseignements à l'Université Jean Moulin-Lyon 3
• Quelle loi en matière de contrefaçon ?
N. BOUCHE, Maitre de conférences, Université Jean Moulin-Lyon 3

10h45 – 11h00 Pause

Table ronde : la pratique confrontée au choix de la loi applicable
(11h00 – 12h45)
Modérateur :
YVES REINHARD
Professeur agrégé des Facultés de droit, Université Jean Moulin- Lyon 3
Directeur du Centre Paul Roubier
1. Choix de la loi applicable et contrats de PI transnationaux en pratique
A. MARIE, Conseil en Propriété Industrielle, Cabinet Beau de Loménie
2. Pourquoi choisir la loi française ?
C. CARON, Avocat à la Cour, Cabinet Christophe Caron, Professeur agrégé des Facultés de droit, Université Val de Marne – Paris XII

3. Pourquoi choisir la loi anglaise ?
L. BRAZELL, Solicitor – Advocate, Cabinet Bird & Bird
4. Droits d'auteur et utilisation contractuelle sur l'Internet
A. ZANGS, Directrice Business Affairs, Société Deezer

LES NOUVELLES STRATEGIES CONTENTIEUSES
(14h00 – 15h00)

Président de séance :
THIERRY MOLLET-VIEVILLE
Président de l'AIPPI
Avocat à la Cour de Paris

• Quel juge en matière de contrefaçon ?
M.-E. ANCEL, Professeur agrégé des Facultés de droit, Université Val de Marne–Paris XII
• L'exclusivité du juge du titre
J. RAYNARD, Professeur agrégé des Facultés de droit, Université de Montpellier I
• Les conflits de procédures
T. AZZI, Professeur agrégé des Facultés de droit, Université René Descartes – Paris V

Table Ronde : la pratique confrontée aux enjeux contentieux
(15h00 – 16h45)

Modérateur :
JACQUES DE WERRA
Professeur à la Faculté de droit de l'Université de Genève

1. La gestion du contentieux international notamment en matière de brevet
P. VERON, Président d'honneur de l'European Patent Lawyers Association (EPLAW) et de l'Association des avocats en propriété industrielle (AAPI)

2. La gestion du contentieux international notamment en matière de brevet, le point de vue de l'avocat allemand
DR. MARTIN KÖHLER, Rechtsanwalt
3. L'exécution des jugements français à l'étranger et des jugements étrangers en France
J.-P. STOULS, Avocat à la Cour, Cabinet Alister Avocats.
4. Le point de vue de l'entreprise : efficacité du système juridictionnel français
J. RIZENTHALER, Directeur de la Propriété Intellectuelle, Société Schneider Electric

16h45 – 17h00 Pause

17H00 – 17h20 Un autre regard : le point de vue de l'American Law Institute sur le droit international privé de la propriété intellectuelle
E. TREPPOZ, Professeur agrégé des Facultés de droit, Université Lumière – Lyon 2

17h20 Propos conclusifs, TH. MOLLET-VIEVILLE

Conference: International Association of Procedural Law Toronto Conference

From June 3-5, 2009, the International Association of Procedural Law is holding

its annual conference in Toronto, Canada. Entitled "The Future of Categories–Categories of the Future," the conference will showcase "leading proceduralists from around the world" who will present "their perspectives on the ways in which procedural reform is precipitating a collapse of the traditional categories of civil and common law in response to a new range of concerns and aspirations for procedure."

More information on the conference, speakers, and program is available at http://www.iapl2009.org/index.html

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New Zealand issues first e-Apostille

The report of the Hague Conference is here.

Forum Non Conveniens in US Courts

On May 1, 2009, the United States Court of Appeals for the Seventh Circuit issued a noteworthy opinion in the consolidated cases of *Abad v. Bayer Corp.* and *Pastor v. Bridgestone/Firestone*. These consolidated appeals raise interesting issues regarding the application of the forum non conveniens doctrine in US courts.

In the *Abad* case, Argentinian plaintiffs filed products liability actions against American manufacturers for injuries sustained in Argentina. Plaintiffs alleged that they (a group of hemophiliacs or their decedents) were infected with the AIDS virus because the defendant manufacturers of the clotting factor that

hemophiliacs take to minimize bleeding failed to eliminate the virus from the donors' blood from which the clotting factor was made. The *Pastor* case was a wrongful-death suit growing out of a fatal auto accident in Argentina with a car equipped with tires manufactured by Bridgestone/Firestone. In both cases, defendants moved the district court for dismissal under forum non conveniens and the district court dismissed the case in favor of the courts in Argentina. On appeal, the Seventh Circuit, with Judge Richard Posner writing, applied the abuse of discretion standard and thus affirmed.

