Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (2/2009)

Recently, the March/April 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)**:

- ***Robert Freitag***: "Die kollisionsrechtliche Behandlung ausländischer Eingriffsnormen nach Art.9 Abs. 3 Rom I-VO" – the English abstract reads as follows:

The article examines the conditions under which foreign mandatory rules "may be given effect" under article 9 par. 3 of the Rome I-Regulation. Freitag argues that the application of foreign mandatory rules is in theory itself mandatory but that the national judge has a discretion as to the evaluation of the compatibility of the relevant foreign law with domestic values. Another strong emphasis is put on the definition of "the country in which the contract is to be performed". The author favors an interpretation of art. 9 par. 3 Rome I-Regulation according to which the place of performance is to be determined by the proper law of the contract, resulting in the possibility of a plurality of relevant foreign mandatory rules. Furthermore, Freitag considers the rule to be of a strict and limiting nature so that the national judge may not give effect (in the meaning of the Regulation) to the mandatory provisions of foreign laws other than the one(s) determined pursuant to art. 9 par. 3 Rome I-Regulation. The article concludes with a criticism of the inapt formulation and adverse effects of art. 9 par. 3 of the Regulation.

- ***Karsten Kühnle/Dirk Otto****:* "'Neues' zur kollisionsrechtlichen Qualifikation Gläubiger schützender Materien in der Insolvenz der Scheinauslandsgesellschaft – Drei Fragen, ein Gesetz, ein Referentenentwurf und ein höchstrichterliches Urteil" – the English abstract reads as follows:

Is a director of a pseudo-foreign company (e.g. a British private company limited by shares) having its centre of main interest in Germany obliged to file a petition for insolvency pursuant to German laws? Which law governs shareholder loans granted to such a company becoming insolvent? Are shareholders of such a company subject to the rules on

piercing of the corporate veil developed by German courts if they cause the company's insolvency by unlawful actions? These three questions have dominated legal discussions in the past five years not only for their practical importance but also for the complexity of issues involved in a pseudo-foreign company's insolvency, e.g. determination of the company's COMI and avoidance of forum shopping, qualification of issues which are a matter of company law (lex fori societas) rather than a matter of insolvency law (lex fori concursus) against the background of Article 4 of the European Insolvency Regulation and the impact of the ECJ's judicature on freedom of establishment. From today's perspective, it appears that three events have clarified the legal position: (i) The German Reform Act to the Limited Liability Company Act (MoMiG), which came into force on 1st November 2008, explicitly addresses the question whether a pseudo-foreign company's director's duty to file for insolvency is governed by the lex fori concursus rather than the lex fori societas. (ii) In January 2008, the German Federal Ministry of Justice has produced a bill on Rules on Conflict of Laws pertaining to Companies, which deals with shareholder loans and their legal classification from a conflict of laws perspective. (iii) The German Supreme Court has reshaped the legal fundament of piercing of the corporate veil in 2007 in the "Trihotel"-case. This case law needs to be considered when deciding whether shareholders of a pseudo-foreign company can be held personally liable for the company's insolvency.

- ***Jochen Glöckner***: "Keine klare Sache: der zeitliche Anwendungsbereich der Rom II-Verordnung" – the English abstract reads as follows:

Pursuant to its Art. 31 the Rome II-Regulation shall apply to events giving rise to damage which occur after its entry into force, while Art. 32 Rome II-Reg. determines that the regulation shall apply from 11 January 2009, except for Art. 29, which shall apply from 11 July 2008. Mostly, both provisions are simply paraphrased in a sense that the Regulation has to be applied by the courts from 11 January 2009 to events that occurred after its entry into force. Some scholars, however, tend to equate the entry into force referred to in Art. 31 with the date of application as determined in Art. 32 Rome II-Reg. requiring courts to apply the regulation only to events occurring after 11 January 2009. The wording of the various language versions of the Regulation, the drafting technique of the European legislator as exemplified in Art. 24 Reg. No. 1206/2001 (Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ 2001 No L 174/1), Art. 29 Reg. No. 861/2007 (Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ 2007 No L 199/1), Art. 26 Reg. No. 1393/2007 (Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ 2007 No L 324/79) or Art. 29 Reg. No. 593/2008 (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), OJ 2008 No L 177/6) as well as the legislative history and the purpose of both provisions however indicate, quite to the contrary, that entry into force must not be confused with applicability. That is why the provision in Art. 32 Rome II-Reg. does not amount to a specification of the date of entry into force under Art. 254 para. 1 EC and the Rome II-Regulation

consequently entered into force on the twentieth day following the day of its publication. So, from 11 January 2009 on Member States Courts are under a duty to apply the Rome II-Regulation not only to all events giving rise to damage, which occur after the same day, but to all events which occur or have occurred since 20 August 2007.

