German Publication: International Law of Civil Procedure

The 4th edition of the renowned German textbook "Internationales Zivilverfahrensrecht" by *Haimo Schack* has been published. The textbook attends to the foundations of international civil procedure law and the limits of jurisdiction under international law. In particular it deals with the rules concerning the procedure on the merits as well as the rules on the recognition and enforcement of foreign judgments.

The 4th edition includes alterations which arose as a result of the new Brussels II *bis* Regulation (Regulation 2201/03/EC) and the Regulation on a European Enforcement Order for uncontested claims (Regulation 805/04/EC). Further it encompasses the Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes and the proposal for the estblishment of a European payment order procedure and measures to simplify and speed up small claims litigation.

German Publication: European Civil Procedure Law

The 2nd edition of the **German commentary on European civil procedure law** edited by *Thomas Rauscher,* Europäisches Zivilprozeßrecht, has been published. The new edition comprises two volumes and includes commentaries on the following regulations and proposals:

- Regulation 44/2001/EC ("Brussels I")
- Regulation 2201/2003/EC ("Brussels II bis")
- Regulation 1348/2000/EC ("Service Regulation")

- Regulation 1206/2001/EC ("Evidence Regulation")
- Regulation 805/2004/EC ("Regulation on a European Enforcement Order")
- Regulation 1346/2000/EC ("Insolvency Regulation")
- the future regulation on the creation of a European Payment Order
- Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure
- Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

Further information can be found on the publisher´s website.

Vol. 2, No. 2 of the Journal of Private International Law

The new issue of the Journal of Private International Law Volume 2, Number 2 (October 2006), will be published shortly. The contents are (*click on the links below to view the abstract*):

- **EU Law as Private International Law? Reconceptualising the Country-of-Origin Principle as Vested-Rights Theory** by *Ralf Michaels* (Associate Professor, Duke University School of Law)
- **The Hague Convention of 30 June 2005 on Choice of Courts Agreements including Appendix Hague Conference on PIL 20th Session** by *Andrea Schulz* (First Secretary, Permanent Bureau of the Hague Conference on Private International Law)
- **Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States** by *Stephen B. Burbank* (David Berger Professor for the Administration of Justice, University of Pennsylvania Law School)
- **A Major Reform of Japanese Private International Law** by *Koji Takahashi* (Associate Professor, Doshisha University Law School, Kyoto)

- **The Evolution of the Extra-territorial Mareva Injunction in Canada: Three Issues** by *Stephen G.A. Pitel* (Associate Professor, Faculty of Law, University of Western Ontario) & *Andrew Valentine* (LLB student, Faculty of Law, University of Western Ontario)
- **The European Court of Justic, English Courts and the Continued Use of the Anti-Suit Injunction in Support of Agreements to Arbitrate: Through Transport v New India** by *Nicholas Pengelley* (Osgoode Hall Law School, York University)
- **The Scope of the Conflict of Laws: Provisions in the European Insurance Directives** by *Louise Merrett* (Fellow and Barrister, Trinity College, Cambridge and Fountain Court Chambers, London)
- **"Mind the Gap Part II" The South African Supreme Court of Appeal and Characterisation** by *Christopher Forsyth* (Director, Centre for Public Law, University of Cambridge)

Information on subscribing to the Journal can be found here.

Readers may also be interested in the forthcoming **Journal of Private International Law Conference 2007**, to be held at the University of Birmingham on 26 – 27 June 2007. Please see the Call for Papers for more information – you are encouraged to submit your abstract as soon as possible.

Publication: Dicey, Morris & Collins on the Conflict of Laws

With the official launch reception only a couple of weeks away, the latest edition of the one of the world's foremost authorities on private international law is now available for purchase. First published in 1896, **Dicey, Morris & Collins, *The Conflict of Laws*** is in its 14th edition. The editors of this seminal work are:

- General Editor: **The Hon Mr Justice Lawrence Collins**
- Editor: **Professor C G J Morse**

- Editor: **Professor David McClean**
- Editor: **Professor Adrian Briggs**
- Editor: **Professor Jonathan Harris**
- Editor: **Professor Campbell McLachlan**

Most will, of course, notice the change in authorship; Sir Lawrence Collins has been elevated to co-author status, to reflect the work and scholarship he has invested in the book since he took over as General Editor in 1987. The publishers, Sweet & Maxwell, describe the latest edition thus:

> ***Dicey, Morris & Collins on the Conflict of Laws*** *is renowned worldwide as the foremost authority on private international law. It explains the rules, principles and practice which determine how the law of England and Wales relates to other legal systems. Explanation of each rule is followed by comment, and illustration by detailed reference to case law, ensuring it remains an in-depth but accessible research tool.*
> *It provides definitive reference for all practitioners concerned with issues such as contracts made or performed in other jurisdictions or with foreign parties, property situated overseas, disputes relating to torts committed abroad or committed by foreign parties, and personal and family matters involving people in other jurisdictions.*
>
> - *Completely revised and updated to include analysis of all the key legislation and cases since the last edition*
> - *Deals with the impact of the Civil Procedure Rules on private international law*
> - *Includes analysis of judicial decisions from common law jurisdictions as well as detailed consideration of international conventions and EU materials*
> - *Supplemented annually to stay up to date with developments in legislation and case law*

ISBN: 042188360X / 9780421883604 (Hardback). *Price*: £349. Available from Amazon, Hammicks Legal, and Sweet & Maxwell.

