

# Third Issue of 2013's Rivista di diritto internazionale privato e processuale

*(I am grateful to Prof. Francesca Villata - University of Milan - for the following presentation of the latest issue of the RDIPP)*

✘ The third issue of 2013 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features four articles and two comments.

*Sergio Maria Carbone*, Professor Emeritus at the University of Genoa, provides an assessment of party autonomy in substantive and private international law in **“Autonomia privata nel diritto sostanziale e nel diritto internazionale privato: diverse tecniche e un’unica funzione”** (Party Autonomy in Substantive and Private International Law: Different Techniques and a Single Function; in Italian).

*The paper focuses on the techniques through which party autonomy may operate in contractual relationships with the aim of assessing that (i) such techniques are, in practice, more and more difficult to define as to their respective fields of application; (ii) irrespective of which of such different techniques is actually deployed, they all share the common objective and the unified task to accomplish, in the most exhaustive way, the plan that the parties intended to implement by executing their contract. Indeed, party autonomy may operate either as a tool for the regulation of an entire relationship or of parts thereof, or as a conflict of laws rule or, again, as a direct or indirect source of regulation of contractual relationships. Whatever the specific role played by party autonomy with regard to a given contract, party autonomy eventually pursues the aim of executing the parties' underlying programme, provided that the fulfillment thereof is consistent with public policy, overriding mandatory rules and with the mandatory rules of the State with which the contract is exclusively connected. In this view, it is also confirmed the gradual establishment of the so-called material considerations method with regard to private international law solutions and, in particular, to the choice of the*

*national legal system which may come into play in determining the law applicable to contractual relationships.*

*Cristina Campiglio, Professor at the University of Pavia, examines the history of private international law from the Statutaries to the present day in “**Corsi e ricorsi nel diritto internazionale privato: dagli Statutari ai giorni nostri**” (History Repeating Itself in Private International Law: From the Statutaries to the Present Day; in Italian).*

*Private international law (“PIL”) aims at pursuing its basic mission, i.e. coordinating the different legal systems and underlying legal cultures, by providing an array of practical solutions. However, no rigid recipe proves to be completely satisfying. As a matter of fact, a growing evidence is accumulating that a merely dogmatic approach is often inconclusive and that PIL implementation cannot be reduced to a mere sum of rigid techniques. Rather, it has turned into an art of its sort, where theories and legal sensibilities may be compounded time to time in different ways. Due to the difficulty (the impossibility, at times) to define a clear-cut hierarchy of values – whether arising from the national legal systems or inherent to individual rights – the legal operator has to come to terms with juridical relativism and, in the absence of any binding guidance, search the most suitable solution to the case in point. Concerning the family law field, which has been known to be the most affected by normocultural differences (i.e., differences in law which are a reflection of cultural differences), it appears that the preferred solution should be the one that assures the continuity of individual status both in time and in space. In the past few years, this need of continuity has led scholars to reevaluate old legal theories and to develop a new method (the so-called recognition method), which essentially put aside conflict rules. This method has been used occasionally by the domestic legislator, who has developed a number of “receptive” choice-of-law rules. However, the recognition method is hard to be applied when the foreign legal institution is unknown to the local court and an adaptive transposition is required. In such an event, another aged theory can be resurrected, i.e. the substitutive method. The main goal of this contribution is on the one hand to provide evidence of the persisting relevance of the old legal theories mentioned above (some of which dating back to the seventeenth century), while suggesting on the other hand the need to give methodological rigor up, in favor of a more eclectic and efficient exploitation of the variety of*

*methods that PIL makes available.*

Carla Gulotta, Associate Professor at the University of Milano-Bicocca, addresses jurisdiction over employers domiciled abroad namely with reference to the *Mahmadia* case in **“L’estensione della giurisdizione nei confronti dei datori di lavoro domiciliati all’estero: il caso *Mahamdia* e il nuovo regime del regolamento Bruxelles I-bis”** (The Extension of Jurisdiction over Employers Domiciled Abroad: The *Mahamdia* Case and the New Regime under the Brussels Ia Regulation; in Italian).

*After years of doctrinal debate, public consultations and normative efforts, the Recast of the Brussels I Regulation was finally adopted on 12 December 2012. Among the most innovative features of the new Regulation is the extension of the jurisdiction of EU Member States’ courts towards employers not domiciled in the Union. According to the author the new rules cannot be labeled as giving raise to “exorbitant grounds of jurisdiction”, nor can they be entirely understood unless they are read as the outcome of the efforts of the EU’s Legislator and judges to guarantee the enforcement of European rules aimed at employees’ protection in international employment cases. The article also argues that while waiting for the new Regulation to become effective, the European Court of Justice is anticipating its effects through an unprecedented wide construction of the expression “branch, agency or establishment” ex Art. 18(2) of Regulation No 44/2001. Lastly, the author suggests that the difficulties envisaged as for the recognition and the enforceability of the judgments given on the new grounds of jurisdiction might be overcome in respect of those Countries knowing similarly extensive rules of protective jurisdiction, or otherwise recurring to a principle of comity.*

