Conference on punitive damages at Vienna

A Conference on Punitive Damages, organised by the Institute for European Tort Law, was held last Monday in Vienna. Aiming to study the nature, role and suitability of punitive damages in tort law and private law in general, this one-day conference got together a panel of scholars and practitioners from different countries: some where punitive damages are approved (England, the United States and South Africa), as well as others (France, Germany, Italy, Spain, Hungary and the Scandinavian countries) where they are rejected -at least, formally rejected. The position of EU law was considered too. The Conference also included a report on punitive damages from a Law and Economics perspective, another on the the insurability of such damages, and a brief presentention from a Private International Law point of view. The Conference will be published soon in a book titled "Punitive Damages: Common Law and Civil Perspectives" (H. Koziol and V. Wilcox eds).

As a PIL academic with a continental education, and also because I have already worked on the topics of service of process of punitive damages claims and the recognition of foreing punitive damage awards, the most interesting panels for me were those dedicated to England and USA and to the evolution of the figure in both jurisdictions. In this respect, a common feature in the recent past is the trend to rationalize and restrict the pronouncements of punitive damages. The constitutionaly of punitive damages has been (and is being) discussed in the USA, given the fact that despite their proximity to criminal issues, they are granted without the guarantees required in criminal contexts. In fact, a change is already taking place under 14th Amendment of the Constitution: the due process clause is being used in order to derive substantial and procedural limits to condemnations of punitive damages. The formula is articulated through judicial decisions of higher courts that correct those of lower courts. Several decisions can be pointed out as milestones: *BMW of North America v. Gore* (1996); *State Farm Mutual Automobile Insurance Co v. Campbell et al*. (2003); and *Philip Morris v. Williams (*2007). In the first decision the Federal Supreme Court ruled that the amount of the punitive damages award was disproportionate, and impossible that the defendant could have foreseen them as a result of his conduct: for these reasons

the award would be contrary to the due process clause. Based on this finding, the Supreme Court proceeded to set three criteria for studying the constitutional compatibility of punitive damages: the degree of reproach of the defendant's conduct; the reasonableness of the relationship between the amount of compensatory damages and punitive damages; and the size of criminal penalties for comparable conduct. In *State Farm v. Campbell*, the Supreme Court set a rule concerning the ratio of punitive damages to compensatory damages: the former should not exceed the amount resulting of multiplying the latter by a figure greater than 0 and less than 10 (rule of "single-digit multiplier"). The Court added that the wealth of the agent causing the damage should not be taken into account; and rejected the so-called "total harm theory", under which when sentencing to punitive damages, damages that could have been suffered by victims other than the applicant's are also to be considered.

Also in the UK punitive or exemplary damages have been called into question: the Law Commission impact study started in 1993 and completed in 1997 gives proof. But in fact, the restrictive pattern was identified in England long before the 90, and its results are more intensive than those reported for USA. Already in 1964, in the case *Rooker v. Barnard*, exemplary damages were described as "unusual remedy" that should be restricted as far as possible (meaning, if permitted by the respect due to the precedent). This will has lead to what sometimes may seem an excessive limitation: it is striking that a demand for punitive damages will not prosper in cases highly reprehensible according to current parameters, such as discrimination based on sex.

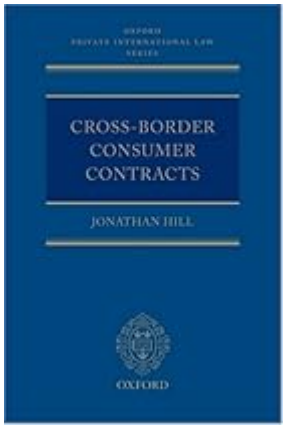
A better knowledge and understanding of punitive damages is certainly required when it comes to PIL. One of the main differences between the two major current civil liability models (those of Anglo-Saxon origin, and the so-called "civil" systems) lies in the fact that where the "civil" systems limit the function of civil liability to repairing or compensating for damages, the commn-law model admits other purposes: sentences must show that damaging conduct is not worth the risk (*tort does not pay*) and discourage its repetition. The relationship between civil liability and compensation, and nothing more than compensation, is so deeply rooted in the Continent, that it not only excludes the possibility of pronouncing sentences of punitive damages in domestic cases: the idea is projected beyond, to cross-border cases. European jurisdictions have therefore refused recognition of foreign judgments awarding punitive damages, arguing that it would be contrary

to public forum. In some countries even service of process of a claim raised in the USA has been refused, thus denying basic cooperation with foreing justice. Nevertheless, we can not talk of a unique, unanimous attitude throughout Europe: whilst recognition of a USA punitive damage award has been rejected in both Germany and Italy, Greece (lower Greek courts) and Spain have reacted the other way round.

