First Issue of 2010's ERA Forum

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

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

> ***1 European civil procedure***
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> *The Brussels I Regulation lays down rules governing the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters in the Member States of the European Union. It supersedes the Brussels Convention of 1968, which was applicable between the Member States before the Regulation entered into force in 2002. The Brussels I Regulation is currently under review by the European Commission. Among the issues raised are those concerning the treatment of choice of court agreements. By an exclusive choice of court agreement, the parties designate which court will decide disputes in connection with a particular legal relationship, to the exclusion of the jurisdiction of any other courts. Two of the articles illustrate current issues dealing with choice of court agreements.*
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> *The first one concerns the admissibility of damages in case of breach of a choice of court agreement. Gilles Cuniberti and Marta Requejo explain how, in the last decade, English and Spanish Courts have awarded damages in case of a breach of this clause. Until recently, the most efficient remedy was to seek an antisuit injunction in England, an order restraining a party from commencing or continuing proceedings in a foreign jurisdiction. This was however considered incompatible with European Union law in several cases decided by the European Court of Justice. The European Commission has nevertheless suggested in the Green Paper on the review of the Brussels I Regulation that the efficiency of jurisdiction agreements could be strengthened by granting damages for breach of such agreements.*
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> *The second article by Marta Pertegás presents the Hague Convention of 30 June 2005 on Choice of Court Agreement. This instrument, not yet in force, establishes uniform rules on jurisdiction and on recognition and enforcement of*

foreign judgments in civil or commercial matters. The Convention would prevail over the Brussels I Regulation in cases where one party resides in an EU Member State and the other in a non-EU Member State that is a party to the Convention. The author argues that, in order to ensure that co-ordination is achieved between the Convention and the future revised European regulation, the Convention should serve as a source of inspiration as to possible amendments to the Brussels I Regulation with regard to choice of court clauses.

2 Private international law

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

The conflict of law rules for non-contractual obligations have also been harmonised at EU level to complement both the Brussels I Regulation (which relates to both contractual and non-contractual obligations) and the Rome I Convention (nowadays a Regulation). The Rome II Regulation5 creates a harmonised set of rules within the European Union to govern choice of law in civil and commercial matters concerning non-contractual obligations. One of the fields of tort law it regulates is product liability. The article of Guillermo Palao Moreno, which is of high practical importance, analyses the conflict of

law rule for product liability cases contained in Article 5 of the Rome II Regulation. In his thorough analysis of Article 5 of the Rome II Regulation, read in conjunction with the other provisions of the Regulation, the author points out that its application could however lead to an undesirable result. Although the inclusion of a specific provision for product liability primarily aims at avoiding the application of the general conflict of law rule of the law of the country in which the damage occurs, Article 5 maintains those solutions present in paragraphs 2 and 3 of Article 4. Furthermore, the author calls for clarification as to the coordination of the Rome II Regulation with the Hague Convention of 2 October 1973 on the Law Applicable to Products Liability.

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

Guest Editorial: Fentiman on "Private International Law and the Downturn"

Richard Fentiman is Reader in Private International Law at the University of Cambridge, where he teaches the postgraduate course on International Commercial Litigation. His book on *International Commercial Litigation* was published by Oxford University Press in February 2010. He is the author of *Foreign Law in English Courts* (OUP, 1998), and he gave a course at the Hague Academy of International Law on *The Appropriate Forum in International Litigation* in 2002. His recent publications include 'The Significance of Close Connection' in Ahern and Binchy*, The Rome II Regulation on the Law Applicable to Non-Contractual Obligations* (Nijhoff, 2009) , and 'Choice of Law in Europe: Uniformity and Integration' (2008) 82 Tulane LR 2021. He recently gave evidence to the House of Lords European Union Committee on the reform of the Brussels I Regulation.

Abstract

An increase in litigation in the wake of the economic downturn was widely anticipated, and with it a rise in cross-border disputes with conflicts elements. Yet the expected flood of cases has not materialised, despite a rise in claims in commercial centres such as London. There are reasons why disputes increase in any slump. But the current downturn has special features. These suggest what kind of disputes may arise, including conflicts disputes, and they explain why the number of claims is less than expected. A surge in litigation may yet occur, as initial attempts at compromise fail. But, whatever the number of disputes, private international law may have a central role in regulating the downturn's legal effects.

Private International Law and the Downturn

1. Facts and figures

Is private international law affected by the current downturn? An intuitive answer is that commercial disputes proliferate with economic contraction. Conflicts disputes increase correspondingly because so much commercial activity is transnational. This is apparently verified by recent developments in London, venue for so many commercial disputes. With the world's leading economies in recession, 2009 saw an increase of 20% on the previous year in claims initiated in the London Commercial Court. ((Financial Times, 8 April 2010.)) 1,225 claim forms were issued, close to the average in the early years of the last decade, and the highest number since 2002. ((When 1,213 claims were initiated: Admiralty and Commercial Court Report 2002-2003, [11].)) More striking still, cases submitted to the London Court of International Arbitration reached a record high in 2009, an annual increase of almost 30%. ((Financial Times, 8 April 2010.)) Many of these claims are likely to have foreign elements. Most commercial disputes in London involve foreign parties, or foreign laws, or foreign assets, or parallel foreign proceedings, or acts or omissions abroad – often in combination. ((The Commercial and Admiralty Court Report 2005-2006 records that

approximately 80% of claims in that year involved at least one non-UK party.))

Such figures need cautious handling. Of course some recent cases originate in the downturn, some with conflicts implications. ((As, for example, *Jefferies International Ltd v Landsbanki Islands HF* [2009] EWHC 894 (Comm).)) But only proper investigation will reveal the true cause (or causes) of the rise in claims in London. Nor can it be a complete explanation to attribute the increase to the recession. The risk of default may have heightened, but the number of transactions from which litigation might arise increased in the preceding years of plenty, enhancing the risk of litigation, downturn or not. Nor does the increase in claims mean that conflicts issues are at stake. How many recent actions in the Commercial Court involve contested issues of private international law remains a matter of speculation until they go to trial, as many will not, given the tendency of commercial disputes to settle. ((Commercial and Admiralty Court Report 2004-2005, 3.)) The nature of arbitrated disputes is even harder to discern, given the privacy of the process. ((Unless ancillary proceedings arise in court.))

Such caveats aside, the rise in pending disputes in London gives pause for thought, and begs intriguing questions. Has the downturn generated more disputes? Does this mean more conflicts disputes? What kind of conflicts disputes? How will they be resolved – in court, by arbitration, or by negotiation? And what of the biggest puzzle? Why has the slump not triggered still more claims? A proper response to these questions demands an empirical study, traversing the economics and sociology of litigation. The following brief remarks are no such thing, but attempt at least to capture some impressions, and suggest some possibilities.

2. Disputes and the economy

Litigation can be generated by economic growth as well as by retrenchment. Transactions multiply with economic expansion, increasing the potential for disputes. Some litigants may also be more aggressive in pursuing or defending proceedings if cushioned by prosperity from the risk of losing. But the risk of default is surely less when times are good, when credit is cheaper, and transaction costs stable. Experience confirms that economic crises spawn litigation. This is reflected in microcosm by the spike in claims in the London

Commercial Court in the late 1990s. 1,808 claims were initiated in 1999, explained in large part by the implosion of the Lloyd's insurance market. ((Admiralty and Commercial Court Report 2005-2006, 5.))

Creditors become impatient in times of diminished liquidity. They are more likely to seek recovery through litigation rather than forgive a debt or reschedule. There is also an increased risk in a downturn that counterparties will default, or seek to escape performance, as transaction costs rise with the increased price of services and materials, and the scarcity of credit. But default is not always forced on obligors by pressures beyond their control. Some may calculate that deliberate repudiation of their obligations, with the risk of litigation, is preferable to adhering to a newly onerous bargain. With credit and liquidity reduced many litigants may have a heightened sensitivity to the cost of funding litigation, and to the risk of losing in court. But economic adversity may also alter the balance of risk, making the cost of litigation seem more attractive than the cost of performance.

Excuses for non-performance, such as incapacity, mistake, fraud, duress or illegality, thus become important, with inevitable conflicts implications in cross-border transactions. Disputes about the identity of the applicable law are the consequence. But this will often be contractually agreed, forcing a defaulting party to argue that the contract is unenforceable by reference to another law. As cross-border litigation increases, so does reliance on overriding rules and public policy. A consequence may be more reliance on overriding prohibitions against onerous interest provisions or exemption clauses, coupled perhaps with pre-emptive litigation in courts where such prohibitions exist. ((A pre-downturn example of pre-emptive reliance on mandatory rules and public policy to invalidate provisions for the payment of interest is *JP Morgan Europe Ltd v Primacom AG* [2005] EWHC 508 (Comm).))