- ***Alexander Bücken***: "Intertemporaler Anwendungsbereich der Rom II-VO" – the English abstract reads as follows:

According to its Article 32 the essential provisions of the Rome II-Regulation apply from 11 January 2009. Article 31 provides that the Regulation applies to events giving rise to damage which occur after its entry into force. There is uncertainty about the date of the entry into force, because there is no provision concerning it in the Regulation. The prevailing opinion states that the Regulation enters into force as from 11 January 2009. The following observations examine, why this opinion is right and which negative effects it would have if the Rome II-Regulation would enter into force as from an earlier date as the date of its application.

- ***Andreas Spickhoff*** on recent decisions of the Federal Court of Justice, the Court of Appeal Koblenz and the Court of Appeal Stuttgart concerning the concurrence of contractual claims and claims based on tort on the level of international jurisdiction and choice of law: "Anspruchskonkurrenzen, Internationale Zuständigkeit und Internationales Privatrecht"
- ***Stefan Huber***: "Ausländische Broker vor deutschen Gerichten – Zur Frage der Handlungszurechnung im internationalen Zuständigkeits- und Kollisionsrecht" – the English abstract which has been kindly provided by the author reads as follows:

The author analyses a judgment of the Court of Appeal of Düsseldorf which granted a claim for damages brought by German investors against a broker situated in New York. Dealing with the questions of jurisdiction and conflict of laws, he agrees with the outcome of the decision but criticises the reasoning of the appellate court. The court assumed jurisdiction because the securities transactions in question had been arranged by a German financial service provider. In the author's view such a reasoning would lead to an exorbitant jurisdiction of German courts under certain circumstances. He proposes a different line of reasoning based on the place where the damage occured.

- ***Gregor Bachmann***: "Internationale Zuständigkeit bei Konzernsachverhalten" – the English abstract reads as follows:

The number of foreign investors in German stock corporations is rising. If they use their influence for the detriment of the company, the question arises where those investors can be sued. In a case to be decided by the Landgericht Kiel (Trial Court), a German shareholder sued a large French company (France Telecom S.A.) who supposedly had deprived the company of a valuable corporate opportunity and thus diminished the value of the shares. The claim was brought at the seat of the claimant. In applying the rules of the Brussels I Regulation, the court found that it was competent to decide the case. It based its decision on Art. 5 Nr. 3 of this regulation, according to which in matters relating to tort, delict or quasi-delict the defendant may be sued at the place "where the harmful event occurred". While the court was right to interpret „tort" or „delict" in a broad sense encompassing detrimental shareholder influence, it cannot be followed in its result. Although the European Court of Justice does not give clear guidance as to where the place of occurrence must be located, it clearly holds that it cannot be generally identified with the place where the claimant resides. Therefore, in cases such as the one at hand the place of occurrence must be either the seat of the company or the place where the shares are stored. Since the latter is just a matter of chance, it must be rejected. The proper place to sue foreign shareholders rather is the place where the company's seat is located. This is in accordance with the general aim of the Brussels Regulation to avoid a splitting-up of jurisdictions and not to unduly favour the claimant.

- ***Stefan Kröll*** on a decision of the German Federal Court of Justice dealing with the principle of venire contra factum proprium in the context of the declaration of enforceability of foreign arbitral awards: "Treu und Glauben bei der Vollstreckbarerklärung ausländischer Schiedssprüche"
- ***Jan von Hein*** on a decision of the Austrian Supreme Court of Justice dealing with the ordering of protective measures with regard to German adults: "Zur Anordnung von Maßnahmen zum Schutz deutscher Erwachsener durch österreichische Gerichte"
- ***Peter Mankowski*** on the final decision of the Dutch Hoge Raad in the "Leffler-case": Übersetzungserfordernisse und Zurückweisungsrecht des Empfängers im europäischen Zustellungsrecht – Zugleich ein Lehrstück zur Formulierung von Vorlagefragen"

AG Opinion on Brussels II bis ("Hadadi")

Yesterday, Advocate General *Kokott* delivered her opinion in case C-168/08 (*Hadadi*).