I seriously doubt whether German or Italian posture could still be held against an English request of service of process, or a request for recognition of an English punitive damage award. Nowadays, service of process cannot be refused: Regulation 1393/07 applies, and there is no escape device (the public policy clause is no longer included). As for recognition, the scene is a little bit more complicated. Two EC Regulations may apply. The ordre public exception has disappeared in Regulation 805/04. It still survives under EC Regulation 44/01: but this that does not mean that the public policy clause will easily be applied. On the contrary: we are in a European context; and mutual trust prevails on European contexts. In this respect, we should also bear in mind the interesting development undergone by the punitive damages issue in the "Rome II" preparatory works: firstly, punitive damages where said to be contrary to a Community public policy; that is, the Community (the Commission) itself backed the doctrine against punitive damages. Nevertheless, this position was later abandoned, and replaced for a nuanced solution: I quote "Considerations of public interest justify giving the courts of the member States the possibility, in exceptional circumstances, of applying exceptions based on public policy (…). In particular, the application of a provision of the law designated by this Regulation which would cause non-compensatory, exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the member State of the court seised, be regarded as being contrary to the public policy (ordre public) of the forum".

Publication: Hill on Cross-Border Consumer Contracts

The very successful *Private International Law Series* by Oxford University Press adds yet another book to its impressive line-up with Jonathan Hill's **Cross-Border Consumer Contracts**. Here's the blurb:



> *Until relatively recently, almost all contracts were domestic: both the consumer and the supplier were from the same country and the situation involved no substantial foreign elements. Technological changes (in terms of international travel, means of communication and information technology) have meant that it is a more frequent occurrence for consumer contracts to involve a cross-border dimension.*
>
> *This book explores the legal regimes which seek to deal with disputes which arise out of such cross-border consumer contracts. In terms of private international law, English law traditionally treated consumer contracts no differently from commercial contracts. However, at European level, jurisdictional and choice of law issues arising out of certain consumer contracts are subject to specific rules. The first part of the book focuses on these European developments and seeks to explain why the private litigation model for the resolution of disputes arising out of cross-border consumer contracts has failed to deal adequately with the problems generated by such contracts. Subsequent to these failures, alternative mechanisms for resolving contractual disputes have a particular significance in the consumer context. The second part of the book focuses on an evaluation of these alternative dispute resolution mechanisms, including online dispute resolution.*

A table of contents can be found on the OUP website. ISBN: 978-0-19-927654-7. Price: £95. Available for £90.25 from the Conflict of Laws .net bookshop (powered

by Amazon) or for £95 from OUP.

Assistant in Private International Law in Luxembourg

The Faculty of Law of the University of Luxembourg is seeking to recruit an Assistant (PhD student) in Private International Law.

The candidate should be a PhD student who will be expected to work on his doctorate, to teach a few hours per week (one to three) and to contribute to research projects in private international law, mostly under my supervision. It is a 2-year fixed-term contract, renewable once.

The full text of the advertisment can be found here. The deadline for the application is 15 January 2009.

New Service Regulation No 1393/2007 and Denmark (Update)

Following our recent post on the application of Reg. No 1393/2007 since 13 November 2008, and the issue of the participation of Denmark, we would like to point out an item published on the newsletter of the Danish Ministry of Justice (No 119 of 21 December 2007). The newsletter refers to an Administrative Order (*Bekendtgørelse*) issued by the Danish Minister for Justice, on the implementation of changes to the provisions of Reg. No 1348/2000 (that were already applicable in Denmark by virtue of the "parallel" agreement with the EC), starting from 13 November 2008.