Just as economic adversity encourages default, so it precipitates collateral litigation against commercial partners, such as guarantors, insurers, and reinsurers, offering further potential for cross-border litigation. Such collateral disputes often concern whether the terms of a secondary contract incorporate those of a primary contract, not least terms affecting jurisdiction, arbitration and choice of law. ((Fentiman, International Commercial Litigation (Oxford: OUP, 2010), [4.71] – [4.86].))

It is also more likely in straightened times that parties to a bad bargain will allege mis-selling, or blame their advisers, perhaps suing for misrepresentation, or alleging negligence against a third party such as a broker or auditor. ((A pre-downturn example, subject to English law, but involving the alleged mis-selling of investments in complex financial instruments, is *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm).)) It becomes important to establish whether the creditworthiness of a counterparty, or the value of an asset, or the risk of a transaction, was misstated – and to address any related conflicts issues. Nor are lawyers immune from such collateral litigation ((See *Haugesund Kommune v Depfa ACS Bank* [2010] EWHC 227 (Comm) (advice as to capacity to contract).)) – not least those who gave insufficiently qualified opinions as to governing law and jurisdiction.

Allegations of fraud also increase with economic stringency – as indeed does fraud – as trading conditions worsen and liquidity deteriorates. ((Mitchell and Taylor, 'The Fraud Litigation Spiral' NLJ 6 February 2010, 175.)) Sellers misrepresent their products, straightened borrowers conceal their circumstances to obtain finance, traders lacking liquidity charge their assets (often receivables) to different lenders to obtain funds. In cross-border disputes this highlights the treatment of pre-contractual fault, and the vexed question of priority between competing assignments of the same debt. Because fraud is often associated with attempts to conceal assets, applications for transnational freezing and disclosure orders also become more frequent.

Governments also tend to respond to economic crises with protective legislation, increasing the legal regulation of businesses and markets, and restricting economically sensitive transactions. The effect is to highlight the importance of conflicts rules governing discharge and illegality, and in particular the treatment of supervening illegality in the place of performance. Old questions may also arise concerning the effect of moratorium legislation, and the expropriation of assets. ((As in *Jefferies International Ltd v Landsbanki Islands HF* [2009] EWHC 894 (Comm).))

So reasons to litigate abound in troubled times. But so does the readiness to sue. Some potential litigants may be deterred from doing so because the liquidity necessary to pursue litigation may be more limited, and the risk of failure more serious, in adverse economic conditions. But not those whose last chance to avoid closure or insolvency is a successful claim – colloquially, 'bet-all' claimants. And

not liquidators, whose task is to maximize a company's assets by recovering its losses, or pursuing its debtors, or disputing disposals of its property. Liquidators are especially prone to challenge purported transfers of a company's accounts receivable – raising (again) vexed questions about the effectiveness of cross-border assignments. ((An older example is *Raiffeisen Zentralbank Osterreich AG v An Feng Steel Co Ltd.* [2001] EWCA Civ 68; [2001] QB 825.))

Such considerations explain why and how litigation follows in the wake of economic crisis. But this may not occasion more trials on the merits, still less more final judgments. Nor for that reason may choice of law disputes increase. Commercial disputes are almost always settled, often when the identity of the forum becomes clear. ((Commercial and Admiralty Court Guide 2004-2005, 3.)) True to form, any additional disputes in the London Commercial Court are likely to be interlocutory, concerning jurisdiction and interim relief, the key components in cross-border litigation. The staying of actions, the restraint of foreign proceedings, and the disclosure and freezing of foreign assets, are likely to loom large. Given the likely complexity of any disputes, orders for case-management may assume special importance – with potential cross-border implications if proceedings in different countries are involved. Moreover, at least in the European Union, where the Brussels I Regulation emphasises the importance of pre-emptive forum shopping, many disputes are likely to involve first-strike actions, often no doubt for declaratory relief. ((Fentiman, 'Parallel Proceedings and Jurisdiction Agreements in Europe', in de Vareilles-Sommières, ed, Forum Shopping in the European Judicial Area (Oxford: Hart, 2007).))

3. A different landscape

The landscape of litigation in the present downturn has novel features unconnected with the economy, which may affect the incidence and nature of disputes. Two are special to Europe but have particular significance for conflicts lawyers.

First, there are now enhanced techniques for reducing the financial risk of litigation, making it more attractive – or less unattractive. The cost of litigation determines whether to initiate or defend proceedings, and (importantly) where to do so. But the financing of litigation has been transformed in recent years by the possibility of third party funding. (('Litigation finance follows credit crunch',

Financial Times 27 January 2010; Litigation and Business: Transatlantic Trends (Lloyds, 2008), 9.)) Evidence of the practice in London is scant. But a growing number of third party investors are prepared to finance claims, conditional on a share of the proceeds if the claim succeeds. In theory at least this possibility is especially appealing in a downturn, both to claimants, whose ability to finance proceedings may otherwise be compromised, and by investors, for whom the value of more conventional asset classes may seem uncertain.

Secondly, the popularity of arbitration has increased. Claims before the London Court of International Arbitration rose significantly by 131% between 2005 and 2009, a trend matched by other arbitral institutions. ((Financial Times, 16 April 2010, 11, citing figures sourced from the Singapore International Arbitration Centre. In the period 2005-2009 the international disputes administered by the other leading centres increased as follows: ICC, Paris 57%; American Arbitration Association 44%; the Singapore International Arbitration Centre 153%; the China International Economics and Trade Arbitration Commission 31%.)) At least some of those disputes would once almost certainly have been tried in court. One explanation is the perennial concern (not always justified) that commercial litigation is excessively lengthy, complex, and costly by comparison with arbitration. ((Concerns about the efficiency of lengthy cases before the London Commercial Court prompted a review of its procedures culminating in the Admiralty and Commercial Courts Guide 2009.)) Another is the increasing tendency to include arbitration clauses in species of contract which previously would have contained jurisdiction agreements. This is especially so in financial transactions. Financial institutions are less reluctant to arbitrate than convention once dictated. This partly reflects a desire to escape the inflexibility of the Brussels jurisdiction regime, preoccupied as it is with avoiding parallel proceedings even to the detriment of jurisdiction agreements. ((Sandy and O'Shea, 'Europe, Enforcement and the English'.)) The consequence has been an increase in hybrid clauses providing in the alternative for litigation or arbitration. ((See, for example, the clause at issue in *Law Debenture Trust Corporation Plc v Elektrim Finance BV* [2005] EWHC 1412 (Ch).)) Given the prevalence of disputes between financial institutions in the downturn, the sensitivity of the transactions involved, and concerns about media scrutiny, parties faced with that choice may well favour arbitration. The effect is not, however, to rule out litigation entirely. Arbitration often generates ancillary judicial proceedings, not least concerning the restraint of foreign proceedings commenced in defiance of an arbitration

clause.

Thirdly, the downturn coincides with important changes in the European conflicts regime, with the coming into force of both the Rome I and Rome II Regulations. It is perhaps unfortunate that many of the conflicts issues which are likely to arise in the near future are governed by novel provisions, causing uncertainty, and itself generating more litigation. Foremost among these are Article 9 of Rome I (likely to become contentious as obligors plead illegality to escape performance), and Articles 4 and 12 of Rome II (regulating the likely crop of claims for mis-selling and negligent advice). It is especially regrettable that Article 14 of Rome I remains unreconstructed and ambiguous, given that the assignment of debts underlies so many contentious transactions.

Finally, any increase in litigation poses a challenge for the Brussels I Regulation, as interpreted in such recent cases as *Owusu*, ((Case C-281/02 *Owusu v Jackson* [2005] ECR I-553.)) *Gasser*, ((Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693.)) *Turner* ((Case C-159/02 *Turner v Grovit* [2004] ECR I-3565.)) and *West Tankers*. ((C-185/07 *Allianz Spa v West Tankers Inc* [2009] 3 WLR 696.)) The inappropriateness of the Regulation for handling high-value, multi-jurisdictional disputes has often been noted, and needs no elaboration here. ((Fentiman, International Commercial Litigation (Oxford, OUP, 2010), [1.40] – [1.47].)) But a proliferation of such disputes can only impose further stress on a regime which destabilises jurisdiction and arbitration agreements, and militates against the allocation of cases to the most appropriate forum. The Brussels regime may indeed have its own role in encouraging litigation, by inciting the prudent to seise their preferred forum early so as to win the all-important battle of the courts. ((See, Fentiman, 'Parallel Proceedings and Jurisdiction Agreements in Europe', above.))

4. A different downturn

Not all slumps are the same, and the present crisis has distinctive features of particular interest to conflicts lawyers. Most obviously, this is the first downturn to affect truly global markets. The last two decades have seen an increase in cross-border transactions, encouraged by the globalization of finance, enhanced communications, and the growth of emerging markets for trade and investment.