Rosario Espinosa Calabuig, Profesora Titular at the University of Valencia, examines the interface between the 1999 Geneva Convention on the Arrest of Ships and Regulations Brussels I and Brussels Ia in **“¿La desarmonización de la armonización europea? A propósito del Convenio de Ginebra de 12 de marzo de 1999 sobre embargo preventivo de buques y su relación con los reglamentos Bruselas I y Bruselas I bis”** (The Disharmonization of the European Harmonization? Remarks on the Geneva Convention of 12 March 1999 on the Arrest of Ships and Its Interface with Regulations Brussels I and Brussels

Ia; in Spanish).

*The International Convention on Arrest of Ships of 1999 came into force on September 14, 2011, and so far it has been ratified by only four EU Member States, including Spain. As the precedent Convention of 1952 – which is still in force in most of the EU Member States – the 1999 Convention prescribes rules on both international jurisdiction, and recognition and enforcement of decisions. Accordingly, the European Union seems to be the one entity having standing to ratify the 1999 Convention, at least with regard to those rules. To this effect, doubts arise about the legality of the aforementioned accession of EU Member States to the Convention but, in particular, about the EU interest in the ratification of the Convention of 1999. Such ratification ought to be encouraged by other Member States, but this is not granted at all. Still, the EU might authorize Member States to ratify the 1999 Convention as previously occurred with reference to other maritime Conventions, such as the 2001 Bunkers or the 1996 HNS. Meanwhile, the 1999 Convention is already operating in countries like Spain. Hence, conflicts arising from the non-coordination between its provisions and those of the Brussels I Regulation ought to be addressed. Among such conflicts are, for example, those arising from a provisional measure being adopted inaudita parte by different courts within the European area of justice. Furthermore, the Brussels I Regulation was recast by Regulation No 1215/2012 which will be in force as of 2015, and among other innovations abolishes exequatur. This paper aims at unfolding those conflicts which might be solved by resorting to the ECJ case-law, in particular Tatry and TNT Express.*

In addition to the foregoing, the following comments are featured:

*Lidia Sandrini, Researcher at the University of Milan, “**Risarcimento del danno da sinistri stradali: è già tempo di riforma per il regolamento Roma II?**” (Compensation for Traffic Accidents: Has the Time Come to Amend the Rome II Regulation?; in Italian).*

*This article addresses Regulation EC No 864/2007 in so far as it deals with traffic accidents, at the aim of investigating whether there is an actual need for amendments to the rules applicable in this field. It is submitted that the coordination between the Regulation and the Motor Insurance Directives can*

*be achieved through the interpretation of the different legal texts in the light of their respective scopes and objects. On the contrary, the impact of the application of the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents definitely needs to be addressed by the EU legislator, in order to ensure the consistency of the solutions in the European judicial area. Finally, with regard to the interpretation of specific connecting factors provided for by the Regulation, it appears that most of the difficulties highlighted by Scholars and faced by judges are due, on one hand, to an inaccurate drafting, and, on the other hand, to the lack of explicit and detailed solutions with regard to general problems, such as the treatment of foreign law, the law applicable to the preliminary questions, and characterization.*

**Luigi Pintaldi, Law Graduate, “Il contrasto tra lodi arbitrali e decisioni dei giudici degli Stati dell’UE nel regolamento (CE) n. 44/2001 e nuove prospettive”** (The Conflict between Arbitral Awards and EU Courts Decisions under Regulation No 44/2001 and New Perspectives; in Italian).

*This article addresses the exclusion of arbitration from the scope of Regulation EC No 44/2001, as interpreted by the Court of Justice of the European Union in the well-known case West Tankers. In West Tankers the Court maintained that the validity or the existence of an arbitration agreement determined as an incidental question comes within the scope of the Brussels Regulation when the subject-matter of the dispute comes within the scope of it. This unsatisfactory result raised the issue of recognition and enforcement of a judgment from a Member State in conflict with an arbitral award recognised and enforced in another Member State. The recognition and enforcement of a judgment may be refused in conformity with paragraphs 3 and 4 of Article 34 affirming that the arbitral award is treated like a judgment with res judicata effects. Alternatively, the recognition and enforcement of a judgment may be refused in accordance with the paragraph 1 of Article 34 stating that the New York Convention prevails over the Brussels I Regulation. Recently, the precedence of the New York Convention was explicitly provided by paragraph 2 of Article 73 and Recital 12 of the new Brussels I Regulation, i.e., Regulation EU No 1215/2012. The exclusion of arbitration was retained by the new Brussels I Regulation with further details: in fact, the ruling rendered by a Court of a Member State as to the validity or the existence of an arbitration agreement now falls within the scope of application of the Regulation, regardless of whether the Court decided*

*on this as a principal issue or as an incidental question. In the light of the new Brussels regime, it seems clearer that the question whether a judgment from a Member State shall be recognized and enforced when it is in conflict with an arbitral award is left to each national law and international conventions.*

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale.

