Guest Editorial: Muir-Watt on Reshaping Private International Law in a Changing World

April's Guest Editorial is by Professor Horatia Muir-Watt: **Reshaping Private International Law in a Changing World**.

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Reshaping Private International Law in a Changing World

The past few decades have witnessed profound changes in the world order – changes affecting the nature of sovereignty or the significance of territory – which require measuring the methodological impact of political and technological transformations on traditional ways of thinking about allocation of prescriptive

and adjudicatory authority as between states. Myriads of issues arise in this respect within the new global environment, such as the extraterritorial reach of regulatory law, the decline of the private/public divide in the international field, the renewed foundations of adjudicatory jurisdiction (particularly in cyberspace), the implications of individual and collective access to justice in the international sphere, the impact of fundamental rights on choice of law, the ability of parties to cross regulatory frontiers and the subsequent transformation of the relationship between law and market. Indeed, one of the most important issues raised by globalization from a private international law perspective is the extent to which private economic actors are now achieving "lift-off" ((As Robert Wai has so aptly put it, in "Transnational lift-off and Juridical Touchdown: The Regulatory Function of Private International Law in a Global Age", 40 *Colum. J. Transnat*. L 209 (2002).)) from the sway of territorial legal systems. To some extent, traditional rules on jurisdiction, choice of law and recognition/enforcement of judgments and arbitral awards have favored the undermining of law's (geographical) empire, which is already threatened by the increasing transparency of national barriers to cross-border trade and investment. Party mobility through choice of law and forum induces a worldwide supply and demand for legal products. When such a market is unregulated, the consequences of such legislative competition may be disastrous.

An excellent illustration of the way in which rules on choice of law and forum, combined with a liberal regime relating to enforcement of foreign judgments, allow private confiscation of the governing law can be found in the circumstances which gave rise to the notorious Lloyd's litigation. ((Among many: *Bonny v. Society of Lloyd's* (3 F.3d 156, 7th Circuit, 1993) ; *The Society of Lloyd's v. Ashenden* (233 F.3d 473, 7th Circuit 2000).)) Here, securities offerings accompanied by inadequate disclosure on the American market managed to slip through the net of the federal Securities Acts. This example shows how "barrier-crossing" – escaping the sway of mandatory provisions by opting out of a legal system, and *de facto* redefining jurisdictional boundaries to suit oneself ((W. Bratton & J. McCahery, "The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second Best World", 86 *Georgetown L J* 201 (1997).)) – through the mobility conferred by unfettered choice of forum alters the status of *lois de police* or internationally mandatory laws, which become merely "semi-mandatory" ((L. Radicati di Brozolo, "Mondialisation, jurisdiction, arbitrage: vers des règles d'application semi-nécessaires?", *Rev crit DIP* 2003.1.))

before the chosen foreign forum. Other well-known examples can be found in the field of tort, where the use of *forum non conveniens* to prevent access by the victims of accidents linked to delocalized industrial activities, to justice in the country of the (parent) corporate defendant, seals the downward spiral in which developing counties are trapped when economically dependant upon versatile foreign capital; lowering the cost of security, environmental protection, or social legislation will attract investment, but will maintain any liability incurred within the limits designed by the low standards of the *lex loci delicti* as applied by local courts. ((As the *Nike* case shows, the powerful market leverage of consumer arbitrage in the defendant's home country may contribute to remedy the problem through consumer refusal to buy products manufactured by means of child labour, etc: see *Nike Inc. v. Kasky* 539 US 654 (2003).)) Here, rules of jurisdiction and choice of law contribute to the "global tragedy of the commons", where in the absence of a central regulator or universally accepted standards of conduct, nothing prevents a state from abetting the exportation by its private sector of industrial costs (pollution, economies on social protection, etc) in the direction of the global community.

Insofar that it is felt desirable to ensure the "touch-down" of economic actors in this context, private international methodology may require considerable reshaping, so as to harness it to the new need for strong yet adjusted regulation of the consequences of private mobility and the inter-jurisdictional competition which it inevitably generates. Approaches developed in a world where the prescriptive authority of State was coextensive with territory are clearly no longer adapted to this function; this is particularly true of the methods inspired by the private interest paradigm on which continental Europe doctrine thrived throughout the second half of the twentieth century and is loath even today to abandon. ((On this point, I express courteous disagreement with Pierre Mayer, who has devoted a chapter of his excellent Hague lectures to challenging the relevance of the changes discussed here: "Le phénomène de la coordination des rdres juridiques étatiques en droit privé", RCADI t327 (2007).)) The message of this editorial is to the effect that private international law should adjust to the stakes involved in real world conflicts of laws, which do not, or do no longer, implicate purely private interests playing out on a closed field, ((This is the "unilateralists' complaint": see P. Gothot, "Le renouveau de la tendance unilatéraliste", *Rev crit DIP* 1971.1; D. Boden, *L'ordre public : limite et condition de la tolérance (essai sur le pluralisme juridique)*.)) but involve strong state

policies or substantive values perceived as fundamental by the global community; in turn, it is mistaken and indeed harmful to continue to represent the rules designed to respond to these conflicts as being "neutral", since this leads to underestimate the needs generated by the novel ways in which national laws inter-relate in a global setting and prevents private international law from being fully invested with an appropriate regulatory function. ((There is nothing particularly surprising in the emergence of new needs in this field, insofar as they mirror those which increasingly affect the role and content of private law as a whole: see Cafaggi & Muir Watt, "The making of European Private Law: Regulatory Strategies and Governance", Sellier, forthcoming 2008.)) Just three examples (among many more) will serve to draw attention to the tectonic upheavals currently occurring and to the pressing need to devote further thought to the reshaping of traditional methods and approaches.

1. *Choice of law and economic due process.*

Within the European Union, the appearance of a market for law is not of course a mere and perverse side-effect of other policies geared to enhancing party autonomy. Carefully designed regulatory competition in the field of goods and services ((Jukka Snell*, Goods and Services in EC Law, A Study of the relationships between the Freedoms,* OUP 2002.)) has been shown to – deliberately – overturn the very concept of "monopolistic states", even in the field of public law and services. ((Ch. Kerber, Interjurisdctional Competition within the European Union", 23 *Fordham Int'l L J*. 217 (2000).)) Indeed, inter-jurisdictional mobility of firms, products and services is once again the means by which law is made to appear as offering on a competitive market, designed in turn to stimulate legislative reactivity and creativity. As illustrated in the global context, one of the market failures to be feared in the context of unregulated competition is the exporting of costs or externalities linked to legislative choices of which the consequences may affect other communities. However, in an integrated legal system, these risks are restricted by the existence of a central regulator, armed with tools such as approximation of substantive rules, or, where diversity is deemed to be desirable, constitutional instruments designed to discipline the various States in their mutual dealings. ((In the US, these are the Commerce Clause, Due Process, Full Faith and Credit)) Here, as recent conflicts of laws

implicating both economic freedoms and workers' rights have shown, the Court of justice is invested with an important balancing function which clearly overflows into the political sphere. ((*Viking* aff. C-438/05, *Laval* aff. C-341/05))