The case concerns the interpretation of the Brussels II *bis* Regulation and raises the question whether a Hungarian or a French court has jurisdiction over a divorce decree where both spouses are habitually resident in France and have both Hungarian and French nationality.

The French Cour de Cassation had referred the following questions to the ECJ for a preliminary ruling:

> *Is Article 3(1)(b) [of Regulation No 2201/2003] to be interpreted as meaning that, in a situation where the spouses hold both the nationality of the State of the court seised and the nationality of another Member State of the European Union, the nationality of the State of the court seised must prevail?*
> *If the answer to Question 1 is in the negative, is that provision to be interpreted as referring, in a situation where the spouses each hold dual nationality of the same two Member States, to the more dominant of the two nationalities?*
> *If the answer to Question 2 is in the negative, should it therefore be considered that that provision offers the spouses an additional option, allowing those spouses the choice of seising the courts of either of the two States of which they both hold the nationality?*

In her opinion, the AG proposes that the ECJ should answer these questions as follows:

> *1. Where the court of a Member State has to examine whether, under Article 64(4) of 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, the court of the Member State in which a judgment was originally given would have had jurisdiction under Article 3(1)(b) of that regulation, it may not regard spouses who both possess the nationality of the Member State of the court seised and of the Member State of origin as being exclusively of its own nationality. Rather, it must take into account the fact that the spouses also possess the nationality of the Member State of origin*

and that the courts of the latter State accordingly would have had jurisdiction in respect of the judgment.

2. For the purposes of determining jurisdiction under Article 3(1)(b) of Regulation No 2201/2003 in the case of spouses who hold more than nationality, not only the more effective nationality is to be taken into account. The courts of all Member States whose nationality is held by both spouses have jurisdiction under that provision.

Related Actions and Jurisdiction Clauses

On 19 June 2008, the Supreme Court of Luxembourg for private and criminal matters (*Cour de cassation*) delivered a judgment in an interesting case involving related actions and a jurisdiction clause.

The related actions were pending before Belgian and Luxembourg courts. Bonds had been issued by a Luxembourg financial institution and sold by a Belgian bank to a Belgium couple, who had then resold them to a member of their family, who lived in Belgium. The new holder of the bonds initiated proceedings to set aside the initial sale and decided to sue both the issuer and the seller of the bonds.

Understandably, it seems that the plaintiff wanted to have both actions tried by one single court. However, he did not directly sue both defendants before the Belgian court. Instead, he sued the Belgian seller in Belgium and the Luxembourg issuer in Luxembourg, but only then to argue that the Luxembourg court ought to decline jurisdiction in favor of the Belgian court on the ground of the law of related actions. The actions were certainly similar, since they each aimed at setting aside the sale, but they did not meet the conditions of *lis pendens*, as the parties were different. Article 28 of the Brussels I Regulation clearly controlled.

The judgment of the Luxembourg *Cour de cassation*

The first instance court of Luxembourg (*tribunal d'arrondissement*) had resolved the dispute by ruling that the claim was inadmissible. It was reversed by the Court of appeal of Luxembourg, which first addressed the issue of jurisdiction and agreed to decline jurisdiction in favor of the Belgian court. The defendant appealed to the *Cour de cassation*.

The first issue that the *Cour de cassation* had to resolve was that the Belgian Court was the first instance court of Liège. The language of Article 28, however, seemed to imply that its scope is limited to actions pending before courts of first instance ("Where these actions are pending at first instance"), and that it does not apply to an appeal court. The *Cour de cassation* dismissed the argument by ruling that the purpose of this condition is to protect the right of the parties to an appeal. In other words, the Court held that there was no real issue as long as the parties would not lose the opportunity to appeal, which would not be the case when an appeal court would decline jurisdiction in favor of a first instance court. The Luxembourg *Cour de cassation* does not cite the authorities on which it relies, but a judgment of the French *Cour de cassation* of 27 October 1992 which had reached the same solution was relied upon in the proceedings and clearly influential.

The second issue was the extent to which the Luxembourg Court had cared about the consequences of its decision in respect of the dispute which it would not handle. Article 28 rightly requires that any European court willing to decline jurisdiction on the ground of related actions verify "if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof". In that case, that meant that the Luxembourg court ought to have verified whether the Belgian court would have had jurisdiction over the action initiated in Luxembourg against the Luxembourg defendant. The *Cour de cassation* found that the court of appeal had explored neither the jurisdiction of the Belgian court, nor whether Belgian law allowed consolidation, and thus allowed the appeal. The solution seems obvious, so much so that one wonders how the court of appeal could have missed it.