Here's an **automatic translation** (by *Google Translate*, not further revised) from Danish:

> ***Order No. 1476 of 12 December 2007 implementing changes to the Service Regulation***
>
> *The notice is published in the Government Gazette on 21 December 2007 and will enter into force on 30 December 2007. The Order shall not apply to service, conducted on 13 November 2008 or later.*
>
> *The notice states that the codified Regulation No 1393/2007 on the service of judicial and extrajudicial documents in civil and commercial matters applies in this country. The consolidated Service Regulation comes into force on 30 December 2007 but must first apply from 13 November 2008. The notice also contains a number of detailed provisions similar to some of the provisions of the current Order No. 423 of 8 May 2007 on certain issues concerning the implementation of a parallel agreement on the service regulation, which lifted from 13 November 2008.*

The Administrative Order can be found here (in Danish). Here's an **automatic translation** (by *Google Translate*, not further revised) of its Articles 1 and 6 (on the entry into force and application):

> ***Order on the implementation of changes to the Service Regulation***
>
> *[…]*
>
> ***§ 1 –*** *1.The provisions of the European Parliament and Council Regulation No. 1393/2007 on the service of judicial and extrajudicial documents in civil and commercial matters and repealing Council Regulation No. 1348/2000 applies in this country.*
>
> *2. Regulation reference to "Member States" also includes Denmark.*
>
> *[…]*
>
> ***§ 6 –*** *1. These Regulations shall come into force on 30 December 2007 and applies to service carried out on 13 November 2008 or later.*
>
> *2. Decree No. 423 of 8 May 2007 on certain issues concerning the*

> *implementation of a parallel agreement on the service be abolished, 13 November 2008.*

Even from this very rough translation, it *seems* that Denmark has implemented administratively the provisions of the new Service Regulation, setting for its implementing measures the same dates of entry into force (30 December 2007) and application (13 November 2008) as those provided for by Art. 26 of Reg. No 1393/2007. This condition is required by Art. 3(4) of the "parallel" agreement (text) between the EC and Denmark on Reg. No 1348/2000, which reads as follows:

> *4. If the notification indicates that implementation can take place administratively the notification shall, moreover, state that all necessary administrative measures enter into force on the date of entry into force of the amendments to the Regulation or have entered into force on the date of the notification, whichever date is the latest.*

The same condition was recalled in the document available on the European Judicial Atlas in Civil Matters that we mentioned in our previous post:

> *In accordance with Article 3(4) of the Agreement, the necessary administrative measures will take effect on the date of entry into force of Regulation (EC) No 1393/2007.*

So, while the situation *would* appear quite clear on the Danish side (Denmark having fulfilled its obligations under the "parallel" agreement), there are still uncertainties on the EC side, at least from the information currently available to the public.

Rome I: Commission's Opinion on the Opting-In by the UK

Following the formal notification of 24 July 2008 by the United Kingdom of its wish to participate in Reg. No 593/2008 (Rome I), the Commission has expressed its opinion – doc. COM 2008(730) fin. of 7 November 2008 – pursuant to the procedure set out in Art. 11*a* TEC (former Art. 11(3) TEC, which is made applicable to the opting-in procedure, *mutatis mutandis*, by Art. 4 of the Protocol on the Position of UK and Ireland). Here's the conclusion:

> *The Commission welcomes the request from the United Kingdom to accept Regulation 593/2008 which is a central element of the Community acquis in the area of civil justice. It therefore gives a positive opinion on the said participation.*
>
> *The Regulation should enter into force for the United Kingdom on the day of the notification to the United Kingdom of the Commission's decision on its request. As in the case of the other Member States, it should apply from 17 December 2009, except for Article 26 which should apply from 17 June 2009.*

(Many thanks to Federico Garau, Conflictus Legum blog, for the tip-off)

New Service Regulation Applicable in EU – In Denmark, as well?

Starting from yesterday, 13 November 2008, new Regulation No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (see our previous posts here and here) **is applicable in the Member States** (see its Art. 26).

Pursuant to Art. 25 of the new Service Reg., "**Regulation (EC) No 1348/2000**

shall be repealed as from the date of application of this Regulation" and "[r]eferences made to the repealed Regulation shall be construed as being made to this Regulation and should be read in accordance with the correlation table in Annex III".

While **the new rules are applicable in the United Kingdom and Ireland**, since these two States took part in the adoption of the Regulation (see Recital no 28), **the position of Denmark appears at the moment quite controversial**.