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# **ERA / MPI Conference on Arbitration and EU Law**

The Academy of European Law (ERA) and the Max Planck Institute Luxembourg will co-organize a conference on Arbitration and EU Law in Trier, Germany, on March 10 and 11, 2014.

**Monday, 10 March 2014**

I. AFTER THE RECAST OF BRUSSELS I

Moderator: *Stefania Bariatti*

09:30 Consequences and interpretation of the arbitration exception

10:00 *West Tankers*, antisuit injunctions and beyond: recent developments and latest case law

*Alexander Layton*

10:30-11:00 Discussion

11:30 Brussels I and the New York Convention: recognition and enforcement of judgments and awards

*Catherine Kessedjian*

12:00 Discussion

Moderator: *Catherine Kessedjian*

12:15-13:00 Panel discussion: How to ensure the effective coordination of judicial and arbitration proceedings?

- *Massimo Benedettelli*
- *Alexander Layton*

## II. THE CROSS-OVER BETWEEN INSOLVENCY AND ARBITRATION

Moderator: Burkhard Hess

14:00 Effects of insolvency in arbitral proceedings taking into account the Insolvency Regulation and the proposals for its review

*Stefania Bariatti*

14:30 Effects of foreign insolvency on arbitration seated in Switzerland

*Martin Bernet*

15:00-15:30 Discussion

## III. PROCEDURE, MINIMUM STANDARDS AND HUMAN RIGHTS

16:00 Innovative systems for dispute resolution in sport - and in other areas?

*Dirk-Reiner Martens*

16:30 Procedural minimum standards and the applicability of Article 6 ECHR in arbitration

*Massimo Benedettelli*

17:00-17:30 Discussion

**Tuesday, 11 March 2014**

## IV. INVESTMENT ARBITRATION

Moderator: *Alexander Layton*

09:30 Compatibility of bilateral investment treaties (BITs) with EU law

*Luca Radicati di Brozolo*

10:00 Investment arbitration under extra-EU BITs

*Patricia Nacimiento*

10:30-11:00 Discussion

Moderator: *Luca Radicati di Brozolo*

11:30 Recent developments in investment arbitration

*Maxi Scherer*

12:00 Discussion

12:15 Panel discussion: Challenges and opportunities for investment arbitration

• *Patricia Nacimiento*

• *Maxi Scherer*

13:00 Lunch and end of the conference

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# **Lithuanian Court Asks ECJ whether Brussels Regime Forbids Recognition of Arbitral Antisuit Injunctions**

The Lithuanian Supreme Court has made a preliminary reference to the Court of Justice of the European Union asking whether the Brussels Regime forbids the recognition of arbitral anti-suit injunctions. In this case, after one party initiated court proceedings in Lithuania, the other party commenced arbitral proceedings in Sweden. The arbitral tribunal found that the Lithuanian court proceedings were in breach of the arbitral agreement and issued an antisuit injunction. The beneficiary of the injunction then sought recognition in Lithuania.

The Lithuanian Supreme Court is therefore asking the CJEU whether the Brussels Regime forbids arbitral antisuit injunction as well, and whether this might mean that the Brussels Regime would have impact on the recognition of arbitral awards issuing such injunctions.

See this report of John Gaffney @ OGEMID:

*In proceedings before the Lithuanian Supreme Court (LSC) concerning the recognition and enforcement of an arbitral award in SCC arbitral proceedings between Gazprom and the Lithuanian Ministry of Energy, the LSC has decided to make a preliminary reference to the Court of Justice of the EU (CJEU).*

### **Background**

*In 2004, Gazprom and the Ministry of Energy of Lithuania and other shareholders in the Lithuanian natural gas company, Lietuvos Dujos, entered into a shareholders' agreement ("SHA"), which required all disputes arising out of or in connection with it to be resolved by arbitration under the Rules of the Stockholm Chamber of Commerce (SCC).*

*In 2011, the Ministry of Energy commenced proceedings before the Lithuanian courts in respect of the actions of Lietuvos Dujos in relation to the terms of a gas supply and gas transit concluded with Gazprom.*

*Gazprom commenced the SCC arbitration proceedings, arguing that Lithuania's attempt to litigate certain matters relating to the management of Lietuvos Dujos before the Lithuanian courts was a breach of SHA.*

*In a 2012 award, the arbitral tribunal (Derains, Nappert, Lamb) declared that the Ministry's initiation and prosecution of the Lithuanian court proceedings was partially in breach of the arbitration agreement contained in the SHA and ordered the Ministry to withdraw certain requests in the court proceedings and to limit its request in the same proceedings to measures that would not jeopardize the rights and obligations established in the SHA and that the Ministry could not request before an arbitral tribunal constituted pursuant to the arbitration clause of the SHA.*