The present crisis also follows a period of unprecedented economic expansion. The downturn was preceded by an economic boom, fuelled by plentiful credit, in which the volume of global business increased – and with it the risk of cross-border litigation even in the best of times.

Again, the first effect of the crisis was an unprecedented credit drought, triggered by paralysis in the wholesale lending markets. The effect may be disputes in which the obligor's default was triggered by the denial or withdrawal of the credit necessary to fund a project, or a purchase, or an investment. There is evidence that many recent disputes in the London Court of International Arbitration concern default prompted by a lack of credit. ((Financial Times, 8 April 2010, quoting James Clanchy, LCIA deputy director-general.)) Another effect has been remarkable volatility in the financial markets, with the value of securities, currencies and commodities not simply falling (as might be expected), but rising and falling unpredictably. (('Global Markets Turn Volatile'.)) Disputes about the assessment of loss may result. Market fluctuations also make it hard for potential litigants to predict whether their losses might evaporate with a market upswing, raising strategic problems for both obligors and obligees. Is it time to default; is it time to sue? ((This may further explain why less litigation has followed the downturn than expected.))

The dearth of credit has also prompted numerous business failures, leading to an increase in insolvency and associated disputes – often disputes with a foreign element, involving the collapse of multi-national businesses, and those with foreign creditors. At its simplest liquidators are likely to pursue unpaid debts and recover losses incurred by failed transactions. But they are equally likely to attack any disposals of the company's assets. This might involve denying the effectiveness of any assignments of a business's receivables or loan book, perhaps by challenging the proprietary effect of such disposals. Or it may involve recharacterising a transaction, by alleging perhaps that it creates a security interest, and so fails for want of form or registration. ((Fentiman, International Commercial Litigation (Oxford: OUP, 2010), [3.177] – [3.181].)) Both attacks beg choice of law questions. What law governs the effectiveness of the assignment of a debt, and the characterisation of a transaction?

The decade before the downturn also saw an increase in the use of complex financing techniques, and increased investment in novel investment vehicles and emerging markets. The legal structure of such techniques is largely untested, and

the risk associated with such investments was often unclear. ((See eg the high-risk swap transactions involved in *Haugesund Kommune v DEPFA ACS Bank* [2009] EWHC 2227 (Comm).)) Cases probing the effectiveness of such transactions might be expected, as are claims for mis-selling, in which investors allege that the risks were either concealed or unexplained. ((A precursor is the dispute in *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm), in which the claim failed.))

Of special importance has been the use of derivatives, principally as a means to mitigate the risk of fluctuating markets, and the development of products linked to the securitization of debt. That one type of derivative, the credit default swap, functions (in effect) as insurance against default under a loan or bond, suggests that such transactions are increasingly likely to be litigated. But the potential for disputes arising from securitization is especially instructive. Traditional 'vanilla' lending – finance in return for repayment and interest – depends on familiar contractual principles, against a tolerably stable conflicts background. So too does the straightforward issue of securities involving investment in the issuer's business. But the predominant financing technique of recent years has been securitization. This embraces a variety of structures with at their core the issue of securities in the form of bonds, backed by the bulk assignment of debt to the issuer, by legal vehicles whose only purpose is to hold the assigned assets and issue the securities. It has also spawned a parallel market in devices such as credit derivatives, effectively a means of betting on the value of securitized assets. Such structures provide finance to the owner of the underlying assets, profits for the issuer, and investment vehicles for those purchasing the securities and wagering on their value. But the legal implications have yet to be fully tested, certainly in a cross-border context. ((Numerous domestic disputes have arisen in the United States.))

Any litigation arising from such structures may seem familiar. Investors facing significant losses are likely to sue issuers for breach of warranty and misrepresentation, or claim from an issue's underwriters, or even pursue the debt's original owner (perhaps for fraud or negligence). So too the asset's original owner may face claims from an issuer. But securitization may be an especially fertile source of litigation for several reasons. ((For an account of the inter-party 'frictions' underlying securitization, each a potential source of litigation, see Ashcraft and Schuermann, *Understanding the Securitization of Subprime*

Mortgage Credit, Federal Reserve Bank of New York Staff Reports, no 318 (March 2008).)) First, a typical securitization involves several contracts between different parties, creating a web of potential claims and counterclaims, involving the borrowers whose debts are securitized, the asset pool's original owner, the issuer of the securities, and the disappointed investors. Secondly, each of the relationships between the several key parties is asymmetric, in so far as one party is likely to have better information than the other concerning value and risk. ((As insightfully explained by Ashcraft and Schuermann, above.)) When one party's position sours such asymmetry leads inevitably to accusations of misrepresentation and non-disclosure. Thirdly, particular difficulty arises where the effectiveness of such arrangements is questioned, and in particular the assignment of the underlying assets to the issuer. These difficulties are magnified where those assignments involve parties from different jurisdictions, creating intensely difficult (if all-too familiar) questions about the cross-border assignment of debts. ((It also lends particular urgency to the debate surrounding the future of the Article 14 of the Rome I Regulation.))

The present downturn also follows a period in which normal business prudence was to some extent ignored. Anecdotal evidence suggests that a combination of market pressure and easy profits meant that transactions were completed in haste, or with a degree of complacency about the legal implications. Of particular interest to conflicts lawyers, there is evidence of unthinking reliance on standardised documentation, of surprising inattention to the language of jurisdiction agreements, and a tendency to ignore qualified legal opinions as to the effectiveness of transactions.

5. To sue or not to sue?

Given the severity of the downturn, and the scale of the losses incurred, a substantial increase in commercial litigation was widely anticipated. ((‘Credit crisis could lead to surge in litigation’, Timesonline, 10 August 2007.)) True, the number of claims has risen in London. But the expected deluge of litigation has not – or has not yet – materialised. As the judge responsible for the London Commercial Court has said, ‘no one has encountered what I call a tidal wave of litigation’. ((Gross J, Judge in Charge of the Commercial Court, quoted in the

Financial Times, 8 April 2010.)) Why is this so?

Legal obstacles may be one reason. A spate of claims related to the mis-selling of financial products has long been expected, cast as actions for fraudulent or negligent misrepresentation. But such claims are inherently problematic, and one judge recently described a sophisticated investor's case as a 'fantasy' and 'commercially unreal'. ((*JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm). It has been suggested that the US fraud proceedings recently brought by the SEC against Goldman Sachs may become a template for litigation by private claimants: 'Wall Street beware: the lawyers are coming', 'Regulator's move risks opening lawsuit floodgates', Financial Times 18 April 2010.)) Certainly, corporate investors may have difficulty in establishing the reliance necessary to found liability, ((See Bankers Trust International Plc v PT Dharmala Sakti Sejahtera (No 2) [1996] CLC 518.)) just as fraud or negligence may be hard to make out against financial institutions with robust practices. ((See *Luminent Mortgage Capital Inc v Merrill Lynch & Co* (20 August 2009), USDC ED Pennsylvania (Philadelphia).)) In the context of an endemic market collapse claimants may also face difficult questions of causation and remoteness in proving loss. ((A feature of recent US litigation, illustrated by *Luminent Mortgage Capital Inc v Merrill Lynch & Co*, above.)) Moreover, and of particular importance, the parties' dealings are likely to be subject to contractual disclaimers and exemption clauses designed to forestall litigation. ((JP Morgan Chase Bank v Springwell Navigation Corporation [2008] EWHC 1186 (Comm); see further, Peekay Intermark Ltd v ANZ Banking Group Ltd [2006] EWCA Civ 386; [2006] 2 Lloyd's Rep 511.))

Nor are contractual claims for breach as likely as might be supposed. Commercial contracts are not meant to be litigated, but to regulate matters of performance and discharge autonomously. Potential claimants may be stopped short by robust exemption or force majeure clauses. Or their rights may be put beyond doubt by events of default clauses and warranties, or reinforced by indemnities, making any defence unsustainable. Such drafting obstacles may not always prevent litigation, given the creativity of lawyers, and what may be at stake. But they make it harder, more costly, and more risky, so deterring claimants and persuading defendants to capitulate.

There are also special incentives to resolve disputes arising from the downturn commercially, by negotiation. Where this cannot be achieved there may be

incentives to resolve the dispute without the full panoply of litigation, by arbitration (perhaps post-dispute arbitration) or other alternative means. One reason is that one or both parties may be financial institutions reluctant to see their differences aired in public in court. The sensitivity of the commercial information involved, and the likelihood of media attention, may incline such litigants to resolve their differences by negotiation. Especially in the financial markets, the inter-connectedness of business provides two further reasons for preferring the amicable settlement of disputes. The need to preserve commercial relations for the sake of future business may incline the parties towards compromise, without the hostility engendered by litigation. The inter-relatedness of the markets also suggests that the roles of the same two parties may be reversed in different disputes, the potential claimant in one being the potential defendant in another. Where cases involve claims and counter-claims between financial institutions there is a natural tendency to seek an accounting solution by means of a negotiated set-off.