The latter State, as it is the rule in respect of measures taken under Title IV of the TEC, did not take part in the adoption of the new Service Regulation and "is not bound by it or subject to its application" (see Recital no 29). Nonetheless, **in the two "parallel" agreements concluded between the European Community and the Kingdom of Denmark** to extend to the latter the provisions of Reg. No 44/2001 and Reg. No 1348/2000, **a simplified procedure was established in order to implement future amendments** to such instruments also in respect of Denmark: according to Art. 3(2) of the Agreement on the service of documents

> *Whenever amendments to Council Regulation (EC) No 1348/2000 are adopted, Denmark shall notify to the Commission of its decision whether or not to implement the content of such amendments. Notification shall be given at the time of the adoption of the amendments or within 30 days thereafter.*

As stated by this document available on the European Judicial Atlas in Civil Matters (*emphasis added*)

> *In accordance with Article 3(2) of the Agreement,* ***Denmark has by letter of 20 November 2007 notified the Commission of its decision to implement the contents of Regulation (EC) No 1393/2007****. In accordance with Article 3(6) of the Agreement, the Danish notification creates mutual obligations between Denmark and the Community. Thus, Regulation (EC) 1393/2007 constitutes amendment to the Agreement and is considered annexed thereto.*
>
> *In accordance with Article 3(4) of the Agreement, the necessary administrative measures will take effect on the date of entry into force of Regulation (EC) No 1393/2007.*

Quite surprisingly, **this important document *seems* not to have been published in the OJ**; furthermore, **the related pages of the European Judicial Atlas in English, French, Italian and German version** are out-of-date, and **contain no mention of it** (**while the Spanish one does**, as pointed out by our friend Federico Garau over at the Conflictus Legum blog).

It is thus questionable whether, at the moment, the provisions of Reg. No 1393/2007 are applicable in Denmark (at least, if one refers to the official text of it). Any further information is welcome.

Daimler Chrysler v Stolzenberg, Part 9: Luxembourg

The *Stolzenberg* case will also be litigated before the European Court of Justice! Last year, the Court of Appeal of Milan, Italy, referred two questions to the ECJ on the interpretation of the public policy clause of Article 27(1) of the 1968 Brussels Convention.

The ECJ was one of the few major courts in the western world which was missing in this judicial odyssey. It has now lasted for more than 15 years. And it is not over.

Part 1: Canada

The case began in the early 1990s with the collapse of an investment company incorporated in Montreal, Castor Holdings. A bankruptcy was opened in 1992 in Canada. It has been presented by many as the largest ($ 1.5 billion) and the longest bankruptcy in Canadian history.

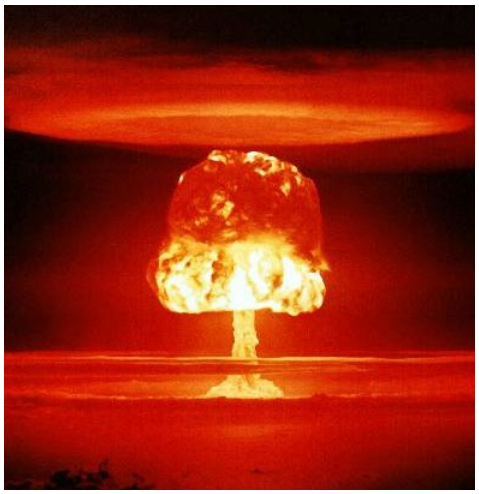
Essentially, the bankruptcy proceedings were about the auditors, Coopers & Lybrand (as they were then). In August 2008, the action against them was still pending. However, proceedings had also been initiated against the directors of the company for distributing $ 15.5 million of dividends in 1991, in the suspect

period. Some of the directors settled with the bankruptcy, but five did not. In August 2008, the latter were eventually sentenced to pay $ 9.7 million. Among the five were the president of Castor, a German national named Stolzenberg, and a Swiss national named Gambazzi.

Part 2: England

Meanwhile, however, a small group of investors had brought proceedings before English courts. In 1996, Daimler Chrysler Canada and its pension fund, CIBC Mellon Trust Co., initiated proceedings against the directors and close to forty other corporate entities. They claimed that their loss in the Castor bankruptcy was the result of wrongful conduct by the directors, including Stolzenberg and Gambazzi.