### **West Tankers**

*In the West Tankers case, which also involved a preliminary reference concerning the relationship of arbitration and the Brussels I Regulation, but which involved a court-ordered anti-suit injunction, the CJEU held that it is incompatible with the Brussels I Regulation for a court of an EU Member State to make an order to restrain a person from commencing or continuing*

*proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement, where such proceedings come within the scope of the Regulation.*

### ***Preliminary reference***

*In the Lithuanian proceedings brought by Gazprom to recognize and enforce the SCC award, the question arose, whether, by analogy with West Tankers – if an EU Member State court should not recognize a court-ordered anti-suit injunction, and if an arbitral tribunal were treated as an equivalent to a court – an EU Member State court should not enforce an arbitral award that constitutes an anti-suit injunction or limits claims in court proceedings.*

*In this regard, the LSC decided to refer three questions to the CJEU:*

- 1. Does an EU Member State court have a right to refuse to recognize an arbitration award, which constitutes a form of anti-suit injunction, on the grounds that such an award limits the jurisdiction of the national court to rule on its own competence in examining the case in accordance to the rules of jurisdiction of the Brussels I Regulation?*
- 2. If the answer to 1. is yes, does the same apply in the case where the arbitral tribunal orders a party to limit its claims in proceedings before an EU Member State court?*
- 3. Can a national court, for the purpose of ensuring the supremacy of the EU law and full effectiveness of the Brussels I Regulation, refuse to recognise the arbitral award if such an award limits the right of the national court to rule on its own jurisdiction and authority in a case that falls under the jurisdiction of Brussels I Regulation?*

*The premise of the questions, i.e., that arbitral tribunals should be considered as equivalent to courts, has a special resonance in EU law, considering that they are not considered as such under the Article 234 EC procedure itself.*

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# Fourth Issue of 2013's ICLQ

The fourth issue of *International and Comparative Law Quarterly* for 2013  includes several pieces on private international law.

Simon Camilleri, Recast 12 of the Recast Regulation: a New Hope?

*This article seeks to consider the EU's new approach to arbitration as set out in Recital 12 of the Brussels I Regulation (Recast). The article first considers the Court of Justice of the European Union's West Tankers decision and the foremost English authority applying that case (The Wadi Sudr) in order to provide some background to the problem which gave rise to Recital 12. Following this, the article goes on to consider whether Recital 12 does in fact act as a solution to the problem created by the West Tankers decision.*

Justine Pila, The European Patent: an Old and Vexing Problem.

*In December 2012, the European Parliament supported the creation of a European patent with unitary effect. For the next year at least, the international patent community will be on the edge of its proverbial seat, waiting to see whether the proposal becomes a reality. If it does, it will be a significant event in both the long and rich history of patent law, and in the equally rich and understudied history of attempts to create a European patent system. In this article I consider the three post-war European patent initiatives of the most direct and enduring relevance in that regard with a view to answering the following questions. First, what drove them? Second, what issues confronted them? And third, how were those issues resolved and with what ultimate effect? In the concluding section I relate the discussion back to the present by offering some remarks on the current European patent proposal in light of the same.*

Csongor István Nagy, The Application Ratione Temporis of the Insolvency Regulation in the New Member States.

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# Latest Issue of “Praxis des Internationalen Privat- und Verfahrensrechts” (3/2012)

Recently, the May/June issue of the German law journal “Praxis des Internationalen Privat- und Verfahrensrechts” (**IPRax**) was published.

- **Burkhard Hess:** “Staatenimmunität und ius cogens im geltenden Völkerrecht: Der Internationale Gerichtshof zeigt die Grenzen auf” - the English abstract reads as follows:

*This article deals with the decision of the International Court of Justice in Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), critically analysing the question of jurisdictional immunities of the the state in current public international law.*

- **Björn Laukemann:** “Der ordre public im europäischen Insolvenzverfahren” - the English abstract reads as follows:

*The advancing integration of European civil procedure means that the criteria under which European insolvency judgments can be refused recognition on grounds of public policy are constantly modified. The European Insolvency Regulation is not excluded from such a development. Public policy is not something which is solely derived from national law. More and more, a European concept of public policy is becoming the benchmark for interpreting Art. 26. This article will focus on the analysis of the public policy clause in the light of international insolvency law principles - mainly the universal and immediate recognition of insolvency proceedings. Against this background, it will show why and to what extent the interpretation of Art. 26 of the Insolvency Regulation differs from that of Art. 34 n° 1 of the Brussels I Regulation, which is applied in the context of civil procedure. Due to the increasing harmonisation within the EU, the article will also shed light on the relation between the public policy exception and the need for a prior legal defence in the State in which the insolvency proceedings were opened.*

- **David-Christoph Bittmann:** “Der Begriff der „Zivil- und Handelssache“ im internationalen Rechtshilfeverkehr” - the English abstract reads as follows:

*The OLG Frankfurt/Main had to decide on a case concerning the qualification of the term of “civil and commercial matters” in the German-British Convention on the conduct of legal proceedings of 20 March 1928. On the basis of this convention the High Court Auckland (New Zealand) requested the service of a petition by way of legal aid from the Amtsgericht Frankfurt/Main. Subject of this petition was a penalty, requested from the New Zealand Commerce Commission against the applicant. The Commission accused the applicant of having infringed the Commerce Act of 1986. The applicant opposed against the service of the petition that the Convention from 1928 is not applicable on the requested penalty. The OLG Frankfurt/Main followed this argumentation and denied a civil and commercial matter. The following article analyses the problem of the qualification of “civil and commercial matters” in international civil procedure law at the example of the penalties requested by the New Zealand Commerce Commission.*

- **Oliver L. Knöfel:** “Ordnungsgeld wegen Ausbleibens im Ausland? - Aktuelle Probleme des deutsch-israelischen Rechtshilfeverkehrs” - the English abstract reads as follows:

*The article reviews a decision of the Higher Social Court of North Rhine-Westphalia (3.12.2008 - L 8 R 239/07), dealing with the question whether a contempt fine (Ordnungsgeld) can be imposed on a party to a lawsuit who has been summoned to appear before a German consul posted abroad or before a German judge acting on foreign soil, but who has failed to comply with the summons. The author analyses the relevant mechanisms of the Hague Evidence Convention of 1970 as well as German procedural law.*

- **Dirk Otto:** “Präklusion und Verwirkung von Vollstreckungsversagungsgründen bei der Vollstreckung ausländischer Schiedsgerichtsentscheidungen” - the English abstract reads as follows:

*The German Federal Supreme Court refused to enforce a foreign arbitration award for lack of a valid arbitration agreement and held that a defendant, who*

*objected against the arbitration throughout the proceedings is not estopped from invoking Art. V (1) (a) of the New York Convention (NYC) for having failed to initiate set-aside proceedings under the lex arbitri. The Supreme Court stressed that a defendant may opt not to commence court proceedings at the place where the award was rendered but may choose to resist enforcement under Article V NYC. This interpretation is in line with case law in other Convention countries. However, a defendant may be estopped from invoking grounds for non-enforcement if he participates in arbitration proceedings but fails to protest against any deficiencies. Furthermore, if a defendant does opt to seek annulment of an award at the place of origin, he has to put forward all reasons for setting aside, otherwise he may be precluded from raising them before the enforcing court.*

- **Frauke Wedemann:** “Die Regelungen des deutschen Eigenkapitalersatzrechts: Insolvenz- oder Gesellschaftsrecht?” - the English abstract reads as follows:

*Under German law, shareholder loans are subordinate to the claims of all other creditors in the case of the insolvency of a company whose members are not personally liable. In its “PIN Group” decision, the German Federal Supreme Court (BGH) held that this rule also applies to companies founded in another EU Member State for which insolvency proceedings have been opened in Germany. The Court stated that the rule is to be characterised as a matter of insolvency law - not company law - and based this ruling on Art. 4(2)(g) and (i) of the European Regulation on Insolvency Proceedings. The author agrees with the decision, but critically examines and refines its reasoning. She analyses in detail whether the application of the German rule to a foreign company is compatible with the freedom of establishment (Art. 49, 54 TFEU). Furthermore she discusses the characterisation of other German rules concerning (1) the rescission of repayments of shareholder loans after the opening of insolvency proceedings or after the refusal to open such proceedings for lack of funds, (2) loans for which a shareholder has provided a security, and (3) the relinquishment of items or rights for use or exercise by a shareholder to the company. She argues that all these rules are to be characterised as matters of insolvency law.*

- **Heinrich Dörner:** “Der Zugriff des Staates auf erbenlose Nachlässe – Fiskuserbrecht oder hoheitliche Aneignung?” – the English abstract reads as follows:

*The state’s right to succeed to heirless estates may be construed either as a succession under private law or as an act of occupation under public law. In the present judgement the “Kammergericht” deals with the legal nature of the state’s right of succession under the Civil Code of the former Russian Soviet Federative Socialist Republic and correctly characterises it as private intestate succession. According to the former Russian law of succession a cousin of the decedent was not entitled to a statutory portion. This regulation does not constitute an infringement of the German public order.*

- **Dirk Looschelders:** “Der Anspruch auf Rückzahlung des Brautgelds nach yezidischem Brauchtum” – the English abstract reads as follows:

*In the discussed case the groom’s family agreed to pay nuptial money to the father of the bride in compliance with the requirements for marriage in the Yazidi tradition. According to this tradition and the parties’ agreement this money had to be repaid, because the marriage was dissolved after the wife had suffered under severe abuse by her husband.*