The jurisdiction clause

Although the *Cour de cassation* did not care to mention it, there was a jurisdiction clause in the bonds' prospectus. It had been drafted by a clever lawyer, so clever that it was not easy to understand what the clause meant.

> *Any dispute arising between the bond holders and the Issuer and/or the Guarantor will be settled by the courts of Luxembourg and/or Belgium as far as the Guarantor is concerned (translation from the French)*

The clause could be construed in at least two ways. First, it could have provided for the exclusive jurisdiction of the courts of two countries for two different kinds of disputes. In other words, Luxembourg courts could have had jurisdiction over actions against the Luxembourg party (the Issuer), while Belgian courts would have had exclusive jurisdiction over disputes against the Belgian party (the seller and possibly the Guarantor). If the plaintiff construed the clause that way, that might explain why he decided to sue each of the defendants in their own courts: because he thought the jurisdiction clause actually compelled him to.

Alternatively, the clause could have meant that the parties had an option, and could choose to sue before either court. In particular, the plaintiff could have sued the issuer either in Luxembourg or in Belgium. That is how the court of appeal interpreted the clause. And this simplified any issue of jurisdiction of Belgian courts the Court of appeal of Luxembourg might face. Obviously, if the clause allowed the parties to choose between the courts of both countries, this meant that each of these courts had jurisdiction. So, the Court of appeal of Luxembourg had not applied so badly article 28.

However, the Court of appeals of Luxembourg went on to rule that there was no evidence that the clause had actually been accepted by both parties, and that it was part of their agreement. The clause had thus been found unenforceable. It could not confer jurisdiction on any court. And the *Cour de cassation* was therefore right to allow the appeal.

So the case is not as interesting as it could have been. Article 28 still awaits its *Gasser* case.

Conference on European Tort Law

The European Centre of Tort and Insurance Law will host its annual Conference on European Tort Law in Vienna from 16th-18th April.

Detailed information on the programme, registration and accomodation can be found on their specially-designed website and on the following information folder.

Many thanks to Thomas Thiede for the tip-off.

Interesting New Book: The Law Market, by Professors Erin O'Hara and Larry E. Ribstein

I just caught wind of an interesting new read from Oxford University Press. Here's the quick summary on their website:

> *Today, a California resident can incorporate her shipping business in Delaware, register her ships in Panama, hire her employees from Hong Kong, place her earnings in an asset-protection trust formed in the Cayman Islands, and enter into a same-sex marriage in Massachusetts or Canada–all the while enjoying the California sunshine and potentially avoiding many facets of the state's laws. In this book, Erin O'Hara and Larry E. Ribstein explore a new perspective on law, viewing it as a product for which people and firms can shop, regardless of geographic borders. The authors consider the structure and operation of the market this creates, the economic, legal, and political forces influencing it, and the arguments for and against a robust market for law. Through jurisdictional competition, law markets promise to improve our laws and, by establishing certainty, streamline the operation of the legal system. But the law market also limits governments' ability to enforce regulations and protect citizens from harmful activities. Given this tradeoff, O'Hara and Ribstein argue that simple*

> *contractual choice-of-law rules can help maximize the benefits of the law market while tempering its social costs. They extend their insights to a wide variety of legal problems, including corporate governance, securities, franchise, trust, property, marriage, living will, surrogacy, and general contract regulations. The Law Market is a wide-ranging and novel analysis for all lawyers, policymakers, legislators, and businesses who need to understand the changing role of law in an increasingly mobile world.*

In a recent talk on the book at the American Enterprise Institute, Professor Ribstein contended that "widespread enforcement of choice-of-law clauses powerfully enhances [the] 'law market,' whose forces can in turn profoundly affect legal systems." When people can choose the laws by which they are governed or create contracts, they said, "a new set of political actors gains influence, and state lawmakers are thereby more effectively disciplined." Professor Ribstein called for:

> *a federal statute to require that states adhere to contractual choice-of-law provisions, except in cases where states pass "explicit legislation" to designate which choice-of-law provisions they will refuse to enforce. Ribstein contended that this solution offers "predictability, which is one thing we're not getting from the chaos of state choice-of-law rules now," as well as more interest group and individual involvement in state legislative processes. Over time, he argued, the proposal will produce an "equilibrium" that protects contractual rights, allows states and local jurisdictions to enact "reasonable regulations," and offers contracting parties "a way out of the tangle" of existing federal, state, and local laws.*

I haven't read it yet, but I certainly will soon. The early reviews have certainly been very good. You can order the book here.