A negotiated solution is especially attractive because of the degree to which litigation in the present climate may itself impair the parties' commercial effectiveness. A feature of the downturn is the pervasiveness of its effects. The scale of the crisis, and the number of transactions affected, makes its impact systemic, or at least ubiquitous. This has particular consequences. A party faced with default by numerous counterparties is more likely to resolve its problems by negotiation. It is one thing to pursue a single claim, quite another to embark on multiple actions involving different parties, which may come to dominate a company's business. The widespread nature of the crisis also means that the claimant in one dispute may be the defendant in another. Many potential claimants may themselves have defaulted in other transactions. To pursue and defend both actions would be to fight on two fronts. The cost and complexity of such litigation, consuming a company's business, is deeply unattractive. Companies may be willing to litigate one or even several matters where this represents a sound investment, and the benefit outweighs the cost, but not to amend their business plan by devoting their resources largely to pursuing and defending claims.

This is not to ignore the recent increase in proceedings in London. But the rise in claims is compatible with suggesting that most will be resolved by negotiation. Whatever the incentives to achieve a commercial solution a claimant may initiate

proceedings to preserve its position. To commence proceedings was once regarded as a hostile act, as a last resort as likely to impair compromise as encourage it. But, at least in Europe, Articles 27 and 28 of the Brussels Regulation compel the parties to initiate proceedings early – indeed, prematurely – by giving priority in parallel proceedings to the court first seised. Many of the claims recently initiated in the London Commercial Court (as in other Member States) may have just this pre-emptive purpose. Whether the presence of such holding claims will impair the chances of reaching a commercial solution in particular cases remains to be seen. But to sue is not at odds with a desire for compromise.

To say that fewer disputes have gone to law than many expected requires, however, three important qualifications. First, pre-dispute legal business is booming. It is apparent that many commercial parties have sought legal advice to establish their rights and liabilities in the wake of the downturn. Secondly, many companies, both sellers and investors, have set aside funds to cover the costs of potential litigation. In that sense, the legal impact of the downturn is already significant. Thirdly, what will happen next is unclear. There will be cases in which any hope of a commercial solution will evaporate as positions harden. There will be others in which such a solution is impossible because the legal position is uncertain. There may even be some where the parties' differences turn on questions of private international law. Such cases may yet become contested actions before courts or arbitrators. As this suggests, it is too early to tell what the true consequences of the downturn will be, for cross-border litigation, and for the conflict of laws. But there is growing awareness amongst practitioners that a new phase is about to begin, as it becomes clearer which disputes can be resolved amicably and which cannot – a phase of adjudication not compromise. In that sense, the story of the downturn's impact on cross-border disputes cannot yet be written.

6. Private international law and the downturn

It is important to ask whether cross-border disputes will increase with the downturn. Any rise in litigation or arbitration matters to the parties, and to the arbitrators, courts and lawyers whose business is adjudication. It has a public

policy dimension, concerning the use of judicial resources. It also has economic effects. The cost of litigation and the ability of parties to recover their commercial losses are financial consequences of the downturn as much as those more commonly reported. The legal impact of any rise in cross-border cases may also be significant, not least for private international law. Litigation creates law. The more issues there are before the courts, the more the law evolves at the hands of the judges. It is perverse to wish for more cases. But when they arise old questions are answered, and new ones posed.

In the end, however, the importance of the downturn for private international law does not depend entirely on the volume of cross-border disputes. It does not turn alone on the work load of courts and arbitrators, or any increase in contentious conflicts questions, or even on whether the parties disagree at all. Which court has jurisdiction, which law governs, whether a judgment is enforceable, whether an injunction is available, are matters which may frame the parties' negotiations, or underpin the advice of lawyers to their clients. The rules of private international law have a special importance in cross-border relations in establishing both the procedural position of the parties and their rights and obligations – matters of importance whether or not they are contested, and whether or not they go to court or arbitration. One way or another, private international law has a role in managing the effects of the downturn. One way or another, that role may be central.

I am grateful to Sarah Garvey of Allen & Overy, who kindly shared her views on these issues, but is absolved from responsibility for the opinions here expressed. *The following remarks are concerned only with private litigation, not with proceedings initiated by regulators.*

Journal of Private International

Law, 2010, Vol 6(1)

The April 2010 (Vol 6, Number 1) issue of the *Journal of Private International Law* is now out, and contains the following articles (links to abstracts on IngentaConnect included):

- **Cross-Border Assignments under Rome I** (*Verhagen, Hendrik L.E.; van Dongen, Sanne)*
- **Choice of Law in International Contracts in Latin American Legal Systems** (*Albornoz, María Mercedes)*
- **The Problem of International Transactions: Conflict of Laws Revisited** *(Rühl, Giesela)*
- **The Rome II Regulation and Traffic Accidents: Uniform Conflict Rules with Some Room for Forum Shopping – How So?** (*Nagy, Csongor István)*
- **Interregional Recognition and Enforcement of Civil and Commercial Judgments: Lessons for China from US and EU Laws** (*Huang, Jie)*
- **The Constitutionalisation of Party Autonomy in European Family Law** (*Yetano, Toni Marzal)*
- **The Insolubility of *Renvoi* and its Consequences** (*Hughes, David Alexander)*
- **Private International Law in Consumer Contracts: A European Perspective** (*Tang, Zheng Sophia)*

Subscription information for J Priv Int L is here.

Publication – Resolving International Conflicts

Peter Hay (Emory Univ. – Law), **Lajos Vékás** (ELTE – Law), **Yehuda Elkana** (Central European Univ.), & **Nenad Dimitrijevic** (Central European Univ. –

Political Science) have published *Resolving International Conflicts: Liber Amicorum Tibor Várady* (Central European Univ. Press 2009). The contents:

- John J. Barceló III, Expanded judicial review of awards after Hall Street and in comparative perspective
- David J. Bederman, Tibor Várady's advocacy before the international court of justice
- Peter Behrens, From "real seat" to "legal seat": Germany's private international company law revolution
- László Burián, The impact of community law on the determination of the personal law of companies
- Richard M. Buxbaum, Public law, Ordre public and arbitration: a procedural scenario and a suggestion
- Richard D. Freer, Forging American arbitration policy: judicial interpretation of the Federal Arbitration Act
- Guy Haarscher, The decline of free thinking
- Attila Harmathy, Questions of arbitration and the case law of the European court of justice
- Peter Hay, Recognition of a recognition judgment within the European Union: "double exequatur" and the public policy barrier
- László Kecskés, European Union legislation and private international law: a view from Hungary
- János Kis, Constitutional democracy: outline of a defense
- Ferenc Mádl, The European dream and its evolution in the architecture of the treaties of integration
- Vladimir Pavi?, 'Non-signatories' and the long arm of arbitral jurisdiction
- Hans-Eric Rasmussen-Bonne, The pendulum swings back: the cooperative approach of German courts to international service of process
- Kurt Siehr, Internationale schiedsgerichtsbarkeit über kulturgut-streitigkeiten
- Lajos Vékás, About the Rome II regulation: the European unification of the conflict rules to torts
- Johan D. van der Vyver, The United States and the jurisprudence of international tribunals

I cannot find the book on the CEU Press website, but here's a link to it on Amazon, where it is £30.35.

Publication: Reithmann/Martiny: Internationales Vertragsrecht

The 7th edition of the work

Internationales Vertragsrecht

edited by *Christoph Reithmann* and *Dieter Martiny*

has recently been published.

The new edition of this well-established book includes in particular the new Rome I Regulation (Regulation (EC) No. 593/2008) and the consequences resulting from the transformation of the Rome Convention into a Community Regulation and encompasses all relevant types of cross-border contracts.

The work is structured into seven major parts:

The **first part** deals with the determination of the law governing the contract. Here, the process of the unification of law is described, taking into account in particular the Rome I Regulation, i. e. its historical background – and therefore also the Rome Convention – its scope of application, its relationship to other Community instruments as well as existing international conventions and its different choice of law rules. Further, this first part contains practical advice for the drafting of contracts.

The **second part** of the book is dedicated to the scope of the law governing the contract as for instance consent, material validity, the interpretation of contracts, the content of contracts, defective performance, burden of proof, limitation of actions, voluntary assignment, subrogation, multiple liability and the transfer of obligations.