*The agreement on nuptial money has not to be qualified contractually but as a question of engagement. The determination of the statute of engagement is controversial, in the present case, however, German law is decisive according to all opinions. Pursuant to § 138 BGB the agreement on nuptial money is void as it violates public policy. A claim for repayment on grounds of unjustified enrichment fails due to § 817 sent. 2 BGB, because the violation of public policy is not only caused by the money receiving party but also the paying claimant.*

- **Martin Illmer:** “West Tankers reloaded – Vollstreckung eines feststellenden Schiedsspruchs zur Abwehr der Vollstreckung einer zukünftigen ausländischen Gerichtsentscheidung” – the English abstract reads as follows:

*After the European Court of Justice’s decision in West Tankers and the Court of Appeal’s conclusions in National Navigation, anti-suit injunctions as well as*

*declaratory decisions by the state courts at the seat of the arbitration regarding the existence and validity of the arbitration agreement are either not available or not effective in preventing torpedo actions frustrating the arbitration agreement. In light of this unsatisfactory status quo, after having succeeded in the arbitration proceedings in London (declaring West Tankers' non-liability for the damage under dispute), West Tankers sought to enforce the arbitral award in England so as to prevent recognition and enforcement of a future Italian judgment on the merits. Whether an arbitral award constitutes a ground for refusing a declaration of enforceability of a foreign decision under Art. 34, 45 Brussels I Regulation is, however, disputed. The High Court as well as the Court of Appeal held that the issue was not decisive for the outcome of the case while it clearly was. This is at last proven by the fact that the High Court implicitly determined the issue by upholding the declaration of enforceability of the arbitral award. This article scrutinises the High Court's decision and the Court of Appeal's dismissal of the appeal in light of the interface of the Brussels I Regulation and arbitration. Furthermore, it discusses the crucial question whether an arbitral award may constitute a ground for refusing a declaration of enforceability under the Brussels I Regulation and whether such a ground would be compatible with the ECJ's decision in West Tankers.*

- **Weidi LONG:** "The First Choice-of-Law Act of China's Mainland: An Overview" - the abstract reads as follows:

*On 28 October 2010, China promulgated the Act of the People's Republic of China on Application of Law in Civil Relations with Foreign Contacts, which came into force in China's Mainland on 1 April 2011. The Act is remarkable for its brevity and lack of concrete solutions. The legislators have opted for generality, while leaving specific issues to the courts and in particular, to the Supreme People's Court. Thus, the legislature has merely set the stage for the judiciary by providing a preliminary framework for future Chinese private international law. Pending interpretive instruments by the Supreme People's Court, this Note stays with an overview of the Act. It first introduces the legal background to Chinese private international law, followed by a brief retrospect of the legislative history of the Act. It then discusses the general features of the Act, viz., the residual role of the closest connection rule, the liberal attitude towards party autonomy, the free-spirited approach to forum mandatory rules, enhanced (possibilities of) content-orientation, and adoption of the habitual-*

*residence principle. Finally, it concludes by observing that Chinese private international law is moving towards a regime with greater flexibility, and that this move is inspired by the demands for substantial justice and the wish to promote national interests.*

- **Duygu Damar:** "Deutsch-türkisches Nachlassabkommen: zivilprozess- und kollisionsrechtliche Aspekte" - the English abstract reads as follows:

*The German-Turkish Agreement on Succession of 1929 is of substantial importance for more than one and a half million Turkish nationals with habitual residence in Germany. The Agreement on Succession does not only regulate the applicable law regarding movable and immovable estate as well as the international competence of German and Turkish courts, but also grants important powers, in line with given tasks, to German and Turkish consuls. These powers generally cause doubts in German practice, whether the certificate of inheritance should be issued by the Turkish consul in case of death of a Turkish national in Germany. The article gives an overview on the conflict of laws rules set in the Agreement on Succession and clarifies the questions of civil procedure with regard to the issuance of certificates of inheritance and their consideration in Turkish law of civil procedure.*

- **Erik Jayme/Carl Friedrich Nordmeier** on the conference of the German-Lusitanian Association in Cologne: "Anwendung und Rezeption lusophoner Rechte: Tagung der Deutsch-Lusitanischen Juristenvereinigung in Köln"
- **Erik Jayme** on art trade and PIL: "Kunsthandel und Internationales Privatrecht - Zugleich Rezension zu Michael Anton, Rechtshandbuch - Kulturgüterschutz und Kunstrestitutionsrecht"
- **Marc-Philippe Weller** on the PIL Session 2011 of the Hague Academy of International Law: "Les conflits de lois n'existent pas! Hague Academy of International Law - Ein Bericht über die IPR-Session 2011"

Kein Abstract

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# Latest Issue of “Praxis des Internationalen Privat- und Verfahrensrechts” (5/2011)

Recently, the September/October issue of the German law journal “Praxis des Internationalen Privat- und Verfahrensrechts” (**IPRax**) was published.