Conference: “Le nuove competenze comunitarie dello spazio giudiziario europeo: obbligazioni alimentari e successioni”

The Faculty of Law and the European Documentation Centre of the **University of Verona** will host **on 20 March 2009 (14:30 h)** a conference on maintenance obligations and successions: **“Le nuove competenze comunitarie dello spazio giudiziario europeo: obbligazioni alimentari e successioni“** (*New EC Competences in the European Judicial Area: Maintenance Obligations and Successions*).

Here’s the programme:

Chair: *Prof. Maria Caterina Baruffi* (University of Verona);

- *Prof. Fausto Pocar* (University of Milan): La disciplina comunitaria della giurisdizione e del riconoscimento delle sentenze in tema di alimenti: il reg. 4/2009;
- *Prof. Alegría Borrás* (University of Barcelona – Co-Rapporteur of the Explanatory Report on the 2007 Hague Convention): La Convenzione ed il Protocollo dell’Aja del 2007 in tema di alimenti;
- *Prof. Rosario Espinosa Calabuig* (University of Valencia): La responsabilità genitoriale e le obbligazioni alimentari nei confronti dei minori: tra il regolamento 2201/2003 e il regolamento 4/2009;
- *Prof. Rainer Haussmann* (University of Konstanz): The proposal of the Commission on applicable law, jurisdiction, recognition and enforcement of decisions and cooperation in matters relating to successions and wills of 2009;
- *Prof. Ruggiero Cafari Panico* (University of Milan): Riconoscimento ed efficacia degli atti in materia successoria;
- *Prof. Alberto Malatesta* (University “Carlo Cattaneo” – LIUC of Castellanza): Relazione di sintesi.

For further information and registration, see the conference’s webpage and the

downloadable flier.

(Many thanks to Fabrizio Marongiu Buonaiuti, University of Rome "La Sapienza", for the tip-off)

AG opinion on Roda Golf (Regulation Nº 1348/00)

On October 2007, a company named Roda Golf & Beach Resort S.L. ('Roda Golf'), executed before a notary an instrument of notification and request, seeking the service of 16 letters giving notice of the termination of a contract on addressees residing in the United Kingdom. On November 2007, the notary appeared before the clerk of the Juzgados de Primera Instancia e Instrucción, San Javier, and formally served the notarial instrument together with the original copies of the 16 letters. The clerk of the referring court issued a measure refusing to effect service of the letters. Roda Golf lodged an application for review before the Juzgado de Primera Instancia e Instrucción No 5, San Javier, in accordance with Article 224 of the Ley de Enjuiciamiento Civil (Law on Civil Procedure). When examining the action contesting the measure of organisation issued by the clerk, the court was uncertain about the interpretation of Regulation (EC) No 1348/2000; therefore, on January 2008 it referred the following two questions to the Court of Justice for preliminary ruling:

'1. Does the scope of Regulation (EC) No 1348/2000 extend to the service of extrajudicial documents exclusively by and on private persons using the physical and personal resources of the courts and tribunals of the European Union and the regulatory framework of European law even when no court proceedings have been commenced? Or,

2. Does Regulation (EC) No 1348/2000 on the contrary apply exclusively in the context of judicial cooperation between Member States and court proceedings in progress (Articles 61(c), 67(1) and 65 EC and recital 6 of the preamble to Regulation (EC) No 1348/2000)?'

AG Ruiz-Jarabo Colomer's long opinion has been delivered on March, the 5th. He starts analysing the matter of admissibility of the question, which is a twofold objection raised by the Commission.

A) According with Article 68 EC, only courts or tribunals of last instance may refer a preliminary ruling question concerning Title IV of the EC Treaty and acts based thereon; the Spanish court asserts it is a court of last instance in accordance with the aforementioned article; the Commission denies it. AG sets out the history and the reasons which led the Member States to adopt Article 68 EC; he concludes that the rule has to be interpreted in accordance with the fundamental right to effective legal protection, therefore restrictively. He then turns to consider what is a "court of last instance" within the meaning of Article 68 EC: only a court sitting at the apex of the national court structure (if so, the Spanish question would not be admissible), or the final court which may give a decision in accordance with the domestic system of remedies?. Judging from previous cases before the ECJ -although concerning Article 234 EC- he rejects the organic approach in favour of the specific-case approach: Article 68 EC refers to courts against whose decisions there is no judicial remedy, applying to supreme courts and also to any other national courts against whose decisions there is no right of appeal.