The **third part** deals with non-contractual obligations and culpa in contrahendo and therefore refers to the Rome II Regulation: In particular, the book addresses the question of freedom of choice (Art. 14 Rome II) and the basic principles which

are common to unjustified enrichment and negotiorum gestio such as accessorial connection, common habitual residence and manifest closer connection. Further, the law applicable to unjust enrichment, negotiorum gestio and culpa in contrahendo under the Rome II Regulation is described as well as its scope (Art. 15 Rome II). In addition, this part covers also subrogation (Art. 19 Rome II) and multiple liability (Art. 20 Rome II).

The **fourth part** concerns overriding mandatory provisions (Art. 9 Rome I). Here, the first chapter is dedicated to the historical background of Art. 9 and gives an overview of this rule. The second chapter deals with the application of Art. 9 and therefore in particular with its scope, its (restrictive) interpretation and its effects. The third chapter addresses overriding mandatory provisions of the law of the forum (Art. 9 (2) Rome I), while the fourth chapter deals with mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed (Art. 9 (3) Rome I). The fifth and the sixth chapter are dedicated to foreign currency and to formalities.

The **fifth part**, constituting the main part of the work, is dedicated to the different types of contracts: contracts of sale (including CISG); different types of contracts on the provision of services such as for instance contracts for work and services, leasing, guarantees, loans and brokerage agreements; further contracts on immovable property (here in particular the sale of land and ground lease); contracts on intellectual property; franchise contracts; commercial agency contracts and distribution agreements; contracts concerning the financial market; contracts of carriage; consumer contracts; transactions such as share and asset deals and joint ventures; insurance contracts and employment contracts.

The **sixth part** deals with questions of agency and power of disposal. Therefore, the book contains inter alia chapters on the law applicable to agency, the power of disposition of insolvency administrators as well as different kinds of restrictions of the power of disposal.

The **seventh** and last **part** of the book covers choice of court as well as arbitration agreements.

More information on this book can be found on the publisher's website, where it can be ordered as well.

Latest Issue of “Rabels Zeitschrift”

The latest issue of the **Rabels Zeitschrift** (Vol. 73, No. 4, October 2009) is a special issue on the occasion of the 60th birthday of *Professor Jürgen Basedow* and contains the following articles:

- ***Dietmar Baetge:*** Contingency Fees – An Economic Analysis of the Federal Constitutional Court’s Decision Authorising Attorney Contingency Fees – the English abstract reads as follows:

In Germany, until recently, contingency fees were prohibited. In December 2006, the legal ban on contingency fees was declared unconstitutional by the Federal Constitutional Court (Bundesverfassungsgericht). Implementing the Court’s ruling, the German legislator, in 2008, legalised contingency fees on a limited basis. This paper attempts to analyse the Constitutional Court’s decision from an economic vantage point. The main constitutional reasons given to justify the legal ban on contingency fees are translated into economic terms and further elaborated. Points of discussion include the problem of moral hazard between the lawyer and the judge on the one hand and the lawyer and his client on the other. A third question dealt with in the paper is the extent to which contingency fees may influence the efficient allocation of resources. The paper concludes that access to the instrument of contingency fees should not be limited to poor clients but also extended to affluent persons.

- ***Moritz Bälz***: Japan’s Accession to the CISG – the English abstract reads as follows:

On 1 July 2008 Japan, as the 71st state, acceded to the United Nations Convention on the International Sale of Goods (CISG). As of 1 August 2009, the most important convention in the field of uniform private law will thus enter into force in Japan, leaving Great Britain as the sole major trading nation not yet party to the convention. The article examines the complex reasons why Japan did not accede earlier as well as why this step was finally now undertaken. It, furthermore, offers an assessment of the importance of the

CISG for Japan prior to the accession and the impact to be expected from the convention on the reform of the Japanese Civil Code which is currently under way. Finally, it is argued that Japan's accession nourishes the hope that the CISG will spread further in Asia, thus not only extending its reach to one of the world's most dynamic regions, but also opening up opportunities for a future harmonisation of Asian contract law.

- ***Friedrich Wenzel Bulst***: The Application of Art. 82 EC to Abusive Exclusionary Conduct – the English abstract reads as follows:

The article addresses recent developments in the application of the prohibition of abuse of dominance in EC competition law. The European Commission has published a communication providing guidance on its enforcement priorities in applying Art. 82 EC to abusive exclusionary conduct of dominant undertakings. Under this more effects-based approach which focuses on ensuring consistency in the application of Arts. 81 and 82 EC as well as the Merger Regulation, priority will be given to cases where the conduct in question is liable to have harmful effects on consumers. After a brief introduction (section I), the author outlines the main elements of the communication and illustrates how the Commission's approach to providing guidance in this area has evolved since the publication of its 2005 discussion paper on exclusionary abuses (section II). The author then addresses the scope of the communication against the background of the case law on the Commission's discretion (not) to pursue cases (section III). The central concept of the communication is that of »foreclosure leading to consumer harm«. Against this background the author discusses, in the context of refusal to supply abuses both in and outside an IP context, the operationalisation of the criterion of harm to consumers (section IV) before concluding (section V).

- ***Anatol Dutta:*** The Death of the Shareholder in the Conflict of Laws – the English abstract reads as follows:

The death of the shareholder raises the question how the law applicable to the company and the law governing the succession in the deceased shareholder's estate have to be delimitated. This borderline becomes more and more relevant against the background of recent jurisprudence of the European Court of Justice (ECJ) in Centros, Überseering and Inspire Art concerning the freedom of

movement of companies in the Community. On the one hand, as a consequence of this jurisprudence the laws governing the company and the succession often differ. On the other hand, the ECJ's jurisprudence might further blur the boundaries between the laws governing companies and successions. The article tries to draw the border between the relevant choice-of-law rules. It comes to the conclusion that the consequences of the shareholder's death for the company and his share are subject to the conflict rules for companies (supra III.). More problematic, though, is the characterisation of the succession in the share of the deceased shareholder. Some legal systems contain special succession regimes for shares in certain private companies and partnerships. The article argues (supra IV.) that the succession in shares has to be dually-characterised and subjected to both, the law governing the company and the succession. Yet clashes between the applicable company and succession laws are to be solved by giving precedence to the applicable company law. The precedence of company law should be clarified by the legislator – by the German legislator when codifying the conflict rules for companies and by the European legislator when codifying the conflict rules for successions upon death (supra V.).

- ***Franco Ferrari***: From Rome to Rome via Brussels: Remarks on the Law Applicable to Contractual Obligations Absent a Choice by the Parties (Art. 4 of the Rome I Regulation)
- ***Christian Heinze***: Industrial Action in the Conflict of Laws – the English abstract reads as follows:

The introduction of a special conflicts rule for industrial action in Art. 9 Rome II Regulation can be considered as a felicitous innovation of European Private International Law. The application of the law of the country where the industrial action is to be taken or has been taken is founded on the public (social) policy concerns of the country where the action takes place and will therefore, in general, obviate the need for any enforcement of this country's strike laws by means of the ordre public or as internationally mandatory provisions (at least as far as intra-European cases are concerned). The major drawback of Art. 9 does not derive from the rule itself but rather from its restriction to »non-contractual liability«. Article 9 Rome II Regulation may therefore designate a substantive law applicable to the non-contractual liability

for the industrial action which is different from the law applicable to the individual employment contract (Art. 8 Rome I Regulation) or a collective labour agreement. This may be unfortunate because the industrial action will usually have consequences for at least the individual employment contract (e.g. a suspension of contractual obligations) which might be governed by a different law (Art. 8 Rome I Regulation) than the industrial action itself (Art. 9 Rome II Regulation). Possible conflicts between these laws can be resolved by extending the scope of Art. 9 Rome II Regulation to the legality of the industrial action in general, thus subjecting any preliminary or incidental questions of legality of industrial actions to Art. 9 Rome II Regulation while applying the lex contractus to the contractual consequences of the action.

- ***Eva-Maria Kieninger***: The Full Harmonisation of Standard Contract Terms – a Utopia? – the English abstract reads as follows:

The article discusses the proposal for a consumer rights directive of October 2008, in which the European Commission suggests to move from minimum to full harmonisation of specific areas of consumer contract law. The article specifically examines whether full harmonisation of the law relating to the judicial control of unfair contract terms, even if politically desirable, will be feasible in the context of non-harmonised national contract law. Examples are presented for cases which were decided differently by national courts on the basis of divergent rules of general contract law. The article discusses whether the Draft Common Frame of Reference (DCFR) can be used by the European Court of Justice (ECJ) and the national courts as a common yardstick to measure the unfairness of a contractual term. Two problems present themselves: one is the question of legitimacy because, until now, the DCFR is no more than a scientific endeavour which in part rests on the autonomous decisions of its drafters and does not merely present a comparative restatement of Member States' laws; second, the DCFR makes excessive use of the term »reasonableness« so that, in many instances, its ability to give guidance in the assessment of the unfairness of a specific contract term is considerably reduced. The question of legitimacy could be solved by an optional instrument which could be chosen by the parties as the applicable law.