Here is the contents:

- **Marc-Philippe Weller:** “Anknüpfungsprinzipien im Europäischen Kollisionsrecht: Abschied von der „klassischen“ IPR-Dogmatik?” - the English abstract reads as follows:

*Friedrich Carl v. Savigny has influenced modern private international law. His method is known as the “classic” private international law doctrine. Its principles are the international harmony of decisions and the neutrality of private international law, embodied in the principle of the most significant relationship.*

*However, in European private international law a slight paradigm change concerning the structure of the conflict of law rules can be detected from a classic point of view. The conflict of law rules of the Rome I and Rome II Regulation are prevalently oriented according to the material principles of the European Union such as the promotion of the internal market, the increase of legal security and the protection of the weaker party (e.g. consumer protection).*

*Nevertheless, in the event of a future codification of private international law at European level, the classic connecting principles of private international law deserve greater attention in the law making process. The Lisbon Treaty would allow such a “renaissance” of the classic private international law doctrine.*

- **Dieter Martiny:** “Die Kommissionsvorschläge für das internationale

Ehegüterrecht sowie für das internationale Güterrecht eingetragener Partnerschaften” - the English abstract reads as follows:

*On 16 March 2011 the European Commission proposed two separate Regulations, one for married couples on matrimonial property regimes and another on the property consequences of registered partnerships. A Communication of the Commission explains the approach of the proposals. While it is in principle to be welcomed that the Proposals are gender neutral and neutral regarding sexual orientation, the relationship between the intended overarching European rules with the (existent) divergent national rules for different types of marriages and partnerships raises some doubts. It is regrettable that, whereas spouses may themselves expressly choose the applicable law to a certain extent, the assets of registered partnerships are, as a rule, subject to the law of the country where the partnership was registered. In the absence of a choice of law by the spouses, similar to the Rome III Regulation - but following the immutability doctrine - the law of their common habitual residence applies in the first instance. The scope of the Proposals as to “matrimonial property” is not totally clear, nor is the role of overriding mandatory rules. Rules on jurisdiction and recognition are broadly in line with the Brussels II bis Regulation and the Succession Proposal. Many details of the recent Proposals need more clarification. However, despite a number of flaws the Proposals seem basically to be acceptable - at least for the civil law Member States.*

- **Andreas Engert/Gunnar Groh:** “Internationaler Kapitalanlegerschutz vor dem Bundesgerichtshof” - the English abstract reads as follows:

*In 2010, the German Federal Court handed down a number of judgments on the liability of investment service providers in an international setting. The Court faced two specific fact patterns: On the one hand, broker-dealers from the U.S. and Britain participated in a fraudulent investment scheme operated by a German asset manager through investment accounts located abroad. The question arose whether German courts had jurisdiction over the foreign defendants for aiding and abetting, and if so, which tort law governed the case. On the other hand, an investment fund from Turkey and a Swiss asset manager offered their services to investors in Germany without being licensed by the German financial services supervisor.*

*As regards the jurisdiction issue vis-à-vis defendants from the U.S. and Turkey, the Court concluded that foreign aiders and abettors to a tort committed in Germany can be sued in Germany. The tortfeasor's acts were imputed to them under § 32 Zivilprozessordnung (German Code of Civil Procedure). In relation to European defendants, the Federal Court claimed jurisdiction under art. 5 no. 3 Brussels I Regulation/Lugano Convention based on the place where the damage occurred. Because investors were almost certain to lose money on the fraudulent scheme, the damage occurred in Germany when investors transferred their funds to a foreign account. In one case, the Court relied on its jurisdiction over consumer contracts for adjudicating a torts claim, which allowed the Court to dismiss a jurisdiction clause.*

*With regard to the conflicts rules on tort law, the cases were still governed by German conflicts law leading to similar issues. As a result, investors were able to rely on German tort law. Under the new Rome II Regulation, future tort claims may well qualify as culpa in contrahendo. The applicable law then depends on the law applicable to the contract itself. In this case, the special conflict rule for consumer contracts (Art. 6 Rome I Regulation) ensures that retail investors can invoke their home country's tort law.*

- **Jürgen Samtleben:** "Schiedsgerichtsbarkeit und Finanztermingeschäfte - Der Schutz der Anleger vor der Schiedsgerichtsbarkeit durch § 37h WpHG" - the English abstract reads as follows:

*The present article discusses the disputed provision of § 37h of the German Securities Trading Act (WpHG), according to which non-merchants are not able to enter into a valid advance arbitration agreement as regards financial services transactions. The decision of the Federal Court of Justice (BGH) at issue addressed a damages claim brought against a US broker who had, through the use of independent German financial intermediaries, secured clients for the purchase of financially risky futures. As in other cases, the BGH found the business practice of the financial intermediaries to be contrary to public policy and concluded that the broker is subject to liability for his participation in an unlawful commercial practice. The central issue, however, was the defendant's contention that the court was bound to refer the matter to arbitration in light of an arbitration clause included in the original account*