A key issue in the litigation was the jurisdiction of English courts. None of the 40 defendants had any connection with England, except Stolzenberg, who had once owned a house in London, but, it seems, did not own it anymore when the proceedings were served on the defendants. The case went all the way up the House of Lords, which held in 2000 in Canada Trust Company v. Stolzenberg, Gambazzi and others that what mattered was whether there was one defendant who was domiciled in England when the claim was issued by the English court, not when it was served on the defendants (8 months later).



Since the start of the English proceedings, the defendants had been subjected to a world wide *Mareva* injunction (now freezing order). As a result, they were under a variety of duties of disclosure that, they thought, were unacceptably far reaching. Some never appeared before English courts, but some did and complied for a while. At some point, however, they refused to provide any more information on their assets (which were situated abroad). They did not live in England, so there was not much the English court could do. But the Mareva injunction has been called one of the two nuclear weapons of English civil procedure. The English court pressed the nuclear button. Because they were not complying, the defendants were debarred from defending any action in England. This included the action *on the merits*. The English court then entered into a default

judgment for close to € 400 million. There had been no trial, no assessment of the merits of the case. There was only a procedural sanction: you do not comply, your opponent will get whatever he asks for.

The Stolzenberg litigation entered into a new stage. It was not anymore about what had happened in Canada. It was about whether such a default judgment could be enforced abroad, where the defendants had assets.

Part 3: Germany

Stolzenberg had fled England early on. He was then, and is still now, believed to be living in Germany. Enforcement proceedings were initiated there, but I do not know much about them.

Part 4: New York

One of the corporate defendants in the English proceedings owned a hotel in mid-town Manhattan. In May 2000, enforcement proceedings of the English judgment were initiated in New York. Eventually, the matter came before the New York Court of Appeals (that is, I understand, the supreme court of the state of New York).

In a judgment of May 8, 2003, the Court confirmed that the judgment could be recognised in New York. It held that the English judgment was not incompatible with the requirements of due process of law. Indeed, the court endorsed previous statement of American courts saying that *"[c]onsidering that our own jurisprudence is based on England's, a defendant sued on an English judgment will rarely be in a position to defeat it with such a showing*", and "*any suggestion that [England's] system of courts 'does not provide impartial tribunals or procedures compatible with the requirements of due process of law' borders on the risible*".

Not only the Queen, but also the English, can do no wrong.

Part 5: France

Stolzenberg had some assets in Paris. Enforcement proceedings were thus initiated in France. In a judgment of 30 June 2004, the French Supreme Court for Private and Criminal Matters (*Cour de cassation*) confirmed the enforceability in France of both the *Mareva* injunction and the English default judgment. Although

Stolzenberg's lawyers raised the issue of the compatibility of the judgement with French public policy, they did not insist on the fact that the default judgment was obtained as a consequence of the unwillingness of the defendants to comply with the *Mareva* injunction. The judgement of the *Cour de cassation* is thus silent on the issue.

Part 6: Switzerland

A Swiss lawyer, Gambazzi had obviously assets in his home country. Enforcement proceedings were initiated there as well. But it was reported that, unlike American and French courts, Swiss courts found that the English judgments were a breach of process and thus denied recognition. More precisely, according to the same report, the Swiss Federal Court would have ruled twice on the case in 2004, as enforcement had been sought against the Swiss assets of two former directors of Castor (Gambazzi and Banziger) in two different Swiss *cantons*, and would only have denied recognition for the purpose of enforcement against Gambazzi's assets.

Part 7: Strasbourg

Of course, from the perspective of the defendants, this seemed like a perfect case for the European Court of Human Rights. Are nuclear weapons compliant with Article 6 and the right to a fair trial? This really looks like a good question to ask the Strasbourg court. So, in the early 2000s, some of the defendants to the English proceedings brought an action against the United Kingdom, arguing, inter alia, that being debarred from defending did not comply with Article 6 of the Convention.

Quite remarkably, the action was declared inadmissible by the ECHR at the earliest stage, as "manifestly ill-founded". The Court did not give any reasons for this decision, which is noteworthy when one knows that the court considers that judgments lacking reasons do not comport with the right to a fair trial.

The defendants would have to wait for another opportunity to have their day in (a European) court.

Part 8: Italy

It seems that Gambazzi also had assets in Italy, as enforcement proceedings were

also initiated in Milan. His lawyers challenged the enforceability of the English judgment, arguing that it was contrary to Italian public policy. As the 1968 Brussels Convention governed the enforcement of such judgement, they relied on the public policy clause of Article 27. On 22 August 2007, the Court of Appeal of Milan decided to refer two questions of interpretation of Article 27 to the European Court of Justice.