This is where uniform choice of law rules come in, as tools of governance designed to fulfill the requirements of economic due process on a Community level. Economic due process, which is now thought to explain the requirements of the Commerce Clause in the US federal Constitution, ((In the field of cyber torts, see J. Goldsmith & A Sykes, "The Internet and the Dormant Commerce Clause", 110 Yale L J 785 (2001).)) ensures that a given community does not impose costs on out of state interests which were not represented in its decision-making process. Thus, for instance, the cost of a law providing for lax standards of environmental protection should not be exported towards a neighbouring state with different priorities: in cases of cross-border pollution, environmental damage caused in the the latter state by firms legally using low standards of protection on the other side of the frontier must be internalized by application of the more protective rule. Posting workers employed under lax labor standards to a host state with higher social protection in order to benefit from the competitive advantage of low cost labor requires application of local law for the duration of the posting in order to avoid unhealthy distorsions of competiton between firms. To a large extent, recent choice of law provisions have integrated this change. ((See article 7 of the new Rome II Regulation for environmental torts and, in the field of employment relationships, the conflict of law provisions of the 1996 Posted Workers Directive.)) Typically, the recitals introducing Rome II attribute virtues to the determination of the applicable law which are far removed from the traditional private interest paradigm. There is still room for further improvement, however. Scrutinizing Rome II through the lenses governmental interest analysis, Symeon Symeonides has shown that in many cases, it would be desirable, as in the field of environmental pollution, to take account of true conduct-regulating conflicts, and to give effect if necessary to the prohibitive rules of the state of the place of conduct if its interest in regulating a given conduct is greater than the that of the state where the harm occurs, when it provides for a laxer standard of care. (("Tort Conflicts and Rome II: A View from Across", *Festschrift Ehrich Jayme*, Sellier, Munich, 2004, p. 935.)) For the moment, this result is only possible through article 16. ((Article 17 does not seem intended to be interpreted bilaterally, and the escape clause of article 4-3 does not appear to allow an issue by issue approach.))

2. *The "new unilateralism"*

The requirements of human rights in cross-border cases are also bringing about profound methodological changes whenever the continuity of an enduring personal or family relationship requires the host state to refrain from refusing recognition under its own private international law rules. Thus, the progressive appearance of a "unilateral method of recognition of foreign situations", implemented both by the European Court of Justice, the European Court of Human Rights, and subsequently by national courts ((See CA Paris, 25th October 2007, not yet published, but a commentary posted by G. Cuniberti is available on this website.)) , ousts traditional bilateral choice of law rules and favors the cross-border validity of what look very like vested rights in fields such as adoption, other parent/child relationships, marriage, same-sex partnerships, etc. Grounds for such change have been discovered in fundamental rights and European citizenship, heralding an adjustment of the philosophical foundations of the conflict of laws to the ideology of recognition and identity which also forms the basis of contemporary European substantive law. ((See for instance, S. Rodota, *Dal soggetto alla persona*, Editoriale Scientifica, Rome, 2007))

Although the objective of recognizing existing personal or family relationships in cross-border situations is entirely legitimate, its implementation certainly requires further thought. Indeed, the common thread which seems to run through the case-law is the principle of non-discrimination. This principle appears both as a fundamental value in itself and, in a Community context, as an essential component of European citizenship. The implication of the new recourse to non-discrimination as a foundation for choice of law is that the traditional use of nationality or domicile as connecting factor generates unjustified discrepancies in the field of personal status. This may in itself suggest that non-discrimination as conflict of laws methodology is totally misguided. Among the most notorious illustrations of judicial use of this principle is the European Court of Justice's judgment in the *Garcia Avello* case. ((ECJ *Garcia Avello*, C-148/02, 2003.)) It was held to be discriminatory for a Belgian court to apply choice of law rules on personal status which lead to the name of a Belgo-Spanish child residing in Belgium being governed by Belgian law, as if he was in the same situation as a child whose parents are both Belgian. The principle of non-discrimination, inherent in the concept of European citizenship, mandates that he benefit from the rules of Spanish law on this point. The Spanish perspective on the

determination of the name of a Spanish child must be recognized in Belgium on the basis of non-discrimination. This reasoning is flawed. The Garcia-Weber child had been born and was still resident in Belgium, which might have provided additional credit to the claim of Belgian law to regulate his family name. By deciding the contrary, and thereby allowing the child to benefit from whichever set of rules he chose to invoke, the Court of justice seems to imply that the sole fact of possessing dual citizenship suffices to differentiate a child from those who possess only the nationality of the country of his or her domicile. Of course, a child with strong personal connections to two different communities may well encounter difficulties in as far as the coherence of his or her personal status is concerned, if each adopts a different stance (whether on name, validity of marriage, adoption, etc). Avoiding limping personal status in this sort of situation is one of the principal policies behind many choice of law rules. But here, the Court's reasoning is distorted because it purported to resolve a difficulty linked to the impact of cross-border mobility on individual status, whereas in fact, there was no such mobility under the facts of the case other than the dual citizenship of the child. It was not unreasonable in the present case that Belgium, which was the country of both citizenship and domicile, sought to regulate the child's name in the same way as that of other purely Belgian children living in Belgium. It would therefore have been far more satisfactory to look towards other principles which, mindful of identity and the protection of persons, have significant implications as far as choice of law is concerned, such as the fundamental right to protection of one's personal and family life under article 8 of the ECHR. Of course, one the proper basis for full faith and credit due to foreign situations is determined, the task for the future will be to define its precise requirements in this respect in practice.

3. *Conflicts of public law*

Is it still true, that, as is so often asserted, the conflict of laws is limited to the field of private law? It has been apparent for some time that the some of the most significant evolutions, for private international law purposes, induced by the new quasi-federal environment in Europe, concern public, administrative or regulatory law. Such law is given extraterritorial effect, through mutual recognition; independant regulatory authorities appear, with a duty to cooperate transnationally; elaborate schemes allocate regulatory authority among the

Member States. In particular, in the field of securities regulation, the 2001 Lamfalussy Report provided considerable impetus for transnational cooperation between regulatory agencies. Thus, borrowing on the Admission Directive, ((Consolidated Directive 2001/34 EC coodinating the condtions for admission of securities to official stock exchange listing.)) which has served as a model for securities regulation as a whole, the Community has established a complete system of decentralised supervision and enforcement of the harmonised regime, supported by cooperation between administrative authorities. ((See Niamh Moloney, *EC Securities regulation Oxford EC Law Library*, 2002, p.100.)) The interesting point is that the administrative duty to cooperate, which justifies negotiation and dialogue when it comes to deciding upon the shared exercise of regulatory authority, may also lead to administrative bodies having to apply foreign regulatory law, which means in turn that conflict of laws principles will need to extend, with certain adjustments, to the field of public law. For an academic discipline which was epistemologically harnassed to the public/private divide – or rather, the public law taboo – this is all something of a landslide. However, it is also remarkable that even before the courts, where traditional approaches tends to linger, there are signs that transnational litigation in regulatory fields is throwing up evidence of shared state interests – so much so that one author has suggested that such litigation, albeit subject to domestic economic law, may bring substantive regulatory benefits to the international community. ((Hannah Buxbaum, Transnational Regulatory litigation, 48 Va J Int'l L 251 (2006).))