- ***Jan Kleinheisterkamp***: Internationally Mandatory Rules and Arbitration

– A Practical Attempt – the English abstract reads as follows:

This article treats the impact that internationally mandatory rules of the forum state may have on the effectiveness of arbitration agreements if the claims are based on such internationally mandatory rules but the parties had submitted their contract to a foreign law. The specific problems of conflicts of economic regulation are illustrated and discussed on the basis of Belgian and German court decisions on disputes relating to commercial distribution and agency agreements. European courts have adopted a restrictive practice of denying the efficacy of such tandems of choice-of-law and arbitration clauses if there is a strong probability that their internationally mandatory rules will not be applied in foreign procedures. This article shows that neither this approach nor the much more pro-arbitration biased solutions proposed by critics are convincing. It elaborates a third solution which allows national courts both to reconcile their legislator's intention to enforce a given public policy with the parties' original intention to arbitrate and to optimize the effectiveness of public interests as well as that of arbitration.

- ***Axel Metzger***: Warranties against Third Party Claims under Arts. 41, 42 CISG – the English abstract reads as follows:

The United Nations Convention on Contracts for the International Sale of Goods (CISG) provides two regimes for warranties against third party claims. The general rule of Art. 41 establishes a strict liability rule for all third party claims not covered by Art. 42. Article 42 limits the seller's liability for infringement claims based on intellectual property. A seller under the CISG warrants only against third party intellectual property claims he »knew or could not have been unaware« at the time of the conclusion of the contract. In addition, his liability is territorially restricted to claims based on third party intellectual property rights in the countries contemplated by the parties at the conclusion of the contract. This article provides an overview of seller's warranties under Arts. 41 and 42. It examines, more specifically, whether the limited scope of seller's warranties for third party intellectual property claims is efficient and whether it is expedient from a comparative law perspective. Under a traditional economic analysis of law approach, the party who can avoid third party claims most cheaply should bear the risk of infringement claims. This will often be the seller, especially if he has produced the goods or has specific knowledge of the

industry. But it may also occur that the buyer is in the superior position to investigate intellectual property rights, e.g. if the buyer is a specialized player in the industry and the seller is a mere vendor without specific knowledge in the field. Article 42 allows an efficient allocation of the risk by the court. The party charged with the risk, be it seller or buyer, should not only warrant against third party rights he knew but also for those he could have been aware of after investigation in the patent and trademark offices of the relevant countries or through other resources. Such a duty to investigate may also exist with regard to unregistered rights like copyrights. A strict interpretation of the seller's (or buyer's) duty is in accordance with international standards. Seller's warranties are strict liabilities rules in many countries with an exception in case of bad faith on the part of the buyer.

- ***Ralf Michaels***: Rethinking the UNIDROIT Principles: From a law to be chosen by the parties towards a general part of transnational contract law – the English abstract reads as follows:

1. The most talked-about purpose of the UNIDROIT Principles of International and Commercial Contracts (PICC) is their applicability as the law chosen by the parties. However, focusing on this purpose in isolation is erroneous. The PICC are not a good candidate for a chosen law – they are conceived not as a result of the exercise of freedom of contract, but instead as a framework to enable such exercise. Their real potential is to serve as objective law – as the general part of transnational contract law. 2. This is obvious in practice. Actually, choice of the PICC is widely possible. National courts accept their incorporation into the contract; arbitrators frequently accept their choice as applicable law. However, in practice, the PICC are rarely chosen. The most important reason is that they are incomplete. They contain no rules on specific contracts. Further, they refer to national law for mandatory rules and for standards of illegality and immorality. This makes their choice unattractive. 3. The nature of the PICC is much closer to that of the U.S. Restatement of the law. The U.S. Restatement becomes applicable not through party choice but rather as an articulation of background law. Actually, this describes the way in which the PICC are typically used in practice. 4. This use as background law cannot be justified with an asserted legal nature of the PICC (their »law function«). Rather, the use is justified insofar as they fulfill two other functions: the »restatement function«

(PICC as description of a common core of legal rules) and the »model function« (PICC as model for a superior law). 5. From a choice-of-law perspective, such use cannot be justified under traditional European choice of law, which designates legal orders, not incomplete codifications, as applicable. 6. By contrast, application could be justified under U.S. choice of law. Under the governmental interest analysis, the PICC could be applicable to situations in which no state is interested in the application of its own law. Their international character qualifies the PICC for the Restatement (2d) Conflict of laws. Finally, for the better-law theory, according to which the substantive quality of a law is a criterion for choice of law, the PICC are a candidate insofar as they perform a model function. 7. In result, the PICC are comparable to general common law or the ius commune, within which regulatory rules of national, supranational and international origin act like islands. 8. Altogether, this results in a complex picture of transnational contract law, which combines national, international and non-national rules. The PICC can be no more, but no less, than a general part of this contract law.

- ***Hannes Rösler***: Protection of the Weaker Party in European Contract Law – Standardised and Individual Inferiority in Multi-Level Private Law – the English abstract reads as follows:

It is a permanent challenge to accomplish freedom of contract effectively and not just to provide its formal guarantee. Indeed, 19th century private law already included elements guaranteeing the protection of this »material« freedom of contract. However, consensus has been reached about the necessity for a private law system which also provides for real chances of self-determination. An example can be found in EC consumer law. Admittedly, this law is restrained – for reasons of legal certainty – by its personal and situational typicality and bound to formal prerequisites. However, the new rules against discrimination are dominated by approaches which strongly focus on the protection of the individual. It is supplemented by national provisions, which especially counter individual weaknesses. The autonomy of national law can be explained by the different traditions with regard to »social« contract law in the Member States. The differences are especially apparent regarding public policy, good faith or breach of duty before or at the time of contracting (culpa in contrahendo). They form another argument against the undifferentiated saltation from partial to total harmonisation of contract law.

- ***Giesela Rühl***: The Presumption of Non-Conformity in Consumer Sales Law – The Jurisprudence of the Federal Court of Justice in comparative perspective – the English abstract reads as follows:

The Law on the Modernisation of the Law of Obligations has introduced a large number of provisions into the German Civil Code. One of these provisions has kept German courts particularly busy during the last years: § 476. The provision implements Art. 5 III of the Consumer Sales Directive and provides that any lack of conformity which becomes apparent within six months of delivery of the goods is presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity. The presumption has proved to be difficult to apply in practice: the German Federal Court of Justice (Bundesgerichtshof; hereinafter BGH) alone as issued eight – highly controversial – decisions. And numerous articles, case notes and commentaries have analysed and criticised each and every one of them. It is therefore surprising to see that both the BGH and the German literature refrain from exploiting one very obvious source of information that might help to deal with § 476: comparative law. Even though Art. 5 III of the Consumer Sales Directive has been implemented in all Member States except for Lithuania nobody has endeavoured to analyse its application in other countries to this date. The above article tries to fill this gap and looks at § 476 from a comparative perspective. It finds that courts across Europe apply the provision in the same way as the BGH regarding the exclusion and the rebuttal of the presumption. However, regarding the scope of the presumption, the BGH stands alone with its strict interpretation. In fact, no other court in Europe refuses to apply the presumption in cases in which a defect that occurs after delivery might be the result of a basic defect present at the time of delivery. The article, therefore, concludes that the BGH should rethink its position regarding the scope of the presumption and refer the next case to the European Court of Justice.

- ***Jens M. Scherpe:*** Children Born out of Wedlock, their Fathers, and the European Convention on Human Rights – the English abstract reads as follows:

Unlike in many European countries, only a father married to the mother will automatically have parental custody (elterliche Sorge) in Germany. A father not

married to the mother is effectively barred from obtaining parental custody unless the mother agrees, and there is not even the possibility – unlike e.g. in England – for the courts to interfere with the mother's decision, cf. §§ 1626a, 1672 BGB. The legal rules are based on the – somewhat questionable – assumption that the mother's motives for refusal of parental custody are based on the welfare of the child. The German statutory provisions have been challenged unsuccessfully in the German Constitutional Court (Bundesverfassungsgericht; BVerfG). However, the BVerfG voiced some doubt as to the premises upon which these rules rested and has demanded that further development be monitored closely. The vast majority of German academic authors also doubts the constitutionality of § 1626a BGB and are in favour of reforming the law. The matter is now the subject of a case pending at the European Court of Human Rights (ECtHR), Zaunegger v. Germany, in which the applicant claims, inter alia, that his right of respect for family life under Art. 8 ECHR is being violated. In previous cases, McMichael v. United Kingdom and Balbontin v. United Kingdom, challenges of Scots and English law on parental responsibility for fathers not married to the mother have failed. This article critically analyses the legal rules in England and Germany and, based on the differences between them and the relevant case law of the ECtHR, suggests that the Court will find that the German rules are indeed in breach of the European Convention. The article concludes with suggestions for reform.