This opinion is interesting for at least three reasons. First, appellants pressed the argument on appeal that federal district courts have the "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Conservation District v. United States*, 424 U.S. 800, 817 (1976). *See* slip op. at 2-3. The court rejected that argument in favor of an abuse of discretion standard of review, which affords district courts substantial leeway in deciding to send international civil cases to a foreign forum.

Second, the court reaffirmed the discretion of district courts in applying the *Gulf Oil* factors, but with an interesting twist: Judge Posner recognized that *Gulf Oil* represented an accommodation of state interests in an international world. In his words, "[a]nd so the plaintiffs . . . argue that the United States has a greater interest in the litigation than Argentina because the defendants are American companies, while the defendants argue that Argentina has a greater interest than the United States because the plaintiffs are Argentines. *The reality is that neither country appears to have any interest in having the litigation tried in its courts rather than in the courts of the other country; certainly no one in the government of either country has expressed to us a desire to have these lawsuits litigated in its courts*." Slip op. at 10 (emphasis added). Has the Seventh Circuit opened the door for such submissions? Should litigants, therefore, now seek to have governments file statements of interest in forum non conveniens cases? If so, one is left to wonder how such a submission will matter and whether US courts will defer to them.

Finally, this case and others reported recently on this site confirm that forum non conveniens is being used frequently in international litigation in US courts. With the Supreme Court's recent decision in *Sinochem* (holding that district courts may determine forum non conveniens questions before ascertaining jurisdiction), are we seeing an increased usage of forum non conveniens in international civil

cases? If so, is this a good thing?

At bottom, the doctrine of forum non conveniens in the United States continues to evolve.

Conference: “Il diritto al nome e all’identità personale nell’Unione europea”

An interesting conference on issues relating to name and personal identity in private international law and EU law will be hosted by the Faculty of Law of the **University of Milan – Bicocca on 22 May 2009** (h. 9:15-13:45): **“Il diritto al nome e all’identità personale nell’Unione europea”** (*Right to Name and Personal Identity in the EU*).

Here’s the programme (*the session will be held in Italian, except otherwise specified*):

Chair: *Roberto Baratta* (University of Macerata, Permament Representation of Italy to the European Union);

- “Il diritto al nome come espressione del principio di eguaglianza tra coniugi nella giurisprudenza italiana”: *Maria Dossetti* (University of Milan – Bicocca), *Anna Galizia Danovi* (Centro per la Riforma del Diritto di Famiglia);
- “Le droit au nom dans la jurisprudence de la Cour de Justice” (*in French*): *Jean-Yves Carlier* (Université Catholique de Louvain);
- “Le droit au nom, entre liberté de circulation et droits fondamentaux” (*in French*): *Laura Tomasi* (Registry of the European Court of Human Rights);
- “La legge applicabile al nome: conseguenze dei principi comunitari ed europei sul diritto internazionale privato”: *Giulia Rossolillo* (University of Pavia);

- "Il riconoscimento del diritto al nome nella prassi italiana": *Sara Tonolo* (University of Insubria);
- Shorter reports and debate: *Valeria Carfì* (University of Siena), *Alessandra Lang* (University of Milan), *Diletta Tega* (University of Milan Bicocca)

Concluding remarks: *Roberto Baratta.*

(Many thanks to Giulia Rossolillo for the tip-off)

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2009)

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

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

- ***Peter Kindler***: "Internationales Gesellschaftsrecht 2009: MoMiG, Trabrennbahn, Cartesio und die Folgen" – the English abstract reads as follows:

> *The article summarizes, in a European as well as in a German perspective, the recent developments for corporations in private international law in 2008. In German legislation, the law aiming at the modernization of the private company limited by shares ("MoMiG") has abandoned the requirement for German companies of having a real seat in Germany, introducing at the same time stricter disclosure requirements in respect of branches of foreign companies in Germany. The German Federal Court, in a ruling of October 2008 ("Trabrennbahn"), has applied the real seat doctrine to companies incorporated outside the EU – in this case in Switzerland –, thus confirming the traditional*

approach of German courts since the 19th century. Finally, in a European perspective, the article addresses the judgment of the EJC in case C-210/06 ("Cartesio") referring to the extent of freedom of establishment in case of transfer of a company seat to a EU Member State other than the EU Member State of incorporation. The article concludes with the statement, inter alia, that EU Member States are free to use the real seat as a connecting factor in private international company law.