Here again, however, there is room for debate as to the appropriate approach to public or regulatory conflicts. An academic proposal on the regulation of global capital markets through interjurisdictional competition, ((S. Choi & A. Guzman, « Portable reciprocity : Rethinking the International reach of Securities Regulation », 71 S. Cal. L. Rev. 903 (1998).)) building on the mutual recognition theme, rejects administrative cooperation as insufficient, time-consuming and overly costly in terms of monitoring compliance. Free choice by issuers and investors as to how, or according to which national rules, they should be regulated (a choice which would then be "mutually" recognised by all states participating in the market according to a system of "portable reciprocity") would supposedly enhance competition across the board and ensure a wide range of legal products catering for risk-takers and risk averse alike. Although this proposal will no doubt meet some scepticism on this side of the Atlantic, where there is less faith in the

regulatory virtues of party freedom, it is extremely interesting, first, because it emphasises once again the radical change in the relationship (or at least in the perception of this relationship) between law and market in a global environment, where party mobility (whether through free choice or exit from the sway of mandatory rules) is already a reality. Second, because it includes in this reversal the activity of regulatory agencies, which to some extent would be functioning on a delocalised basis. If one links these ideas to equally intriguing recent proposals to delocalise the adjudicatory activity of the courts in order to enhance global efficiency with the cooperative consent of states, ((It has even been suggested that accessing the courts of a chosen jurisdiction can be seen as an "after-sale service" bundled with the choice of the applicable law in the field of contracts or corporate charters, so that such access should also be available extraterritorially in the form of delocalized courts, in the context of a competitive global market for legal services: see H. Hansmann "Extraterritorial Courts for Corporate Law", *Yale Law School Faculty Scholarship Papers*, 2005, Paper 3.)) the vision of the global world it projects is quite startling. Clearly, private international law needs be ready to meet the challenge of its new regulatory rôle.

New Book: Japanese and European Private International Law in Comparative Perspective

A very interesting volume, collecting the contributions presented by prominent European and Japanese scholars at a conference organised in 2007 by the Max Planck Institute for Private Law in Hamburg, has been recently published by Mohr Siebeck: **Japanese and European Private International Law in Comparative Perspective**. A presentation of the book, and the TOC, are available on the MPI's website:

> *Edited by Jürgen Basedow, Harald Baum und Yuko Nishitani, this conference volume is based on a symposium of the same name that was held in March 2007*

at the MPI for Private Law in Hamburg and represents the first comprehensive analysis of the new Japanese private international law in any western language.

The idea of national codification is advancing on a global scale in conflict of laws. A large number of legislative projects dealing with codifying and modernizing private international law, both on the national and the supranational level, have been launched in the past few years. Among such recent initiatives, the advances taken by the European and the Japanese legislators are particularly reflecting these developments. On January 1, 2007, the new Japanese 'Act on General Rules for Application of Laws' entered into force replacing the outdated conflict of laws statute of 1898. This major reform finds its parallels in the current efforts of the European Union to create a modern private international law regime for its member states.

This volume presents the first comprehensive analysis of the new Japanese private international law available in any western language and contrasts it with corresponding European developments. Most of the contributors from Japan are scholars who were actively involved in and responsible for preparing the new Act. All of them are renowned experts in the field of private international law. Leading European experts in the conflict of laws supplement the Japanese analyses with comparative contributions reflecting the pertinent discussion of parallel endeavours in the EU. To guarantee better understanding, English translations of both the present and the former Japanese statutes have been added.

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Title: **Japanese and European Private International Law in Comparative**

Perspective, edited by *Jürgen Basedow*, *Harald Baum*, and *Yuko Nishitani*, Mohr Siebeck (Materialien zum ausländischen und internationalen Privatrecht/48), Tübingen, March 2008, XVIII + 434 pages.

ISBN: 978-3-16-149547-2. Price: euro 89.

First issue of 2008's Journal du Droit International

The first issue of French *Journal du Droit International* (also known as *Clunet*) will be released shortly. It contains four articles dealing with conflict issues.

The first is authored by Pascal de Vareilles-Sommieres, who teaches at Paris I University, and Anwar Fekini, who is a practising lawyer in Paris and Tripoli. It discusses The New International Oil Exploration and Sharing Agreements in Libya (*Les nouveaux contrats internationaux d'exploration et de partage de production pétrolière en Libye. Problèmes choisis*). The English abstract reads:

> *The article intends to study the legal regime of the exploration and production sharing agreements (EPSAs) entered into by the Libyan National Oil Company with foreign oil companies since 2005. In this first part, the authors focus on legal sources governing Libyan EPSAs. Though admitting the prominent part of Libyan law chosen by the parties in a choice of law provision among these sources, the authors wonder whether the parties simultaneously intended to get other possible legal sources combined with it. A possible choice of public international law is first examined. Scrutinising the parties intention, the article comes to the conclusion that no sign pointing to an internationalisation of the EPSAs appears in the agreements. As a consequence, international contract law is not to be combined with Libyan law as far as the legal regime of the EPSAs is concerned. The study then looks for possible hints of the parties intention to get the lex mercatoria involved in the regulation of their agreement along with Libyan law. Several signs are brought to the light showing the*

parties' common intention to let international trade usages interfere with Libyan law to be combined with it in order to finally make up the lex contractus.

The second part of this study will be published this year in a forthcoming issue of this Journal.

The second article is a study of the Rome II Regulation (*Le règlement (CE) n° 864/2007 du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles (« Rome II »)*). It is authored by Carine Briere, who lectures at Rouen University. Here is the English abstract:

The aim of this article is to present Regulation (EC) n° 864/2007 known as « Rome II », which is the result of a long process of elaboration. Codecision procedure has been used to adopt this text which harmonises rules of conflict of laws regarding noncontractual obligations to improve predictability concerning the law applicable. It constitutes a new step towards the construction of a private international community law. The Regulation follows current private international law trends that give competence to the law of the country in which the damage arises. Nevertheless, an escape clause introduces a flexible approach when the lex loci damni seems to be inappropriate. Specific rules for certain torts and restitutionary obligations are also laid down. They derogate the general rule. Moreover, the Regulation upholds in an extensive way the choice of law principle and determines the link with other norms such as the Hague Conventions on which it does not take precedence.

However, this Regulation, adopted in order to facilitate correct workings of the internal market, shall not prejudice the application of internal market legislation.

The third article from Moustapha Lô Diatta from HEI in Geneva presents the Evolution of Bilateral Treaties on Migratory Workers (*L'évolution des accords bilatéraux sur les travailleurs migrants*). The abstract reads:

Bilateral labour agreements represent not only the oldest but also the most important source of international migrant workers law. Since their appearance in earlier twentieth century, they have been changing at contracting parties' will, by reference to the political and economic context, the developments of

international labour migration and the progress made by international legislation in protecting migrant workers. The purpose of this study is to show to what extent the lessons that can be drawn from this evolution could contribute to the ongoing debate and consultations within the international bodies to establish a multilateral framework in which international labour migration would be mutually beneficial.

Finally, Philippe Roussel Galle from Dijon University presents a Few Ideas on the Interpretation of Regulation 1346/2000 on Insolvency Proceedings after the French Circular of 15 December 2006 (*De quelques pistes d'interprétation du règlement
(CE) n° 1346/2000 sur les procédures d'insolvabilité : la circulaire du 15 décembre 2006*).

The entry into force of law n° 2005-845 of 26 July 2005 which institutes, among other things, a safeguard procedure, combined with the first court decisions enforcing regulation (EC) n° 1346/2000 on insolvency proceedings, have lead the French Ministry of Justice to repel and replace the circular of 17 March 2003 regarding the implementation of the regulation. The new circular, enacted on December 15th 2006, gives precisions and interpretation guidelines on the European text and brings, notwithstanding sovereign judicial appreciation, solutions to the difficulties its implementation might create in France.

New Articles for Early 2008

It has been a little while since my last trawl through the law journals, and a few articles and casenotes have been published in the intervening period that private international law enthusiasts may wish to add to their reading list:

J.M. Carruthers, "**De Facto Cohabitation: the International Private Law Dimension**" (2008) 12 *Edinburgh Law Review* 51 – 76.

P. Beaumont & Z. Tang, "**Classification of Delictual Damages – Harding v**

Wealands and the Rome II Regulation" (2008) 12 *Edinburgh Law Review* 131 – 136.