Enforcing Prenuptial Agreements in English Courts

A comparative article on international prenuptial agreements – focused on the failure of English courts to enforce prenuptial agreements – will be published in the forthcoming issue of *International Family Law*. In the article entitled "**Enforceable Pre-nuptial Agreements: the World View**" international family lawyer Jeremy D. Morley calls the English approach:

> *an anachronistic peculiarity of English law and an unfortunate example of a stubborn refusal to adapt the law to new conditions.*

Morley argues that the recent judgments of the House of Lords in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186 point to the urgent need for the courts to set aside the preposterous contention that it is 'substantially uncontestable' that substantial harm to the public would arise if prenuptial agreements were enforceable.

He states that the current law results from the ruling in 1929 in *Hyman v Hyman* [1929] AC 601 that binding prenuptial agreements contravened public policy. However, society has changed dramatically since 1929. When Hyman was decided, people had little expectation of getting divorced and divorce was generally regarded as sinful. People with assets did not require contractual protection should a divorce occur because the law did not provide for capital transfer upon divorce. The status of marriage itself provided all of the necessary terms of the relationship between spouses. Morley goes on to argue that as,

> *international affairs proliferate, England's "anomalous view of prenuptial agreements will increasingly and inappropriately create problems for international litigants.*

See Issue 4 of 2006 *International Family Law* for the full article.

Jurisdiction over European Patent Disputes, and the European Payment Procedure Order

Richard Taylor (DLA Piper) has written a short summary in the latest issue of the Law Society Gazette, discussing the response by the European Court of Justice, in *Roche Nederland BV v Primus* (C-539/03) and in *Gesellschaft fur Antriebstechnik mbH & Co KG (GAT) v Lamellen und Kupplungsbau Beteiligungs KG (LuK)* (C-4/03), **to attempts by European courts to extend their jurisdiction over European patent disputes**, referring to the provisions of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968.

Ref: *Law Society's Gazette L.S.G. (2006) Vol.103 No.39 Page 31*

In other news, the **European Parliament's second reading of the proposal for the adoption of a Regulation of the European Parliament and of the Council creating a European order for payment procedure** is scheduled for the 23rd October 2006.

The discussions in the various European organs have gone smoothly for this particular proposed Regulation. The only point of difference between the amended Commission proposal and the common position of the Council concerns the definition of the term “cross-border case”. The Commission "regrets" the limitation to cases where both parties are domiciled in a Member State and has made a declaration accordingly.

No surprises are expected on the 23rd October either; the common position of the Council has been negotiated together *with* the European Parliament in view of reaching a first-reading agreement. Therefore the European Parliament should

not request any amendments of the common position – at least in theory.

EDPS Opinion on Maintenance Obligations Regulation Proposal

The European Data Protection Supervisor (EDPS) has given his **opinion** on the **Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations** (COM(2005) 649 final).

The matters discussed in the opinion are limited to those concerning personal data protection. The EDPS summarizes the main thrust of the Proposal thus:

> *the proposal lays down a mechanism of exchange of information about the debtor and the creditor of maintenance obligations, with a view to facilitating the establishment and the recovery of maintenance claims. For this purpose, central national authorities will be designated in order to handle requests of information lodged by national judicial authorities (of other Member States) and collect personal data from different national administrations and authorities in order to fulfil these requests. The usual procedure will be as follows: a creditor will lodge an application through a court; the national central authority, upon request of the Court, will send an application to the central authorities of the requested Member State (through a specific form contained in Annex V); the latter central authorities will gather the requested information and will reply to the requesting central authority, which will then provide the information to the requesting court (para.4.)*

The EDPS notes that the current proposal does not provide for exchanges of personal data with third countries, but international cooperation is explicitly envisaged in the explanatory memorandum. In this context, the EDPS states, it is noteworthy to mention the ongoing negotiations for a new comprehensive Convention of the Hague Conference on Private International Law concerning

international recovery of maintenance. He continues:

> *It goes without saying that this international cooperation is likely to lay down mechanisms for exchanges of personal data with third countries. In this regard, the EDPS would like to stress again that these exchanges should be allowed only if the third country ensures an adequate level of protection of personal data or if the transfer falls within the scope of one of the derogations laid down by Directive 95/46/EC.*

Overall, the EDPS welcomes the proposal, subject to alterations and reservations of a technical, rather than substantive, nature. The opinion of the EDPS can be found here.