Unfortunately, under Spanish procedural law it is unclear whether an appeal may be brought against a decision such as the one pending before the Juzgado de Primera Instancia e Instrucción No 5, San Javier. Under this circumstances, AG draws attention to the referring court's view that it has the status of a court of last instance; he also points out that where uncertainties arise, it is appropriate to choose the approach which is most favourable to the reference for a preliminary ruling. He therefore concludes that the first plea of inadmissibility must be dismissed.

B) The second plea of inadmissibility concerns another essential condition that a court has to meet in order to seek a preliminary ruling: the question must arise in the context of proceedings; 'a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature'. This means two requirements: the reference must be made by a court or tribunal (first requirement), in relation to a case in which (second condition) it exercises a judicial function. In the instant case, although the referring court is part of the

Spanish judicial structure, there are uncertainties regarding whether the action concerned is an *inter partes* dispute , and whether the decision of the court is judicial in nature.

AG Ruiz-Jarabo Colomer studies EC case law on Article 234 EC, stating that it also applies to preliminary rulings sought under Article 68 EC. He then recalls the conditions set by the ECJ for a proceeding to be considered *inter partes*: first, it will suffice if an individual is claiming a right and seeks a ruling from a court; second, the claim must be clearly defined in terms of both the facts and the law; third, the national court must ensure the observance of all procedural safeguards when it exercises jurisdiction. Applying such criteria to the present case, AG concludes that the main proceedings are *inter partes*.

As for the requirement of judicial nature of the function, the AG brings up a special exception set by the EJ in the *Job Centre* affair (case C- 11/94), where the applicant asked for an order to register a company: the Court ruled that there was no judicial activity, but only the exercise of administrative authority; it nevertheless went on to state that 'Only if the person empowered under national law to apply for such confirmation seeks judicial review of a decision rejecting that application – and thus of the application for registration – may the court seised be regarded as exercising a judicial function, for the purposes of Article [234]". Applying the exception to the present case, AG concludes that the function performed by the referring court is judicial in nature.

The issue of admissibility being solved, AG tackles the questions referred for preliminary ruling. The Juzgado de Primera Instancia e Instrucción No 5, San Javier, seeks a precise definition *of extrajudicial documents* in the context of Regulation (EC) No 1348/20. For some Member States, extrajudicial documents may be served under this Regulation only where court proceedings have been commenced; since ordinary declaratory proceedings have not yet been commenced in the matter referred by the Juzgado de Primera Instancia e Instrucción No 5, San Javier, those Member States propose that the Court should restrict the service of extrajudicial documents to situations where proceedings are underway. However, this opinion is not shared by the AG: leaning on the purpose of Regulation (EC) Nº 1348/2000 and its legal basis (art. 65 EC), he defends a broad interpretation of the scope of the Regulation; *extrajudicial documents* are not only documents which are included in a case-file; the term also covers documents which are required to be served, regardless of whether or not

proceedings have been commenced.

To end, AG suggest a definition of *extrajudicial document* mid way between an autonomous interpretation and interpretation by reference to the law of the State of origin: in his view extrajudicial documents are documents which, first, require the involvement of an authority or a public act; second, give rise to specific and different legal effects as a result of that involvement; and, third, are used to support a claim in possible court proceedings.

(Regulation (EC) Nº 1348/2000 has been replaced by Regulation (EC) Nº 1393/2007, which is already in force)

European Commission's Proposal on Succession and Wills to Be Presented Shortly

According to the January 2009 issue of *Brussels News*, the information bulletin of the Brussels Office of the Bar Council, the European Commission will present its **Proposal for a regulation on PIL aspects of succession and wills on 24 March 2009**:

> ***Wills and Succession***
> *The Commission's long-awaited private international law proposal is due out on 24 March. It is expected to cover not only applicable law, but also jurisdiction, recognition and enforcement. The Chancery Bar Association has been actively following preparations, and will react.*

As it is widely known, works on the proposed EC legislation have been prepared by the Commission through a Green Paper on Succession and Wills, published in 2005 (see also the annex working document – in French), and a subsequent public hearing, held on 30 November 2006, based on the contributions received in reply

to the Green Paper. On 16 November 2006, the European Parliament voted a resolution with recommendations, calling on the Commission to submit a legislative proposal (see our post here).