G. Ruhl, "**Extending Ingmar to Jurisdiction and Arbitration Clauses: The End of Party Autonomy in Contracts with Commercial Agents?**" (2007) 6 *European Review of Private Law* 891 – 903. An abstract:

> *In the judgment discussed below, the Appeals Court of Munich (OLG München) deals with the question whether jurisdiction and arbitration clauses have to be set aside in the light of the Ingmar decision of the European Court of Justice where they cause a derogation from Articles 17 and 18 of the Commercial Agents Directive. The Court concludes that this question should be answered in the affirmative if it is 'likely' that the designated court or arbitral tribunal will neither apply Articles 17 and 18 nor compensate the commercial agent on different grounds. Thus, the Court advocates that Articles 17 and 18 be given extensive protection. This is, however, problematic because such extensive protection imposes serious restrictions on party autonomy, whereas these restrictions are not required by Community law in general or by the principle of effectiveness in particular. Therefore, it is very much open to doubt whether this decision is in the best interests of the Internal Market.*

F. Bolton & R. Radia, "**Restrictive covenants: foreign jurisdiction clauses**" (2008) 87 *Employment Law Journal* 12 – 14. The abstract:

> *Reviews the Queen's Bench Division judgment in Duarte v Black and Decker Corp and the Court of Appeal decision in Samengo-Turner v J&H Marsh & McLennan (Services) Ltd on whether restrictive covenants were enforceable under foreign jurisdiction clauses contained in the long-term incentive plan agreements of UK domiciled employees of multinational companies. Examines the conflict of laws and whether English law applied under the Convention on the Law Applicable to Contractual Obligations 1980 Art.16 and under Regulation 44/2001 Arts.18 and 20.*

W. Tetley, "**Canadian Maritime Law**" *L.M.C.L.Q.* 2007, 3(Aug) Supp (*International Maritime and Commercial Law Yearbook* 2007), 13-42. The blurb:

> *Reviews Canadian case law and legislative developments in shipping law in*

2005 and 2006, including cases on: (1) carriage of goods by sea; (2) fishing regulations; (3) lease of port facilities; (4) sale of ships; (5) personal injury; (6) recognition and enforcement of foreign judgments; (7) shipping companies' insolvency; (8) collision; and (9) marine insurance.

S. James, "**Decision Time Approaches – Political agreement on Rome I: will the UK opt back in?**" (2008) 23 *Butterworths Journal of International Banking & Financial Law* 8. The abstract:

Assesses the extent to which European Commission proposed amendments to the Draft Regulation on the law applicable to contractual obligations (Rome I) meet the concerns of the UK financial services industry relating to the original proposal. Notes changes relating to discretion and governing law, assignment and consumer contracts.

A. Onetto, "**Enforcement of foreign judgments: a comparative analysis of common law and civil law**" (2008) 23 *Butterworths Journal of International Banking & Financial Law* 36 – 38. The abstract:

Provides an overview of the enforcement of foreign judgments in common law and civil law jurisdictions by reference to a scenario involving the enforcement of an English judgment in the US and Argentina. Reviews the principles and procedures applicable to the recognition and enforcement of foreign judgments in the US and Argentina respectively, including enforcement expenses and legal fees. Includes a table comparing the procedures for the recognition and enforcement of foreign judgments in California, Washington DC and New York.

J. Carp, "**I'm an Englishman working in New York**" (2008) 152 *Solicitors Journal* 16 – 17. The abstract:

Reviews case law on issues arising where a national of one country works in another country. Sets out a step by step approach to ascertaining: the law governing the employment contract; the applicability of mandatory labour laws, including cases on unfair dismissal, discrimination, working time, and the transfer of undertakings; which country has jurisdiction; and public policy. Offers practical suggestions for drafting multinational contracts.

J. Murphy – O'Connor, "**Anarchic and unfair? Common law enforcement of foreign judgments in Ireland**" 2007 2 *Bankers' Law* 41 – 44. Abstract:

> *Discusses the Irish High Court judgment in Re Flightlease (Ireland) Ltd (In Voluntary Liquidation) on whether, in the event that the Swiss courts ordered the return of certain monies paid by a Swiss airline, in liquidation, to an Irish company, also in liquidation, such order would be enforceable in Ireland. Considers whether: (1) the order would be excluded from enforcement under the common law on the basis that it arose from a proceeding in bankruptcy or insolvency; and (2) the order would be recognised on the basis of a "real and substantial connection" test, rather than traditional conflict of laws rules.*

V. Van Den Eeckhout, "**Promoting human rights within the Union: the role of European private international law**" 2008 14 *European Law Journal* 105 – 127. The abstract:

> *This article aims to contribute both to the 'Refgov' project, which is focused on the ambition to find ways of promoting human rights within the EU, but also, more in general and apart from the project, to an improved understanding of the crucial place conflict of law rules occupy in the building of a common Europe—a highly political question behind apparently technical issues. In the study the author deals with the parameters, points of interest, etc in relation to private international law which should be heeded if European Member States 'look at' each other's laws, and—in the context of the 'Refgov' project—if the idea is to exchange 'best practices' or harmonise substantive law, or to harmonise private international law, etc further through a type of open method of coordination. The contribution also shows that private international law issues are decisive in respect of every evaluation of the impact of European integration on human rights, both if this integration process takes place through 'negative' harmonisation (for example by falling back on the principle of mutual recognition) and through 'positive' harmonisation.*

R. Swallow & R. Hornshaw, "**Jurisdiction clauses in loan agreements: practical considerations for lenders**" (2007) 1 *Bankers' Law* 18 – 22. Abstract:

> *Assesses the implications for borrowers and lenders of the Commercial Court judgment in JP Morgan Europe Ltd v Primacom AG on whether proceedings*

brought in Germany challenging the validity a debt facility agreement were to be treated as the first seised under Regulation 44/2001 Art.27 (Brussels I Regulation), despite the fact that the agreement contained an exclusive jurisdiction clause in favour of the English courts. Advises lenders on the drafting of loan agreements to help mitigate the risk of a jurisdiction clause being frustrated. Considers the steps that might be taken by the lender once a dispute has arisen.

A. Dutton, "**Islamic finance and English law**" (2007) 1 *Bankers' Law* 22 – 25. Abstract:

Reviews cases relating to Islamic finance, including: (1) the Commercial Court decision in Islamic Investment Co of the Gulf (Bahamas) Ltd v Symphony Gems NV on whether the defendant was liable to make payments under a Sharia compliant contract governed by English law that would contravene Sharia law; (2) the Court of Appeal ruling in Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd (No.1) interpreting a choice of law clause expressed as English law "subject to the principles" of Sharia law; and (3) the Commercial Court judgment in Riyad Bank v Ahli United Bank (UK) Plc on whether the defendant owed a duty of care to a Sharia compliant fund where it had contracted directly with its parent bank.

J. Burke & A. Ostrovskiy, "**The intermediated securities system: Brussels I breakdown**" (2007) 5 *European Legal Forum* 197 – 205. Abstract:

Presents a hypothetical case study of a dispute arising from a cross-border securities transaction involving parties from the UK, Sweden and Finland to examine the application of the private international law regime under Regulation 44/2001 Art.5(1) (Brussels I Regulation), the Convention on the Law Applicable to Contractual Obligations 1980 Art.4 (Rome Convention) and the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary. Considers the extent to which commercial developments in the securities industry have outstripped the current conflicts of law rules.