Part 9: Luxembourg

And here we are now in Luxembourg.

The Court of Milan referred the two following questions (Case C 394/07):

> *1. On the basis of the public-policy clause in Article 27(1) of the Brussels Convention, may the court of the State requested to enforce a judgment take account of the fact that the court of the State which handed down that judgment denied the unsuccessful party the opportunity to present any form of defence following the issue of a debarring order as described [in the grounds of the present Order]?*
>
> *2. Or does the interpretation of that provision in conjunction with the principles to be inferred from Article 26 et seq. of the Convention, concerning the mutual recognition and enforcement of judgments within the Community, preclude the national court from finding that civil proceedings in which a party has been prevented from exercising the rights of the defence, on grounds of a debarring order issued by the court because of that party's failure to comply with a court injunction, are contrary to public policy within the meaning of Article 27(1)?*

So it seems that (some of) the defendants might eventually have their day in a European court.

Italian Conference on the Rome I Reg.: “La nuova disciplina comunitaria della legge applicabile alle obbligazioni contrattuali”

A very interesting conference on the Rome I Regulation will be hosted by the University of Venice “Ca’ Foscari” on Friday 28 November 2008: “**La nuova disciplina comunitaria della legge applicabile alle obbligazioni contrattuali**” (The new EC regime on the law applicable to contractual obligations). The symposium is organised in the frame of a research project carried on by several Italian universities (Milan, LUISS-Guido Carli of Rome, Cagliari, Venice and Macerata) and cofinanced by the Italian Ministry of Research and University (MIUR). Here’s an excerpt of the programme (*our translation; the sessions will be held in Italian, except otherwise specified*):

Welcome and opening remarks: *Pierfrancesco Ghetti* (Rector, University “Ca’ Foscari” of Venice); *Carmelita Camardi*, (Director, Department of Law, University “Ca’ Foscari” of Venice); *Mauro Pizzigati* (President of the Bar Council of Triveneto).

PROBLEMI GENERALI (GENERAL PROBLEMS) (9:30 – 13:00)
Chair: *Nerina Boschiero* (University of Milan)

- *Paul Lagarde* (University of Paris I – Sorbonne): Introduction. Considérations de méthode *(in French)*;
- *Fabrizio Marrella* (University “Ca’ Foscari” of Venice): Funzione ed oggetto dell’autonomia della volontà: il problema della mancata “delocalizzazione” (Function and Object of Party Autonomy: the Issue of “delocalization”);
- *Nerina Boschiero* (University of Milan): I limiti al principio di autonomia derivanti dalle norme imperative, dall’ordine pubblico e dal diritto comunitario derivato (Limits to Party Autonomy: Mandatory Provisions,

Public Policy and Secondary EC Law);
- *Ugo Villani* (University LUISS-Guido Carli of Rome): La legge applicabile in mancanza di scelta dei contraenti (Applicable Law in the Absence of Choice);
- *Andrea Bonomi* (University of Lausanne): Le norme di applicazione necessaria (Overriding Mandatory Provisions);
- *James Fawcett* (University of Nottingham): UK Perspective on Rome I Regulation *(in English)*.

Debate.

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QUESTIONI SPECIFICHE (SPECIFIC ISSUES) (14:30 – 16:00)
Chair: *Laura Picchio Forlati* (University of Padova)

- *Paolo Bertoli* (University of Insubria): Ambito di applicazione e materie escluse: in particolare, la responsabilità precontrattuale (Scope of Application and Excluded Matters: in particular, Precontractual Liability);
- *Paola Piroddi* (University of Cagliari): I contratti di assicurazione (Insurance Contracts);
- *Francesco Seatzu* (University of Cagliari): I contratti conclusi con i consumatori e i contratti individuali di lavoro (Consumer Contracts and Individual Employment Contracts);
- *Gianluca Contaldi* (University of Macerata): I contratti di trasporto (Contracts of Carriage);
- *Angelica Bonfanti* (University of Milan): Le relazioni con le convenzioni internazionali in vigore (Relationships with Existing International Conventions).