- ***Wolfgang Wurmnest***: Unilateral Restrictions of Parallel Trade by Dominant Pharmaceutical Companies – Protection of Innovation or Anti-competitive Market Foreclosure? – the English abstract reads as follows:

The elimination of cross-border barriers to trade as means of encouraging competition in the single market lies at the heart of EC-competition policy. Limitations of parallel trade were therefore treated as restrictions of competition. With regard to the pharmaceutical sector the merit of such a competition policy has been called into question. It is said that the unique features of the market for pharmaceuticals, namely the existence of price regulation at the national level for prescription medicines, makes parallel trade socially undesirable as it does not foster real price competition and undermines investment in R&D to the detriment of the consumer. Hence, unilaterally imposed restrictions of parallel trade by dominant producers, such as supply quota systems, should not be regarded as a violation of Art. 82 EC. This article

discusses the legal and economic arguments in favour of a policy shift in light of the recent case Lélos v. GlaxoSmithKline. In this case the European Court of Justice (ECJ) has held that a pharmaceutical company in a dominant position cannot be allowed to cease honouring the ordinary orders of an existing customer for the sole reason that the customer engages in parallel trade, but that Art. 82 EC does not prohibit a dominant undertaking from refusing to fill orders that are out of the ordinary in terms of quantity in order to protect its commercial interests. It is argued that the ECJ was right in denying pharmaceutical companies a general right to limit the flow of pharmaceutical products by unilateral measures as the pro-competitive effects of parallel trade are greater than often assumed.

- ***Nadjma Yassari:*** The Reform of the Spousal Share under Iranian Succession Law – An example of the transformability of Islamic law – the English abstract reads as follows:

It is generally held that Islamic law is a static system of rules, unable to accommodate change. This is especially thought true of family and succession laws that are firmly rooted in a religious foundation. Nonetheless, one can observe in the last decades how active the Iranian legislator has been in reforming its family laws, with the result that a number of traditional provisions have undergone remarkable changes. Most recently, the Iranian Parliament ventured into the field of succession law by amending the inheritance portion received by the surviving wife, which so far had been limited to movables. Under the new regulations, she takes her portion also from immovable property. The previous limitations placed on the inheritance portion of the widow have no base in the Koran, the primary source of Islamic shi'i law, and were deduced from another primary source of law, notably the traditions of the twelve Imams. This article examines the religious foundations of the inheritance rule on the spousal share, its codification in the Iranian Civil Code and the proposed amendments by the Iranian Parliament. It shows how the Iranian Parliament by emphasising another interpretation of the sources has been successful in changing a rule that has prevailed in Iranian law for over 80 years. Without doubt, this reform is a significant step towards the harmonisation of the widow's inheritance share and the elimination of the harsh economic consequences of the rule as it stood. Beyond this effect however it can also be taken as an illustration of the way legal development can be set

within an Islamic framework. Moreover, it shows that it is ultimately the intrinsic structure of the sources of Islamic law and the methods by which law is deduced from them that makes reform possible.

Rabels Zeitschrift: Special Issue on the Communitarisation of Private International Law

The latest issue (Vol. 73, No. 3) of the German law journal **Rabels Zeitschrift** is a special issue dedicated to the communitarisation of private international law and contains the following articles (written in English):

- *Heinz-Peter Mansel:* Kurt Lipstein (1909-2006)
- *Jürgen Basedow*: The Communitarisation of Private International Law – Introduction
- *Jan von Hein*: Of Older Siblings and Distant Cousins: The Contribution of the Rome II Regulation to the Communitarisation of Private International Law
- *Paul Beaumont*: International Family Law in Europe – the Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity
- *Anatol Dutta*: Succession and Wills in the Conflict of Laws on the Eve of Europeanisation
- *Eva-Maria Kieninger*: The Law Applicable to Corporations in the EC
- *Stefania Bariatti*: Recent Case-Law Concerning Jurisdiction and Recognition of Judgments under the European Insolvency Regulation
- *Cathrin Bauer/Matteo Fornasier*: The Communitarisation of Private International Law

The journal is electronically available (for a fee) here.

Round-Up of Canadian Conflicts Publications

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

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

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

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

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

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

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

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

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

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

Stephen Pitel, "Rome II and Choice of Law for Unjust Enrichment" in John Ahern & William Binchy, *The Rome II Regulation on the Law Applicable to Non-*

Contractual Obligations (Leiden: Martinus Nijhoff Publishers, 2009) 231

Stephen Pitel, "Choice of Law for Unjust Enrichment: Rome II and the Common Law" [2008] Nederlands Internationaal Privaatrecht 456

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

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

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

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

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

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2009)

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

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

- ***Anatol Dutta***: "Das Statut der Haftung aus Vertrag mit Schutzwirkung für Dritte" – the English abstract reads as follows:

The autonomous characterisation of national legal institutions is one of the challenging tasks of European private international law. This article attempts to determine the boundaries between the Rome I and the Rome II Regulation with regard to damages of third parties not privy to the contract but closely connected to one of the parties. Notably, German and Austrian law vest contractual rights in such third parties, especially in order to close gaps in tort law. It is argued here that those third party rights, although based on contract according to national doctrine, are to be characterised as a non-contractual obligation and governed by the Rome II regime (infra III). Under Rome II, in principle, the general conflict rule for torts in Art. 4(1) applies; if the damage suffered by the third party is caused by a product, the liability towards the third party is subject to the special rule in Art. 5(1) (infra IV). Hence, the law governing the contract from which the third party rights are derived plays only a minor role (infra V): for those third party rights neither the special rule for culpa in contrahendo in Art. 12(1) – insofar as pre-contractual third party rights are concerned – nor the escape clauses in Art. 4(3) and Art. 5(2) lead to the law which governs the contract.

- ***Ivo Bach***: "Neuere Rechtsprechung zum UN-Kaufrecht" – the English abstract reads as follows:

The number of case law on the CISG increases exponentially. Thanks to online databases such as the one of Pace University or CISG-online a majority of cases are internationally available. The rapid increase of case law, however, complicates the task of staying up to date in this regard. This contribution shall be the first of a series that summarises the recent developments in case-law and at the same time categorises the cases in regard to their topic and in regard to their importance. The series aligns with the date the respective decisions become available to the general public, i. e. the date they are published on the CISG-online database, rather than the date of the decision. This contribution covers the cases with CISG-online numbers 1600–1699.

- ***Alice Halsdorfer***: "Sollte Deutschland dem UNIDROIT-Kulturgutübereinkommen 1995 beitreten?" – the English abstract reads

as follows:

The ratification of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 is the perfect occasion to raise the question whether or not Germany should strive for an additional ratification of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995. While many contracting states of the UNESCO Convention 1970 did not implement comprehensive return claims for illegally exported cultural objects, the self-executing UNIDROIT Convention 1995 provides such claims and in addition further claims for stolen cultural objects. One of the major difficulties is the absence of provisions on property rights. It may be argued an initial lack or intermediate loss of ownership should not affect return claims for cultural objects with the consequence that the last possessor has to be considered the rightful claimant. Further, it may be argued that the return of cultural objects includes necessarily a transfer of possession but not a transfer of property. However, the return of cultural objects to the state from which these cultural objects have been unlawfully removed may influence the applicable law and indirectly affect property rights. Since this effect is achieved only under the condition that the lex rei sitae is replaced by the lex originis, it might be advisable to extend the scope of the ss 5 (1), 9 of the German Law on the Return of Cultural Objects in the event of a future ratification of the UNIDROIT Convention 1995.

- ***Martin Illmer***: "Anti-suit injunctions zur Durchsetzung von Schiedsvereinbarungen in Europa – der letzte Vorhang ist gefallen" – the English abstract reads as follows:

Yet another blow for the English: the final curtain for anti-suit injunctions to enforce arbitration agreements within the European Union has fallen. As the augurs had predicted, the ECJ, following the AG's opinion, held that anti-suit injunctions enforcing arbitration agreements are incompatible with Regulation 44/2001. Considering the previous judgments in Marc Rich, van Uden and Turner as well as the civil law approach of the Regulation, the West Tankers judgment does not come as a surprise. It accords with the system and structure of the Regulation. De lege lata the decision is correct. Moaning about the admittedly thin reasoning and an alleged lack of convincing arguments does not

render the decision less correct. Instead, the focus must shift to the already initiated legislative reform of Regulation 44/2001. Meanwhile, one may look for alternatives within the existing system to hold the parties to the arbitration (or jurisdiction) agreement, foreclosing abusive tactics by parties filing actions in certain Member States notorious for protracted court proceedings.