M. Requejo, "**Transnational human rights claims against a state in the**

European Area of Freedom, Justice and Security: a view on ECJ judgment, 15 February 2007 – C292/05 – Lechouritou, and some recent Regulations" (2007) 5 *European Legal Forum* 206 – 210. Abstract:

> *Comments on the European Court of Justice ruling in Lechouritou v Germany (C-292/05) on whether a private action for compensation brought against Germany with respect to human rights abuses committed by its armed forces during its occupation of Greece in the Second World War fell within the scope of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 Art.1, thus preventing the defendant from claiming immunity for acts committed during armed conflict. Examines the EC and US jurisprudential context for such private damages claims.*

L. Osana, "Brussels I Regulation Article 5(3): German Law Against Restrictions on Competition" (2007) 5 *European Legal Forum* 211 – 212. Abstract:

> *Summarises the Hamburg Court of Appeal decision in Oberlandesgericht (Hamburg) (1 Kart-U 5/06) on whether the German courts had jurisdiction under Regulation 44/2001 Art.5(3) (Brussels I Regulation) to order a German tour operator not to incite Spanish hotels to refuse to supply contingents to a competitor German tour operator, behaviour that had been found to be anti-competitive.*

C. Tate, "**American Forum Non Conveniens in Light of the Hague Convention on Choice of Court Agreements**" (2007) 69 *University of Pittsburgh Law Review* 165 – 187.

E. Costa, "**European Union: litigation – applicable law**" (2008) 19 *International Company and Commercial Law Review* 7 – 10. Abstract:

> *Traces the history of how both the Convention on the Law Applicable to Contractual Obligations 1980 (Rome I) and Regulation 864/2007 (Rome II) became law. Explains how Rome II regulates disputes involving non-contractual obligations and determines the applicable law. Notes areas where Rome II does not apply, and looks at the specific example of how Rome II would regulate a dispute involving product liability, including the habitual residence test.*

E.T. Lear, "**National Interests, Foreign Injuries, and Federal Forum Non Conveniens**" (2007) 41 *University of California Davis Law Review* 559 – 604 [**Full Text Here**]. Abstract:

> *This Article argues that the federal forum non conveniens doctrine subverts critical national interests in international torts cases. For over a quarter century, federal judges have assumed that foreign injury cases, particularly those filed by foreign plaintiffs, are best litigated abroad. This assumption is incorrect. Foreign injuries caused by multinational corporations who tap the American market implicate significant national interests in compensation and/or deterrence. Federal judges approach the forum non conveniens decision as if it were a species of choice of law, as opposed to a choice of forum question. Analyzing the cases from an adjudicatory perspective reveals that in the case of an American resident plaintiff injured abroad, an adequate alternative forum seldom exists; each time a federal court dismisses such a claim, the American interest in compensation is irrevocably impaired. With respect to deterrence, an analysis focusing properly on adjudicatory factors demonstrates that excluding foreign injury claims, even those brought by foreign plaintiffs, seriously undermines our national interest in deterring corporate malfeasance.*

I am sure that I have missed various articles or case comments published in the last couple of months. If you spot any that are not on this list (or, even better, if you have written one and it is not on this list), please let me know.

German Annotation on Referring Decision in FBTO

Schadeverzekeringen N.V. v Jack Odenbreit (C-463/06)

An interesting annotation by *Angelika Fuchs* on the decision of the German Federal Supreme Court asking the European Court of Justice for a preliminary ruling on the interpretation of Article 11 (2) and Article 9 (1) (b) of Regulation No 44/2001/EC has been published in the latest issue of the German legal journal Praxis des Internationalen Privat- und Verfahrensrechts (IPRax 2007, 302 et seq.).

The facts of the case are as follows: The claimant, who is habitually resident in Germany, suffered an accident in the Netherlands and brought a direct action in Germany against the other party's insurer the latter of which is domiciled in the Netherlands. Here the question arose whether German courts have international jurisdiction for this claim on the basis of Articles 11(2), 9 (1) (b) Brussels I Regulation.

This question was answered in the negative by the first instance court (*Amtsgericht Aachen*) dismissing the action on the grounds that German courts lacked international jurisdiction. However, the court of appeal (*Oberlandesgericht Köln*) held in an interim judgment that the action was admissible. The case was subsequently referred to the Federal Supreme Court (*Bundesgerichtshof*) which pointed out that the crucial question was whether the injured party can be regarded as a "beneficiary" in terms of Article 9 (1) (b) Brussels I Regulation or whether the term "beneficiary" refers only to the beneficiary of the insurance contract (this has been so far the point of view of the prevailing opinion in German doctrine). In the latter case, the injured party could not sue the insurer at his/her (i.e. the injured party's) domicile.

One of the main arguments in favour of the jurisdiction of the courts at the injured party's domicile is Recital 16a of Directive 2000/26/EC which has been suggested in Directive 2005/14/EC and reads as follows:

> *Under Article 11(2) read in conjunction with Article 9(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, injured parties may bring legal proceedings against the civil liability insurance*

provider in the Member State in which they are domiciled.

Even though the Supreme Court attached some importance to this recital, the Court had nevertheless doubts whether an autonomous and uniform interpretation of the rules in question was possible on this basis. Thus, the Federal Supreme Court referred with judgment of 26 September 2006 the following question – its first on the Brussels I Regulation – to the ECJ:

> ***Is the reference in Article 11 (2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to Article 9 (1) (b) of that regulation to be understood as meaning that the injured party may bring an action directly against the insurer in the courts for the place in a Member State where the injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State?***

Fuchs examines in her annotation whether the well-established methods of interpretation militate in favour of the jurisdiction of the courts in the State where the injured party is domiciled and argues that the wording of Articles 11(2), 9 (1) (b) Brussels I Regulation does not support the assumption of jurisdiction since – while the injured party is referred to in Article 11 (2) – this is not the case in Article 9 (1) (b) Brussels I Regulation. In her opinion also a historic interpretation does not lead to another result since the Jenard Report illustrated that a *forum actoris* of the injured party was not intended. This situation had not been altered in the course of the communitarisation of the Brussels Convention. With regard to teleologic arguments, *Fuchs* states first that there was no need to protect the injured party by admitting direct actions before the courts of his/her domicle and secondly that this additional head of jurisdiction might have undesirable consequences such as forum shopping or a race to the court. With regard to a systematic interpretation she refers *inter alia*, in addition to the mentioned Recital 16a of Directive 2000/26/EC (which, however, is not regarded as a conclusive argument), to the Rome II Regulation. Here a special rule for traffic accidents had been discussed – but not been accepted (see for the adopted version of Rome II our older post which can be found here). Thus, according to *Fuchs* only the systematic argument which is based on an analogous application

of Article 9 (1) (b) Brussels I Regulation might be used – notwithstanding substantial reservations – in favour of admitting direct actions before the courts of the injured party's domicile.

The referring decision can be found (in German) at the Federal Supreme Court's website. See with regard to the reference also our older post which can be found here.

Review of Stone's EU Private International Law

Book review of Peter Stone, *EU Private International Law Harmonisation of Laws* [Elgar European Law, Cheltenham, 2006, *lvi*+462pp, ISBN 1-84542-015-2]. *(Reviewed by Dr Lorna Gillies, Leicester)*

This book is part of a series collection on European Law by Edward Elgar Publishing. According to the blurb, the book offers a "critical assessment of four main areas of concern: civil jurisdiction and judgments; the law applicable to civil obligations ; family law ; and insolvency." The premise of the text is the development of EU international private law rules from Article 95 EC. For the first time, principles of international private law are analysed, considered and presented in the context of EU law. This is one of the key strengths of the book. The book will be of particular interest to academics, practitioners and postgraduate students. Whilst a number of key EU proposals had yet (and still remain) to be finalised when the book was written, this book is nevertheless of significant and relevant interest to the target audience. Whilst the author admittedly does not consider in depth the proposals for the Rome I or II regulations, a further strength of the book is the inclusion of the author's proposed new articles of these instruments in, most often, his concluding analysis of current instruments. Furthermore, the book also makes reference to the EU accession to the Hague Conference on Private International Law.