- ***Marc-Philippe Weller:*** "Die Rechtsquellendogmatik des Gesellschaftskollisionsrechts" – the English abstract reads as follows:

This article deals with the International Company Law in the aftermath of the judgments "Cartesio" from the ECJ and "Trabrennbahn" from the German Federal Court of Justice. There are three different sources of International Company Law. The sources have to be applied in the specific order of precedence stated by Art. 3 EGBGB:

(1.) The European International Company Law is based on the freedom of establishment according to Art. 43, 48 EC. The freedom of establishment contains a hidden conflict of law rule known as "Incorporation Theory" for companies that relocate their real seat in another EC-member state.

(2.) As part of Public International Company Law the "Incorporation Theory" is derived from various international treaties such as the German-US-American-Friendship-Agreement.

(3.) The German Autonomous International Company Law follows the "Real Seat Theory" when it is applied in cases with third state companies (e.g. Swiss companies). Therefore, substantive German Company Law is applicable to third state companies with an inland real seat. According to the so called "Wechselbalgtheorie" (Goette), foreign corporations are converted into domestic partnerships.

The German jurisdiction is bound to the German Autonomous International Company Law (i.e. the real seat theory) to the extent of which the European and the Public International Company Law is not applicable.

- ***Alexander Schall:*** "Die neue englische floating charge im Internationalen Privat- und Verfahrensrechts" – the English abstract reads as follows:

After Inspire Art, thousands of English letter box companies have come to Germany. But may they also bring in their domestic security, the qualified floating charge? The answer depends on the classification of the floating charge under the German conflict laws. Since German law does not acknowledge global securities on undertakings, the traditional approach was to split up the floating charge and to subject its various effects (e.g. security over assets, the right to appoint a receiver/administrator) to the respective conflict rules. That meant in particular that property in Germany could not be covered by a floating charge (lex rei sitae). This treatment seems overly complicated and not up to the needs of an efficient internal market. The better approach is to understand the floating charge as a company law tool, a kind of universal assignment. This allows valid floating charges on the assets of UK companies based in Germany. And while the new right to appoint an administrator under the Enterprise Act 2002 is part of English insolvency law, the article shows that this does not preclude the traditional right to appoint a (contractual or – rather – administrative) receiver for an English company with a CoMI in Germany.

- ***Stefan Perner:*** "Das internationale Versicherungsvertragsrecht nach Rom I" – the English abstract reads as follows:

Unlike its predecessor – the Rome Convention –, the recently adopted Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) covers the entire insurance contract law. The following article outlines the new legal framework.

- ***Jens Rogler:*** "Die Entscheidung des BVerfG vom 24.1.2007 zur Zustellung einer US-amerikanischen Klage auf Strafschadensersatz: – Ist das Ende des transatlantischen Justizkonflikts erreicht?"
  This article deals with the service of actions for punitive damages under the Hague Service Convention. The author refers first to a decision of the Higher Regional Court Koblenz of 27.06.2005: In this case, the German defendant should be ordered to pay treble damages in a class action

based on the Sherman Act. Here, the Regional Court held that the Hague Service Convention was not applicable since the case did not constitute a civil or commercial matter in terms of Art. 1 (1) Hague Service Convention. The author, however, argues in favour of an autonomous interpretation of the term "civil or commercial matter" according to which class actions directed at punitive/treble damages can be regarded as civil matters in terms of Art. 1 Hague Service Convention.Further, the author turns to Art. 13 Hague Service Convention according to which the State addressed may refuse to comply with a request for service if it deems that complicance would infringe its sovereignty or security. There have been several decisions dealing with the applicability of Art. 13 Hague Service Convention with regard to class actions aiming at punitive/treble damages. Those decisions discussed in particular whether Art. 13 corresponds to public policy. In this respect, most courts held that Art. 13 has to be interpreted more narrowly than the public policy clause. In this context, the author refers in particular to a decision of the German Federal Constitutional Court of 24 January 2007 (2 BvR 1133/04): In this decision, the Constitutional Court has held that the mere possibility of an imposition of punitive damages does not violate indispensable constitutional principles. According to the court, the service may be irreconcilable with fundamental principles of a constitutional state in case of punitive damages threatening the economic existence of the defendant or in case of class actions *if* – i.e. only then – those claims deem to be a manifest abuse of right. Thus, as the author shows, the Constitutional Court agrees with a restrictive interpretation of Art. 13 Hague Service Convention.