- ***Matthias Kilian***: "Die Rechtsstellung von Unternehmensjuristen im Europäischen Kartellverfahrensrecht"
  The article reviews the judgment given by the European Court of First Instance in the joined cases T-125/03 and T-253/03 (*Akzo Nobel Chemicals Ltd. and Akcras Chimcals Ltd. ./. Commission of the European Communities*) which can be found here.

- ***Rainer Hüßtege***: "Der Europäische Vollstreckungstitel in der Praxis"
  The article reviews a decision by the Higher Regional Court Stuttgart (23.10.2007 – 5 W 29/07) dealing with the requirements of a European Enforcement Order Certificate in terms of Art. 9 Regulation (EC) No. 805/2004 stating that the issue of the ceritificate requires according to Art. 6 No. 1 (c) inter alia that the court proceedings in the Member State of origin met the requirements as provided for the proceeding of uncontested claims. This requirement was not met in the present case since the summons was not served in accordance with Art. 13 (2) of the Regulation.

- ***Christoph M. Giebel***: "Die Vollstreckung von Ordnungsmittelbeschlüssen gemäß § 890 ZPO im EU-Ausland" – the English abstract reads as follows:

Under German law, the State is exclusively responsible for enforcing contempt fines issued by German courts. Thus, the State collects the contempt fine through its own public authorities ex officio. This approach is in contrast to the legal situation in several other EU Member States that allow the judgment creditors not only to decide upon the enforcement of the contempt fine but also to keep the funds obtained through the enforcement. In terms of EU cross border enforcement, it is commonly accepted that for example a French "astreinte" may be enforced in Germany by invoking Art. 49 of the Regulation (EC) No. 44/2001. However, it is still doubtful whether or not German judgment creditors could similarly enforce a German contempt fine in another EU

Member State. These doubts were recently intensified by a resolution rendered by the Higher Regional Court of Munich on 3rd December 2008 – 6 W 1956/08 – (not res judicata). The Higher Regional Court of Munich has refused to confirm a contempt fine issued by the Regional Court of Landshut as a European Enforcement Order under the Regulation (EC) No. 805/2004. The Higher Regional Court of Munich basically argues that the judgment creditor has no legitimate interest to apply for such confirmation due to the German legislator having attributed the responsibility for the enforcement exclusively to the State. The arguments put forward by the Higher Regional Court of Munich would also rule out any cross border enforcement of German contempt fines according to the rules of the Regulation (EC) No. 44/2001. This would lead to a considerable disadvantage of German judgment creditors within the Common Market. In the article, the author discusses in detail the arguments put forward by the Higher Regional Court of Munich both from a German and European Community law perspective. The author comes to the conclusion that prior-ranking European Community law demands that German contempt fines may also be enforced in other EU Member States both on the basis of the Regulations (EC) No. 44/2001 and No. 805/2004. In reconciling the requirements of European Community and German law, the author proposes that the judgment creditor shall be entitled to act on the basis of a representative action for the State. The funds obtained through the enforcement in the relevant EU Member State shall therefore invariably be paid to the relevant State treasury in Germany.

- ***Felipe Temming***: "Zur Unterbrechung eines Kündigungsschutzprozesses während des U.S.-amerikanischen Reorganisationsverfahrens nach Chapter 11 Bankruptcy Code"
  The article reviews a judgment of the German Federal Labour Court (27.02.2007 – 3 AZR 618/06) dealing with the interruption of an action for protection against dismissal according to the reorganization proceedings under Chapter 11 U. S. Bankruptcy Code.

- ***Kurt Siehr:*** "Ehescheidung deutscher Juden"
  The article reviews a judgment of the German Federal Court of Justice (28.05.2008 – XII ZR 61/06) concerning in particular the question whether divorce proceedings before a Rabbinical Court in Israel lead to the result that the plea of lis alibi pendens has to be upheld in German divorce

proceedings. As stated by the Federal Court of Justice this could only be the case if the Jewish divorce could be recognised in Germany. This was answered in the negative by the Federal Court of Justice under the given circumstances confirming its previous case law according to which a divorce before a Rabbinical Court constitutes an extra-judicial divorce – and not a sovereign act – which can, under German law, only be recognised if the requirements of the law applicable according to German PIL (Art. 17 EGBGB) are satisfied. Due to the fact that in the present case German law was applicable with regard to the divorce according to Art. 17 EGBGB, this was not the case.

- ***Frank Spoorenberg/Isabelle Fellrath***: "Offsetting losses and profits in case of breach of commercial sales/purchase agreements under Swiss law and the Vienna Convention on the International Sale of Goods"

This contribution analyses the computation of damages that may be awarded in order to compensate the buyer for the losses incurred on the substitution transactions as a result of the seller's default in a commercial sales/purchase agreement. It discusses more specifically the possible compensation of substitution and additional losses with any profits incurred on a single substitution transaction, and on successive substitution transactions, focusing on the articulation of the international and Swiss law provisions governing general losses and substitutions losses. Reference is made by ways of illustration to a recent unpublished ICC arbitration award addressing the issue from a set off perspective.

- ***Dirk Otto***: "Formalien bei der Vollstreckung ausländischer Schiedsgerichtsentscheidungen nach dem New Yorker Schiedsgerichtsabkommen" – the English abstract reads as follows:

The author criticises a decision of Austria's Supreme Court which required a party seeking to enforce a foreign arbitration award in Austria to submit a legalised original or certified/legalised copy of the arbitration award although the defendant never disputed that a submitted simple copy was authentic. The author submits the correct approach would have been to require compliance with the formalities of Art. IV of the New York Convention only if (i) defendant disputes the authenticity of a copy or (ii) the enforcing court has to pass default judgment as only in these situations there is a genuine need to prove the

conformity of documents.

- ***Götz Schulze***: "Anerkennung von Drittlandscheidungen in Frankreich" – the English abstract reads as follows:

The author analyses two judgments of the French Court of Cassation pertaining to the incidental recognition of foreign divorce decrees under French law. In the first case, a Moroccan wife had filed for divorce in France. The conciliation hearings were opposed by the husband, who claimed that the marriage had already been dissolved by a final Moroccan divorce decree. The second case regarded a French married couple who had been resident in Texas. Upon separation, the husband returned to France, where he filed a petition for divorce. The admissibility of the latter was contested because divorce proceedings were already pending in Texas, which finally led to a final divorce decree. Since the cases did not fall within the scope of the Brussels II Regulation, French procedural law was applicable. In both cases, the question at stake was whether the courts had to take into account the foreign judgments when assessing the admissibility of the divorce petition. The Court of Cassation answered in the affirmative. It held that national courts have to determine the recognition of foreign divorce decrees in every stage of the procedure as an incidental question. It thereby overruled an earlier judgment, according to which the recognition of foreign judgments was reserved for the "juge de fond" and could not be determined in conciliation hearings or summary proceedings. It also held that recognition could not be denied for reasons beyond the three exhaustive grounds of non-recognition established under French law, which are lack of international jurisdiction, misuse of rights, and public policy. In the second case, the lower court had denied recognition because the divorce decree had not been registered with the register office. The reported judgments herald an important shift in French procedural law and were unanimously welcomed by legal writers. Not only did the Court of Cassation interpret national civil procedural law in a manner as to align it with art. 21 (4) Brussels II Regulation. It also overcame the long criticised procedural privileges for French nationals. As the court made clear, art. 14 Code of Civil Procedure, which grants to every French national an international venue within the domestic territory, cannot be read as to inversely hinder the recognition of a foreign judgment.

Futher, this issue contains the following information:

- The new German choice of law rules as amended due to the adaptation to Regulation (EC) No. 593/2008 (Rome I) which are applicable from 17 December 2009: "Das EGBGB in der ab 17.12.2009 geltenden Fassung"
- ***Erik Jayme/Carl Friedrich Nordmeier*** report on two PIL conferences held in Lausanne: "Zwanzig Jahre schweizerisches IPR-Gesetz – Globale Vergleichung im Internationalen Privatrecht"
- ***Ralf Michaels/Catherine H. Gibson*** report on the conference held at Duke Law School on 9 February 2008 titled: "The New European Choice-of-Law Revolution: Lessons for the United States?"
- ***Hilmar Krüger*** reports on the wife's right of succession under Iranian law: "Neues zum Erbrecht der überlebenden Ehefrau nach iranischem Recht"
- ***Hilmar Krüger*** reports on the recognition of foreign decisions in the field of family law in Turkey: "Zur Anerkennung familienrechtlicher Entscheidungen in der Türkei"

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”