The book contains detailed case tables of UK, EU Member State and ECJ cases as well as an international case section listing cases from Singapore and the United States. The table of cases also conveniently provides particular page references throughout the text. Mirroring the influence of EU policy, the book is divided into an introduction and four substantive parts comprising nineteen chapters. Part I contains the introduction which succinctly considers the basis for harmonisation of international private law rules (ie those on civil jurisdiction, choice of law, family law and insolvency) at EU level.

Part II is the largest part of the book and focuses, not surprisingly, on civil jurisdiction and judgments across nine chapters. The main focus of the text in this Chapter is, as expected, Regulation 44/2001. A historical assessment of the changes from the Brussels Convention 1968 to the final version of the Regulation is provided. The Chapter consider the application of English cases with frequent reference to ECJ cases. At the end of Chapter Two there is a helpful table providing all of the commencement dates for the Brussels and Lugano Conventions and Regulation 44/2001. Chapter Three focuses on domicile as the connecting factor in the Brussels Convention and Regulation 44/2001. This Chapter usefully considers the concept of domicile and the application of the concept vis-à-vis local, other European and external (ie non EU) defendants. Chapter Four then considers the alternative grounds of jurisdiction in Regulation 44/2001 and assesses the changes to Article 5 in particular. The author assesses the merits of Article 5(1) and comments on the possible reform of Article 5(3). Unlike many other texts on international private law, a strength of this book is that it offers a separate chapter on the jurisdiction rules for protected contracts, namely consumer, employment and insurance contracts. The jurisdictional and governing laws of such contracts are becoming increasingly important as (the (would-be) "reasonably informed and circumspect") consumers purchase goods and services from sellers in different jurisdictions and as employees move between (an ever increasing number of) Member States to seek work. This text is different to other international private law texts as it recognises the legal and commercial importance of such (supposedly minor) contracts to EU policy and the application of international private law rules in the day-to-day lives of ordinary EU citizens. As one would expect, there are also chapters on the rules on exclusive jurisdiction, submission and concurrent proceedings. The latter contains an interesting and reflective analysis of the recent cases *Gasser v MISAT* and *Turner v Grovit*. There is also a shorter chapter on provisional measures. The final two

chapters in this Part provide an assessment of the rules on recognition and enforcement and enforcement procedure. These succinct chapters provide key summaries of the relevant case law plus, in respect of enforcement an analysis of Regulation 805/2004, the European Enforcement Order for Uncontested Claims.

Part II of the book focuses on the law applicable to civil obligations. Part II contains four chapters which focus on contracts, protected contracts (mirroring Part I), torts and restitution. The main focus on Chapter Twelve is the replacement of the Rome Convention 1980. Regular reference is made in this Part to the proposals for the Rome I Regulation. The basis of the Rome Convention is considered as is its application and relationship with other conventions. The author does comment on the Green Paper which considered the replacement of the Rome Convention with a Community Instrument. The author recommends the further clarification of the rules governing implied choice of law by the inclusion of a range of factors in Article 3(1A) with the emphasis on establishing the commercial expectations of the parties. Articles 3 and 4 of the Rome Convention are considered in depth. The case is then put by the author for possible reform thereof. Importantly, the author devotes Chapter Thirteen separately to protected contracts, in recognition of the important and difficult task in reconciling party autonomy in selecting the governing law with the overriding need to protect consumers, employees and insured parties. The author provides commentary on the replacement of the Rome Convention with the Rome I Regulation and in concluding his analysis suggests in particular, a revised Article 5. On the matter of insurance contracts, Chapter Thirteen assesses and considers possible reform of Directives 88/357 and 90/619 on non-life and life insurance contracts respectively. Chapters Fourteen and Fifteen are devoted to the proposal for the Rome II Regulation. Chapter Fourteen considers the proposed Regulation vis-à-vis torts in depth, including, *inter alia*, its scope and relationship with other international convention. This Chapter also offers critical assessment and suggested amendments to, *inter alia*, Articles 3(2) and (3) and analysis of a number of specific torts including product liability, unfair competition, intellectual property, defamation, environmental damage, industrial disputes and traffic accidents. Chapter Fifteen provides a concise analysis of the proposals in Rome II vis-à-vis claims in restitution.

Part III of the book contains three, and by comparison shorter, chapters on family matters comprising matrimonial proceedings, parental responsibility and familial

maintenance and matrimonial property. Part III of the book focuses on Regulations 1347/2000 (Brussels II) and 2201/2003 (Brussels IIA). Chapter Sixteen includes a table on the transitional operation of these two regulations amongst the Member States. Chapter Seventeen examines parental responsibility and contrasts the Brussels IIA Regulation with the Hague Convention 1996 on Parental Responsibility and Measures for the Protection of Children and the 1980 Child Abduction Convention.

The final part of the book, Part IV, is on the matter of insolvency. Chapter nineteen examines the jurisdiction, choice of law and enforcement aspects of insolvency as contained in Regulation 1346/2000. A noticeable feature of this Chapter is the author's criticism of the rational for secondary proceedings and his suggestion for harmonisation of "the substantive laws of the Member States as regards the definition and extent of preferential rights […] by means of a directive under Article 95 EC."

In conclusion, this book is warmly welcomed and will be an important research resource to its readership. Purchase the book from here or direct form the CONFLICT OF LAWS .NET bookshop.

Symposium: "International Litigation In Intellectual Property And Information Technology"

The symposium is organized by the *Unité de droit international privé* of the ULB (*Université Libre de Bruxelles*) in the framework of the project on **"Judicial Cooperation in Matters of Intellectual Property and Information Technology"**, co-financed by the European Commission, and will take place in **Brussels on Friday, March 2nd 2007**.

It is a follow-up to an earlier roundtable, held in Heidelberg in late 2006 (a

background paper prepared for the Heidelberg meeting can be found here; other interesting preliminary documents dealing with specific topics are available here). As stated on the symposium programme, a number of key issues related to cross-border IP litigation will be addressed, in the light of recent case-law of the European Court of Justice (GAT and Roche judgments, on which a number of recent posts can be found on our website) and legislative proposals (Rome II Regulation):

> *How should the applicable procedural framework be organized to guarantee at the same time an effective protection of intellectual property rights and legal certainty? Which court has jurisdiction to entertain actions relating to foreign rights and/or relating to infringements perpetrated trough the internet? Is it still possible to consolidate proceedings relating to parallel IP rights after the decisions of the European Court of Justice in the GAT and Roche cases? What are the means to collect evidence located abroad in cross-border IP cases? What is the role and scope of preliminary and protective measures in IP international litigation?*

For the full programme, the complete list of speakers and further information (including registration, free for students), see the project website and the downloadable leaflet.

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25 years IPRax – Conference in Regensburg

To celebrate the 25th anniversary of the German legal journal "IPRax" (*Praxis des Internationalen Privat- und Verfahrensrechts*), a conference took place in Regensburg from 20th to 21st January 2006, where current questions of private international law and international civil procedure law were discussed.