- ***Christian Heinze*:** "Der europäische Deliktsgerichtsstand bei Lauterkeitsverstößen"
  The article examines the impact of the new choice of law rule on unfair competition and acts restricting free competition (Art. 6 Rome II Regulation) on Art. 5 No. 3 Brussels I Regulation: The author argues that it should be adhered to the principle of ubiquity according to which the claimant has a choice between the courts at the place where the damage occurred and the courts of the place of the event giving rise to it. In view of Art. 6 Rome II Regulation he suggests, however, to locate the place where the damage occurred with regard to Art. 5 No. 3 Brussels I

Regulation in case of obligations arising out of an act of unfair competition at the place where the competitive relations are impaired or where the collective interests of consumers are affected – if the respective measure had intended effects there. In case an act of unfair competition affects exclusively the interests of a specific competitor, the place should be determined where the damaging effects occur, which is usually the place where the affected establishment has its seat. With regard to the determination of the place of the event giving rise to the damage, the author suggests to apply a centralised concept according to which the place of the event giving rise to the damage is, as a rule, the place where the infringing party has its seat.

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

"Targeted activity" in Art. 15 (1) lit. c Brussels I Regulation and in Art. 6 (1) lit. b Rome I Regulation aims at extending consumer protection. Accordingly, it at least comprises the ground which was already covered by "advertising" under Arts. 13 (1) pt. 3 lit. a Brussels Convention; 5 (2) 1st indent Rome Convention. "Targeted activity" is a technologically neutral criterion. Any distinction between active of passive websites has to be opposed for the purposes of international consumer protection since it would fit ill with the paramount importance of the commercial goal pursued by the marketer's activities. Any kind of more or less unreflected import of concepts from the United States should be denied in particular. Any switch in the mode of communication does not play a significant role, either.

Activities by other persons ought to be deemed to be the marketer's activities insofar as he has ordered or enticed such activities. In principle, registration in lists for mere communication purposes do not fall within this category. If only part of the overall programme of an enterprise is advertised "targeted activity" does not exclude contracts for other parts of that programme if and insofar as such advertising has prompted the consumer to get into contact with the professional.

- ***Dirk Looschelders:*** "Begrenzung des ordre public durch den Willen des

Erblassers" – the English abstract reads as follows:

When applying the Islamic law of succession, in many cases conflicts occur with the fundamental principles of German law, especially with the German fundamental rights. In particular problems arise in view of the Islamic rule that the right of succession is excluded when the potential heir and the deceased belong to different religions. The Higher Regional Court of Berlin ascertains that such a rule is basically inconsistent with the German "ordre public", regulated in Article 6 EGBGB. In this particular case, however, the court refused the recourse to Article 6 EGBGB, because the consequence of the application of the Egypt law and the will of the deceased – the exclusion of the illegitimate son of Christian faith from the succession – comply with each other. In the present case, this conclusion is strengthened by the fact that the deceased has manifested his will in a holographic will, which is effective under German law. Nevertheless, with regard to the testamentary freedom (Art. 14 Abs. 1 S. 1 GG), the same conclusion would be necessary, if a corresponding will of the deceased could be discovered in any other way. Insofar, the "ordre public" is limited by the will of the deceased.

- ***Boris Kasolowsky/Magdalene Steup:*** "Ordre-public-Widrigkeit kartellrechtlicher Schiedssprüche – der flagrante, effective et concrète -Test der französischen Cour de cassation" – the English abstract reads as follows:

The Cour de Cassation decision in SNF v. Cytec is the first case in which a final appeal court of an EU Member State dealt with the enforcement of an arbitration award allegedly in breach of EC competition law. On the basis of the breach of EC competition law, one of the parties argued that the enforcement of the award would – pursuant to Eco Swiss – be contrary to public policy within the meaning of Article V. 2 (b) of the New York Convention.