Many thanks to the EU Law Blog for the tip-off.

Significant Reform of Japanese Private International Law

The most significant reform of Japanese private international law for more than a century has been completed with the enactment of a new Act. The new Act, **Ho no Tekiyo ni Kansuru Tsusoku Ho**, will come into effect on 1st January 2007. The reform is far-reaching and covers, *inter alia*, contract, tort, unjust enrichment, and assignment of rights.

For further details, see Koji Takahashi, "A Major Reform of Japanese Private International Law" (2006) 2 *Journal of Private International Law* 311, due out this month.

EU Council Confirms Decision for the Accession of the Community to the Hague Conference on Private International Law, and Common Position on European Small Claims Procedure

At its recent Justice and Home Affairs meeting (2752nd), **the Council adopted a decision on the accession of the European Community to the Hague Conference on private international law** (HCCH) (7591/06). Page 30 of the press release states:

> *At present, the Community enjoys only observer status in the HCCH. Full membership is necessary for two reasons. It would grant the Community a status consistent with its new role as a major international player in the field of civil judicial cooperation. It would also enable the Community to fully participate in the negotiation of conventions in areas of its competence by expressing its views and positions and ensuring consistency and coherence between its own rules and envisaged international instruments. Moreover, the Community as such rather than its Member States would be the subject of the rights and obligations stemming from Hague Conventions in areas of its competence.*
>
> *The Hague Conference on private international law is a long-established international organisation with the objective of ensuring the progressive unification of the rules of private international law, mainly by negotiating and drafting international conventions (www.hcch.net).*

In other news, **the Council confirmed its common position on the European Small Claims Procedure**.

> *Following its agreement on 1 and 2 June 2006 and after completion of the work*

on recitals and standard forms, the Council confirmed its general agreement on the whole of a draft regulation establishing a European small claims procedure. The European Parliament has not yet delivered its opinion in first reading.

The purpose of this proposal is to simplify and speed up litigation concerning small claims in crossborder cases and to reduce costs by establishing a European Procedure for Small Claims. The proposal also eliminates the intermediate measures necessary to enable recognition and enforcement of judgments given in one Member State in a European Small Claims Procedure in other Member States.

This draft Regulation will apply, in cross-border cases, in civil and commercial matters, whatever the nature of the court or tribunal, where the value of a claim does not exceed EUR 2000 at the time the procedure is commenced, excluding all interest, expenses and outlays. Litigation on revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of state authority is excluded from the scope of application.

…A claimant will commence the European Small Claims Procedure by completing a claim form set out in the Annex to the text and lodging it at the competent court or tribunal directly, by post or by any other means of communication such as fax or e-mail acceptable to the Member State in which the procedure is commenced. The claim form will include a description of evidence supporting the claim and be accompanied, where appropriate, by any relevant supporting documents. Once the Regulation will be adopted, it will be applied in all Member States with the exception of Denmark. (p.28-29)

The full press release for both items can be found here.

Commission's Response to

Council’s Common Position on Rome II

In the wake of the **Council's common position** on the proposed adoption of a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II") (see our news item on the common position here), the **European Commission have published their Communication to the European Parliament**, pursuant to Art 251(2) of the EC Treaty.

The Communication discusses the common position's points of departure from both the Commission's modified proposal on 21 February 2006, and the amendments made by the European Parliament on 6 July 2005 (which were reflected in the Commission's modified proposal.) One point in particular may be of interest:

> *Article 16 departs from Article 13 of the Commission’s amended proposal which contained an additional paragraph dealing with the possibility for the court to give effect to overriding mandatory rules of another country than the country whose law is applicable under the rules of the instrument. This provision in the Commission’s proposal did not reflect any particular Community interest; it was aiming at consistency as it was inspired by a similar provision in the 1980 Rome Convention on the Law Applicable to Contractual Obligations.* ***The Commission has accepted this deletion****.*

Whilst the Commission states overall that it, "accepts the common position in the light of the fact that it includes the key elements included in its initial proposal and Parliament’s amendments as incorporated into its amended proposal", there are nevertheless some strong indicators of its displeasure over the common position in the text. For example:

> *The Commission continues to regret the approach in the common position which provides for a rather complex system of cascade application of connecting factors. It remains persuaded that its original solution offered an equally balanced solution for the interests at stake, while expressed in much simpler drafting.*

The word "regret", in fact, appears no less than *four* times in the six-page document. It will be interesting to see what the European Parliament makes of it all; the second reading has been scheduled by the DG of the Presidency for 12 December 2006.

The Commission's Communication to the European Parliament can be downloaded from here (PDF). All comments welcome.