A talk was given by *Prof. Dr. W.-H. Roth, (*Bonn*)* who addressed *inter alia* the question whether primary EU law contains conflict of law rules and whether the

principle of mutual recognition can be deduced from the fundamental freedoms. Further he attended – as *Prof. Dr. D. Coester-Waltjen* did- to the question whether the principle of mutual recognition might be regarded as a corrective of private international law rules.

Prof. Dr. B. Hess (Heidelberg) attended to European civil procedure law and in particular to the methods of interpretation used by the ECJ. He stressed the significance of autonomous interpretation which can be regarded as the most important method of interpretation. While the importance of the comparative interpretation was decreasing, the relevance of a systematical – teleological interpretation was increasing. Further, he favoured a resumption of the ratification process concerning the European Constitution. He argued the entry into force of the Charter for Fundamental Rights would strengthen a constitutional interpretation.

Prof. Dr. S. Leible (Bayreuth) analysed in his speech the relationship between European private international law and European civil procedure rules using the example of the proposal for Rome I and Regulation 44/01/EC with regard to cross-border consumer contracts. He concluded that Rome I will create a very welcome synchronism between jurisdiction and applicable law concerning international consumer contracts.

Prof. Dr. G. Wagner (Bonn) talked about the future Rome II Regulation and drew on the one hand a comparison between the two proposals for a Rome II Regulation (Commission´s proposal and the Parliament´s proposal) and on the other hand a comparison between these proposals and autonomous German law.

And finally *Prof. Dr. D. Coester-Waltjen (*Munich) addressed in her speech the principle of mutual recognition – in particular in the context of family law. She discussed – after giving a definition of the term "principle of mutual recognition" – especially potential problems such as the question whether only official or also private acts could be recognized. Further, she attended to the embedding of the principle of mutual recognition in international conventions and asked whether the principle of mutual recognition can be derived from European primary or secondary law. Finally she gave guidelines how arising problems could be handled and classified the principle of mutual recognition within the context of private international law methods.

The mentioned speeches as well as short summaries of the respective discussions (in German) can be found in (2006) 4 IPRax.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2025: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts“ (IPRax) features the following articles:

H.-P. Mansel: **70 Years of the German Council for Private International Law (1953-2023)**

On the occasion of the seventieth anniversary of the founding of the German Council for Private International Law, a conference of the Council was held in Cologne at the invitation of the author as President of the Council, organized by the Institute for Private International and Foreign Law at the University of Cologne. The topic of the conference was “Global Private International Law and 25 Years of Judicial Cooperation in the European Union”. The German Council for Private International Law is an academic institution that advises the Federal Ministry of Justice on German and European legislative projects. Professor Zoltan Csehi, ECJ, gave the opening lecture.

Z. Csehi: **The approach of the Court of Justice of the European Union to private international law**

This article examines the reasons why some scholars, while considering the CJEU’s interpretation of private international law to be correct as to its result,

disagree with the CJEU's reasoning. An analysis of the CJEU's methodology in this area shows that the approach adopted is not primarily based on the classic principles of private international law. Rather, the focus is on the applicable primary and secondary EU law, in particular the numerous regulations in the area of European judicial cooperation. These instruments are interpreted according to the CJEU's usual methods, namely by way of autonomous interpretation. Therefore, due account should be taken of this "systemic change" that international civil procedure and conflict of laws rules have undergone as a result of the Europeanization of this area of law.

R. Wagner: **25 years of judicial cooperation in civil matters**

With the Treaty of Amsterdam entering into force on 1 May 1999, the European Union obtained the legislative competence concerning the judicial cooperation in civil and commercial matters. This event's 25th anniversary gives ample reason to pause for a moment to briefly appreciate the achievements and to look ahead. This article follows the contributions of the author to this journal in regard to the 15th and the 20th anniversary of the entry into force of the Treaty of Amsterdam (IPRax 2014, 217 and IPRax 2019, 185).

C. Budzikiewicz: **European international matrimonial law and third countries**

The article examines the question of how relations with third countries affect international divorce law, international matrimonial property law and international maintenance law. In the European conflict of laws, the principle of lois uniformes applies. This means that conflict-of-law rules have been established that apply to both EU-related and third-country-related cases. Accordingly, the EU rules on jurisdiction also cover third-country-related cases in principle. Nevertheless, friction and tensions may arise in relation to third countries. This applies, for example, with regard to the primacy of international treaties. But it also covers the creation of limping marriages, the ordre public reservation and conflict-of-law rules relating to form requirements. The fact that both the Rome III Regulation and the European Matrimonial Property Regulation were adopted only by way of enhanced cooperation creates additional conflict potential, as the non-

participating Member States are thus third countries, just like the non-EU states. The article deals with the resulting tensions and seeks solutions to overcome them.

D. Coester-Waltjen: **European International Law on Parent and Child in Relation to Third States**

This article aims to analyse problems of determining international jurisdiction and applicable law in matters of parental responsibility as well as recognition of decisions in these matters under European law in connection with third countries. Special focus will be put on EU-Regulation 2019/1111, the 1996 Hague Child Protection Convention and the 1980 Hague Abduction Convention. Whereas those rules of the EU-Regulation 2019/1111 and the 1996 Hague Child Protection Convention, which form lois uniformes, allow a relatively clear and easy determination of international jurisdiction and applicable law even in cases in which the habitual residence of the child – the decisive factor – changed lawfully, the issues become more complicated in cases of child abduction. The EU-Regulation provides some specific rules for that situation concerning jurisdiction, proceedings and enforcement. However, these rules are only applicable if the child had its habitual residence before the abduction in a Member State that is bound by the Regulation and is presumably abducted to another Member State bound by the Regulation. The specific rules do not provide for abduction to or from a third state. For these cases redress should be had to the provisions of the 1996 Hague Convention, the 1980 European Convention on Recognition of Custody Decisions, the 1980 Hague Abduction Convention or the internal national law – possibly intertwined with other rules of the Regulation. Thus, it is complicated to determine the applicable mechanism – even though the concerns – mainly the well-being of the child – are the same in all abduction cases. As time is an issue the complications are counterproductive and may produce inconsistencies.

D. Looschelders: **European International Succession Law and Third States**

The EU Succession Regulation is based on the principles of universal application and unity of succession. Accordingly, it contains only a few provisions that

expressly distinguish between cases with substantial connections to two or more Member States and third state situations. The most important exception is the limited relevance of the renvoi in the case of references to third-state law in accordance with Article 34 of the EU Succession Regulation. However, there are numerous other constellations in which the assessment of the succession under the European Succession Regulation in third state situations poses particular difficulties. The article examines these constellations and identifies possible solutions. Finally, the disharmonies arising from the continued validity of bilateral treaties concluded between several Member States, including Germany, and third states are discussed.

T. Pfeiffer: **The Impact of the Rome I and II Regulations on the Private International Law of Non-Member States and the Hague Principles on Choice of Law in International Commercial Contracts**

The article analyzes the influence of the Rome I and Rome II Regs. on the private international law of third countries and on the Hague Principles on Choice of Law in International Commercial Contracts. In doing so, it distinguishes between different ways in which influence is exerted and the varying degrees of influence in individual states or regions, whereby, with regard to the Hague Principles, the exemplary function of certain provisions in the Rome I Reg. can be clearly demonstrated. From an international perspective, the advantage of the Rome Regulations can be seen in the fact that, as European legal acts, they have already passed one, i.e. the European test of international acceptance. A disadvantage of some regulations, on the other hand, is the typical European fondness for detail.