The Cour de Cassation considered in particular the intensity of the courts' review when dealing with a party resisting enforcement of an award for being contrary to competition law and public policy. In its decision it reconfirmed the view of the Cour d'appel that the review out to be rather limited.

The article suggests by reference to the Cour de Cassation in SNF v Cytec, but also to the decisions rendered in

other jurisdictions, that (i) a rather limited standard level of review of arbitration awards for breach of EC competition law giving rise to a breach of public policy is being developed and (ii) only the most obvious breaches may result in a challenge succeeding or enforcement being refused. Consequently, there should (increasingly) be a level playing field within Europe. Further, given the rather limited review – which is now becoming accepted – there should in most cases also be no significant additional risks in enforcing arbitration awards in EU Member State jurisdictions rather than in non-EU Member State jurisdictions.

- ***Sebastian Mock**:* "Spruchverfahren im europäischen Zivilverfahrensrecht" – the English abstract reads as follows:

Austrian and German corporate law provide a special proceeding for minority shareholders to review the appraisal granted by the majority shareholder on certain occasions (Spruchverfahren). This proceeding stands separate from other proceedings regarding the squeeze out of the minority shareholders and does not legally affect the validity of the decision. In contrast to Austrian and German civil procedure law the application of the Brussels regulation does not generally lead to jurisdiction of the court of the state where the seat of the company is located. Neither the rule on exclusive jurisdiction of Art. 22 no. 2 Brussels regulation nor the rules on special jurisdiction of Art. 5 no. 5 Brussels regulation apply for the Spruchverfahren. As the consequence the international jurisdiction under the Brussels regulation is only determined by the domicile respectively the seat of the defendant in the procedure (Art. 2 Brussels regulation). However, a corporation can ensure the concentration of all proceedings in the Member state of their seat by implementing a prorogation of jurisdiction according to Art. 23 Brussels regulation in their corporate charter.

- ***Arno Wohlgemuth**:* "Internationales Erbrecht Turkmenistans" – the English abstract reads as follows:

The law governing intestate and testamentary succession in Turkmenistan is dispersed in different bodies of law such as the Turkmenistan Civil Code of 1998, the rules surviving as ratio scripta of the abrogated Civil Code of the Turkmen SSR of 1963, the Law on Public Notary of 1999, and the Minsk CIS Convention on legal assistance and legal relations in civil, family and criminal matters of 1993, as amended. Whereas in principle movables are distributed as provided by the law in force at the place where the decedent was domiciled at the time of his death, immovable property will pass in accordance with the law prevailing at the place where it is located.

- ***Christian Kohler*** on the meeting of the European Group for Private International Law (EGPIL) in Bergen on 19-21 September 2008: "Erstreckung der europäischen Zuständigkeitsordnung auf drittstaatsverknüpfte Streitigkeiten – Tagung der Europäischen Gruppe für Internationales Privatrecht in Bergen"

  The consultation's focus was on the proposed amendments of Regulation 44/2001 in order to apply it to external situations. The introduction of this proposal – which can be found (besides in this issue of the IPRax) also at the EGPIL's website – reads as follows:

At its meeting in Bergen, on 19-21 September 2008, the European Group for Private International Law, giving effect to the conclusions of its meeting in Hamburg in 2007, which took into account the growth of the external powers of the Union in civil and commercial matters, considered the question of enlarging the scope of Regulation 44/2001 ("Brussels I") to cover cases having links to third countries, cases to which the common rules on jurisdiction do not apply. On this basis, it proposes, as its initial suggestion, and as one possibility among others, the amendment of the Regulation for the purpose of applying its rules of jurisdiction to all external situations. These proposals are without prejudice to the examination of other possible solutions – in particular, conventions adopted by the Hague Conference on Private International Law – or a similar analysis of other instruments, such as Regulation 2201/2003 ("Brussels II bis") or the new Lugano Convention of 30 October 2007. Other questions still remain to be considered – in particular the adaptation of Article 6 of Brussels I and the extension of Brussels I to cover the recognition and enforcement of judgments given in a third country.

- ***Erik Jayme/Michael Nehmer*** on a symposium hosted by the Law Faculty of the University of Salerno on the international aspects of intellectual property: "Urheberrecht und Kulturgüterschutz im Internationalen Privat- und Verfahrensrecht – Studientag an der Universität Salerno"