A thorough research had been previously carried at an academic level, on behalf of the Commission, by the Deutsches Notarinstitut in cooperation with *Prof. H. Dörner* and *Prof. P . Lagarde* (the whole documentation – including the Final Report – can be downloaded from the Documentation Centre of the DG Justice, Freedom and Security).

Following the research, a conference, "**Conflict of Law of Succession in the European Union – Perspectives for a Harmonisation**", was organized in Brussels on 10-11 May 2004, where a number of very interesting papers were presented by leading scholars from various European jurisdictions. The proceedings of the symposium (highly recommended) are available on the DNotI website.

On the Commission's initiative, see also **our Guest Editorial** ("Reflections on the Proposed EU Regulation on Succession and Wills") **by *Prof. Jonathan Harris*** (University of Birmingham, co-editor of the Journal of Private International Law), who has been advising the UK Ministry of Justice on the proposed Regulation, and gave oral evidence to the House of Lords Select Committee on European Union Law in October 2007. The transcript of this evidence is available here.

Consultation Paper on Jurisdiction

The Law Commission of Ontario has released a consultation paper written by Professor Janet Walker (Osgoode Hall Law School, York University). The paper (available here) proposes that Ontario's current law on the taking and retaining of jurisdiction in civil matters is in need of reform. It offers a proposed statute which would reform the law in this area. The proposals have some common elements with the Uniform Law Conference of Canada's model statute, the Court Jurisdiction and Proceedings Transfer Act (available here), but also some important differences.

The Law Commission welcomes comments on the paper, and the process for commenting is explained in the paper. Beyond this, those generally interested in how countries resolve issues of jurisdiction in civil matters should find the points raised in the paper of interest.

To date three Canadian provinces have moved away from the traditional approach, which is based on a combination of common law and rules of civil procedure, and have brought into force the Court Jurisdiction and Proceedings Transfer Act (British Columbia, Saskatchewan and Nova Scotia). Some other provinces have enacted the statute but not yet brought it into force, and some other provinces are considering adopting it.

Recognition of a U.S. Judgment in Brazil

I am grateful to Henry Saint Dahl, the President of the Inter-American Bar Foundation, for contributing this report.

In *General Electric Company v. Varig S Aviação Aérea Rio-Grandense*, the Superior Court of Justice in Brazilia, Brazil allowed the recognition (*homologação*) of a US judgment issued by the New York Southern District Court. The Brazilian decision was dated November 5, 2008 but was only published on December 11, 2008.

The parties signed a contract, General Terms of Agreement, according to which Varig purchased from GE an aircraft engine. The contract had a New York choice-of-law clause. The New York judgment was declaratory and it established that General Electric was not responsible for certain malfunctioning of the engine. The American court had decided that: "a) the General Terms of Agreement entered between Varig and GE is in full force and it is applicable to the incident caused by the engine malfunction of June 7, 2000; and b) the Agreement shall be construed following the substantive law of New York."

Varig argued that the chosen law should be stricken, as a matter of Brazilian public policy, and that the Brazilian Consumer Code (*Código de Defesa do Consumidor*) should be applied instead. In particular, Varig asserted that this was a consumer transaction and that the Brazilian Consumer Code banned clauses whereby the buyer waived any redress in instances of the seller's negligence.

The case was complicated by a related action, against General Electric, filed in Brazil by Varig's insurance company (Presumably the declaratory action would be used to defend against this lawsuit.)

The Brazilian court allowed recognition of the foreign judgment. It held that the Consumer Code applied internally and that it did not prevent the law chosen by the parties to operate freely. It also determined that the recognition requirements (jurisdiction, service, translations, etc.) of art. 15 of the introductory law to the Civil Code had been complied with. Finally, the court decided that the existence of related litigation in Brazil posed no obstacle to the recognition of the foreign judgment according to art. 90 of the Code of Civil Procedure (no *lis pendens*).

This is an important case where the Brazilian court applied truly international standards to an international case. Other Latin American countries should take notice.

Priscila Sato, a Brazilian attorney at Arruda Alvim Wambier *Advocacia e Consultoria Jurídica provided a copy of the text and general guidance.*