H. Kronke: **The European Union’s role and its impact on the work of the global private-law-formulating agencies (Hague Conference, UNIDROIT, UNCITRAL)**

Focusing, on the one hand, on the European Union’s constitutional competences and, on the other hand, the distinction between categories of instruments (treaties versus soft-law instruments), the author provides an overview of the Union’s participation in and the substantive impact on the negotiation processes

over the past decades. While there are examples of highly satisfactory co-operation, there have also been instances of stunning obstruction or unhelpful disinterest. He underscores the role both the relevant Directorates General and individual officials in charge of a dossier may have and calls for better co-ordination of work in the Member States' ministries and departments.

R. Michaels: **Private International Law and the Global South**

"Modern law's episteme is inescapably colonial and racist," says Upendra Baxi, "and private international law cannot escape the, as it were, Original Sin." With this in mind, I scrutinise for private international law what Nicolaïdis calls EUniversalism: Europe's claim for universality of its values, spurred by its amnesia about their contingent and colonial origins. How was European private international law shaped against a non-European other? How does private international law today, in its relation, with the Global South, perpetuate colonial hierarchies? To what extent is European private international law an inadequate model for private international law within the Global South itself?

L. d´Avout: **Explanation and scope of the "right to recognition" of a status change in the EU**

The CJEU challenges the legislation of a Member State (Romania) which does not allow the recognition and recording on the birth certificate of a change of first name and gender identity, as lawfully obtained by a citizen of this Member State in another Member State by way of exercising their freedom of movement and of residence. The consequence of this legislation is that an individual person is forced to initiate new legal proceedings with the aim to change their gender identity within this first Member State. The judgment Mirin appears to develop the jurisprudence of the CJEU by confirming the subjective right of transsexual persons to unconditional recognition of their change of civil status in one Member State of the European Union by all other Member States without a supplementary procedure. A contextualised consideration of this judgment enables its significance to be assessed more precisely.

K. Duden: **Recognition of the change of gender entry: on the home straight to a Union-wide comprehensive status recognition?**

The European principle of recognition is becoming more and more important. From company law, it has spread to the law of names, family law and the law of the person. For an increasing number of status questions, the CJEU has established benchmarks from EU primary law for how Member States must treat certain cross-border situations. Mirin is a further step in this development: the CJEU is extending the principle of recognition to a politically highly controversial and salient area – the change of a person's legal gender entry. In doing so, the court is possibly paving the way for comprehensive status recognition and is setting limits for Member States invoking public policy. Furthermore, the ruling allows interesting insights into the procedural background of the principle of recognition and the object of recognition.

A. Dickinson: **An Act of Salvage**

The sinking of the tanker, 'The Prestige', off the Spanish coast more than two decades ago triggered not only an environmental catastrophe, but also a complex chain of legal proceedings that have not yet reached their final destination. This note considers the procedural background to, and substance of, the most recent decision of the English Court of Appeal in Kingdom of Spain v London Steam-Ship Owners' Mutual Insurance Association Limited [2024] EWCA Civ 1536, considering issues of judgment enforcement under the Brussels I regime and of remedies against a third-party victims pursuing direct actions against insurers without following the dispute resolution mechanisms in the insurance policy.

LEX & FORUM Vol. 3/2024

EDITORIAL

In an increasingly globalized world—and especially within the framework of a unified market founded on economic freedom and the free movement and establishment of individuals and businesses—international sales have emerged as a cornerstone of the legal and economic order. They are not merely instruments for the acquisition of assets across borders; they also function as a key mechanism for fostering business growth and enhancing competitiveness through the expansion of commercial activity and client networks.

Given their fundamental role, international sales are subject to a broad and multi-layered legal framework at the international level. This complex regulatory landscape gives rise to a number of interpretative and practical challenges, particularly with regard to the interaction and prioritization of overlapping legal norms.

With these considerations in mind, our journal hosted an online event on 1 October 2025, aiming to shed light on the central legal issues surrounding international sales in the current international context. The scholarly contributions presented during that event are now published in this issue, enriched with doctrinal analysis and case law references, in the hope of contributing meaningfully to ongoing academic and professional discourse. It opens with a study by Professor *Michael Sturner,* Chair of Civil Law, Private & Procedural International Law and Comparative Law at the University of Konstanz and Judge at the Karlsruhe Court of Appeal, entitled "*The Right to Repair: A New Paradigm in EU Sales Law*". Judge *Dimitrios Koulaxizis* contributes an article examining "*The United Nations Convention on Contracts for the International Sale of Goods (CISG) in Relation to the Rome I Regulation on the Law Applicable to Contractual Obligations*"; Prof. *Anastasios Valtoudis*, Professor of Civil Law at the Aristotle University of Thessaloniki, addresses "*Issues Concerning the Preconditions for the Application of the CISG – Delimitation in Light of Directive 2019/771 and Articles 534 et seq. of the Greek Civil Code*"; Prof. *Eugenia Dacoronia*, Professor of Civil Law at the Faculty of Law of the University of Athens, offers a critical reflection on "*The UNIDROIT Principles of International Commercial Contracts – 30 Years On: Their Significance and Comparison with the Provisions of the Greek Civil Code*". The volume also includes the contribution of

Associate Professor of Civil Law at the Aristotle University of Thessaloniki *Timoleon Kosmidis,* who explores "*Natural Gas Supply: National Legislation and International Commercial Practice*".

The *Praefatio* of the issue hosts the valuable reflections of Professor *Silvia Marino* of the University of Insubria/Italy, on the complex issue of *lis pendens* and related actions in the context of family property disputes under European Union Private International Law ("Lis Pendens and Related Actions in European Union Private International Law on Family Property Issues").

The case law section features a number of significant judicial decisions. Notably, it includes the important judgment of the Court of Justice of the European Union (CJEU), 4 October 2024, C-633/22, *Real Madrid Club*, addressing *public policy* as a ground for refusing the enforcement of a foreign judgment on account of an infringement of freedom of the press (commented by *R. Tsertsidou*). Also presented is the ruling of the German Federal Court of Justice (BGH), 29 November 2023, VIII ZR 7/23, which deals with the application of domestic mandatory rules even in the presence of a contractual choice of law, where the contractual relationship lacks a substantial connection to a foreign legal system (commented by *N. Zaprianos*). From the Greek courts, this issue includes: Athens Court of First Instance, judgment no. 3155/2022, concerning the possibility of reviewing the parties' freedom to choose the competent court under the rule (Art. 281 grCC) prohibiting of abuse of rights (commented by *S. Karameros*); Athens Court of Appeal (Single-Member), judgment no. 2435/2024, concerning the recognition of a foreign adoption judgment issued in favor of a same-sex couple (commented by *M. Gerasopoulou*); and Piraeus Court of First Instance (Single-Member), judgments no. 3355/2023 and 11/2022, regarding the applicable law for the appointment of a special guardian to initiate a paternity challenge, pursuant to the 1996 Hague Convention (commented by *G.-A. Georgiadis*).

The scientific section of this issue includes a study by Associate Professor *V. Kourtis* (Aristotle University of Thessaloniki), entitled *"Issues of Intertemporal Law in Cross-Border Maintenance Claims within the European Area"*. It also features the academic contribution of Judges *P. Kapelouzos, St. Krassas, and M. Martinis*, submitted in the context of the *Themis Competition 2023*, under the title *"May I 'book' my forum delicti? Or else: The Objective Limits of Jurisdiction Clauses in Tort Cases"*. The issue concludes with the regular quarterly review of the CJEU's case law covering the period July–September 2024, edited by *A. Anthimos*.

Lex&Forum renews its scientific appointment with our readers for the next, 16th issue, with the central topic (Focus) on "*Cross-border matrimonial and registered partnership property regimes*".