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SHORTER REPORTS (16:10 – 16:50)

- *Francesca Villata* (University of Milan): I contratti relativi a strumenti finanziari (Contracts on Financial Instruments);
- *Zeno Crespi Reghizzi* (University of Milan): Le conseguenze della nullità del contratto (Consequences of Nullity of the Contract);
- *Nerina Boschiero* (University of Milan): I contratti di proprietà

intellettuale tra Roma I e Roma II (Contracts on Intellectual Property Rights between Rome I and Rome II Regulations).

Debate.

Concluding remarks: *Tullio Treves* (University of Milan; Judge, ITLOS).

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Due to organisational issues, participation to the conference is restricted to a limited number of invited scholars. Anyway, **the sessions will be recorded and made available afterwards on the website of the Italian Society of International Law** (SIDI), so that interested parties unable to attend may follow the conference. In addition, **the papers presented at the colloquium will be published both in English and Italian edition**. Further information will be provided on our site as soon as available.

(Many thanks to Prof. Nerina Boschiero)

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2008)

Recently, the November/December 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)**:

- ***B. Hess***: "Rechtspolitische Überlegungen zur Umsetzung von Art. 15 der Europäischen Zustellungsverordnung – VO (EG) Nr. 1393/2007" – the English abstract reads as follows:

The article deals with article 15 EC Regulation on Service of Documents as

revised by Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. The author recommends to extend the application of cross border direct service of documents within the EU under German law and in this context makes a concrete proposal for the implementation of article 15 into a revised article 1071 German Code of Civil Procedure.

- ***C. Heinze***: "Beweissicherung im europäischen Zivilprozessrecht" – the English abstract reads as follows:

Measures to preserve evidence for judicial proceedings are of vital importance for any claimant trying to prove facts which are outside his own sphere of influence. The procedural laws in Europe differ in their approach to such measures: while some regard them as a form of provisional relief, others consider these measures to be part of the evidentiary proceedings before the court. In European law, evidence measures lie at the intersection of three different enactments of the Community, namely Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and (in intellectual property disputes) Art. 7 of Directive 2004/48/EC on the enforcement of intellectual property rights. As a result of the European Court of Justice's judgment in Case C-104/03, St. Paul Dairy Industries v. Unibel Exser BVBA, most commentators believe that evidence measures fall exclusively under the evidence regulation (EC) No 1206/2001 and not under the more general Brussels I Regulation (EC) No 44/2001. Taking into consideration the ECJ's decision in St. Paul and the opinion of Advocate General Kokott in Case C-175/06, Alessandro Tedesco v. Tomasoni Fittings Srl and RWO Marine Equipment Ltd. (removed from register before judgment), the following article discusses the application of both regulations on measures to preserve evidence. It comes to the conclusion that measures to secure evidence fall under the evidence Regulation No 1206/2001 if they involve an act of judicial cognizance in taking evidence in another Member State which is directly relevant for the decision of the case (no fishing expedition). The article further proposes a supplementary application of the Brussels I Regulation (EC) No 44/2001 for those matters which are not covered by the evidence regulation.

Such matters firstly include the jurisdiction of the court requesting to take evidence, secondly the jurisdiction of the court where the evidence is located to secure this evidence if a party directly applies to that court without making use of the cross-border procedures of the evidence regulation, as well as the cross-border enforcement of substantive information rights without any act of judicial cognizance in the other Member State.

In those situations, it seems convincing to regard evidence measures which at least partially aim at securing evidence as a sub-category of provisional and protective measures and therefore apply the twofold system for provisional measures laid down in the van Uden judgment of the Luxembourg court (Case C-391/95, van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line and Another).

- ***U. Weinbörner***: "Die Neustrukturierung und Aktualisierung des Länderteils der Rechtshilfeordnung für Zivilsachen (ZRHO)" – the English abstract reads as follows:

A statute has transferred matters of international judicial assistance in civil law to the Federal Office of Justice (BfJ) in Bonn. The BfJ is now also responsible for processing individual cases of reciprocal mutual assistance with other countries in civil, commercial and administrative matters. Accordingly, since January 1, 2007, the BfJ is also in charge of editing the foreign country section of the Civil Judicial Assistance Ordinance (ZRHO). This section is an administrative directive. It governs how reciprocity in mutual assistance proceedings takes place. The working directives of the ZRHO, which appear in a loose-leaf collection and are only updated once a year, are no longer up-to-date in many parts.

A Working Group (made up of representatives of the federal government and the German states) was established on the basis of a resolution by the 2007 Conference of Civil Representatives in Hamburg. Under the leadership of the BfJ, it has drawn up a new standardised structure for the foreign country section, which is intended to guide the user in a clear and easily understandable way and provides additional information in the explanations of the individual requests.

With the set-up of a procedure for permanent online updating, including the IR-

online database of the Ministry of Justice of North Rhine-Westphalia, the backlog in updates can be dealt with and new information can be published quickly. The online offer portrayed below is produced by the BfJ and the Ministry of Justice of North Rhine-Westphalia. It reflects the agreement already achieved between the federal government and the German states concerning the instructions for specific countries. It can be used as a basis for the administrative orders of the foreign country section as a whole. The complete update will take at least another two years. That is due to two factors: the amount of work needed for the regular update of the information, and the re-structuring of the foreign country section.

- ***U. P. Gruber:*** "Die Brüssel IIa-VO und öffentlich-rechtliche Schutzmaßnahmen"
- ***A. Staudinger***: "Gemeinschaftsrechtlicher Erfüllungsortgerichtsstand bei grenzüberschreitender Luftbeförderung"
- ***P. Schlosser***: "Nichtanerkennung eines Schiedsspruchs mangels gültiger Schiedsvereinbarung"
- ***R. Geimer***: "Enge Auslegung der Ausnahmeklausel des Art. 34 Nr. 2 EuGVVO – Der EuGH marginalisiert den 'Federstrich' des Reformgesetzgebers"
- ***H. Roth:*** "Zur verbleibenden Bedeutung der ordnungsgemäßen Zustellung bei Art. 34 Nr. 2 EuGVVO"
- ***E. Jayme/C. F. Nordmeier:*** "Multimodaler Transport: Zur Anknüpfung an den hypothetischen Teilstreckenvertrag im Internationalen Transportrecht – Ist § 452a HGB Kollisions- oder Sachnorm?"
- ***T. Domej:*** "Negative Feststellungsklagen im Deliktsgerichtsstand"
- ***P. Oberhammer/M. Slonina:*** "Konnexität durch Kompensation?"
- ***T. Struycken/B. Sujecki:*** "Das niederländische Gesetz zur Regelung des internationalen Sachenrechts" – the English abstract reads as follows:

On 1 May 2008, the new Dutch Act on Conflict of Laws in cases of Property (Wet Conflictenrecht Goederenrecht) came into force. This Act is the latest one in a series of legislative measures in the field of Private International Law in the Netherlands. In this Act the Dutch legislator incorporated the most important Dutch case law in the field of international property law. Additionally, some principle provisions were introduced which affect the classical topics in the

field of international property law. This article will give a short overview of the key issues of this new Act.

Further, this issue contains the following **materials**:

- Niederlande: Gesetz vom 25.2.2008 über die Regelung des Kollisionsrechts der sachenrechtlichen Verhältnisse von Sachen, Forderung, Aktien sowie den Effektengiroverkehr (Gesetz über das Kollisionsrecht des Sachenrechts) Staatsblad 2008, Nr. 70

As well as the following **information**:

- ***M. Tamm***: "Tagungsbericht zum Symposium anlässlich des 65. Geburtstags von Prof. Dr. Harald Koch – Thema: `Nationale und internationale Perspektiven für ein soziales Privat- und Prozessrecht`"
- ***H. Krüger***: "Syrien: Neues Schiedsrecht"

Ontario Court Orders Children Returned to United Kingdom

In *Courtney v. Springfield* (available here) the parties had cohabitated as a same-sex couple for nine years in the United Kingdom and the defendant had adopted two children (the couple could not legally adopt them as a couple). The defendant separated from the plaintiff in 2003 and moved to Ontario with the children in 2007. The plaintiff sought the return of the children, based on the Hague Convention on the Civil Aspects of International Child Abduction. She won: the court ordered the return of the children to the United Kingdom.

The case concerns the following issues: (a) did the plaintiff, who had not adopted the children, have "rights of custody" over the children; (b) was the plaintiff exercising those rights at the time of removal (since the parties had been separated for four years), (c) were there other reasons the court should nonetheless decline to order the return of the children. The answers: yes, yes,

and no. The most complex analysis is on the first of these issues, and the case contains several interesting factual wrinkles.