*agreement. Although signed only by the client, the clause arguably comported with US law, notwithstanding its failure to meet the formal requirements of Art. II of the New York Convention. As it was not clear whether the claimant could be labeled a merchant, the BGH could not make a final determination on the applicability of § 37h WpHG. Equally left open was the question whether the claimant had engaged in the financial activities in question for private purposes and thus as a consumer; in such a case the account agreement would fail to satisfy the formal requirements of § 1031(5) of the German Code of Civil Procedure (ZPO). The article makes clear that the formal requirements of § 1031(5) ZPO can be overridden by a written arbitration agreement that otherwise satisfies the New York Convention. In contrast, § 37h WpHG constitutes a matter of (missing) subjective arbitrability which, according to the Convention, is to be determined under national law. Whereas § 37h WpHG in its current version only protects non-merchants, this limitation is overly narrow and should be abandoned so that all investors acting in a private capacity are protected from the application of an arbitration clause.*

- **Astrid Stadler:** “Prozesskostensicherheit bei Widerklage und Vermögenslosigkeit” - the English abstract reads as follows:

*The key issue in the proceedings before the Court of Appeal in Munich was the question whether an insolvent US corporation - with its center of main interest being located in Great Britain - was exempt from its obligation to provide security for legal expenses of a counterclaim after the principal cause of action had been dismissed. The author agrees with the court’s judgment, stating that the counterclaimant legally was exempt but disagrees with the reasons given by the court. In her opinion, an exemption would have been possible according to Sec. 110 para. 1 German Code of Civil Procedure, which imposes the obligation to provide security only upon claimants domiciled outside the EU. With the (counter-)claimants insolvency estate being located in Great Britain, the companies statutory head office in the US (Delaware) was irrelevant. The article furthermore raises the question whether an exemption to the obligation of providing security for legal expenses should be granted whenever the foreign (counter-)claimant is penniless. The article objects to such a rule considering the ratio legis of Sec. 110 German Code of Civil Procedure, which simply tries to compensate the difficulties being linked to an execution outside the EU or*

*the EEA. The defendants risk of being sued by an insolvent plaintiff not being able to reimburse the defendant's legal costs in case of a dismissal of his action exists as well with respect to plaintiffs domiciled in the forum state. Thus a general rule applicable to all insolvent plaintiffs would be necessary, which however runs contrary to a tendency in European countries of generally abolishing the obligation of foreign plaintiffs to provide security for legal expenses in order to make their court more attractive.*

- **Thomas Rauscher:** "Ehegüterrechtlicher Vertrag und Verbraucherausnahme? - Zum Anwendungsbereich der EuVTVO" - the English abstract reads as follows:

*The contribution discusses several decisions rendered by the Berlin Court of Appeal (Kammergericht) concerning the qualification of a right in property as arising out of a matrimonial relationship in the sense of Art 2 (a) of the EC-Enforcement-Order-Regulation (Regulation (EC) No 805/2004) as well as the application of the EC-Enforcement-Order-Regulation towards consumer cases. The meaning of matrimonial property rights under the EC-Enforcement-Order-Regulation should be interpreted with regard to the ECJ's DeCavel-decisions given under the Brussels Convention. The primary claim will be decisive for the interpretation of this exemption from the Regulation's scope of application; secondary claims are exempted from the scope of application as well. The protection of consumers under Art 6 (1)(d) EC-Enforcement-Order-Regulation should not only apply in B2C-cases as under Art 15 Brussels I-Regulation but also in C2C-cases; the consumer being the defendant needs protection against certification of a title as European Enforcement Order without regard to the plaintiff's qualification as a consumer or professional. Finally it is questionable that the court did not ask the ECJ to render a preliminary decision concerning those remarkable questions.*

- **Martin Illmer:** "Englische anti-suit injunctions in Drittstaatensachverhalten: zum kombinierten Effekt der Entscheidungen des EuGH in Owusu, Turner und West Tankers" - the English abstract reads as follows:

*Due to the territorial limits of the ECJ's judgments in Turner and West Tankers, English courts are still granting anti-suit injunctions in relation to non-EU*

*Member States. However, even this practice may be contrary to EU law due to the combined effect of the ECJ's judgments in Turner, West Tankers and Owusu. This line of argument which was lurking in the dark for some time now came only recently before the English High Court. Based on the assumption that forum non conveniens (which was the critical issue in Owusu) and anti-suit injunctions (which were the critical issue in Turner and West Tankers) are two related issues with overlapping preconditions, anti-suit injunctions might have been buried altogether. The High Court, however, rejected such an assumption without further discussion of the issue and granted the anti-suit injunction.*

- **Ghada Qaisi Audi:** DIFC Courts-ratified Arbitral Award Approved for Execution by Dubai Courts; First DIFC-LCIA Award pursuant to Dubai Courts-DIFC Courts Protocol of Enforcement

*The enforcement of arbitral awards made by the Dubai International Financial Centre-London Court of International Arbitration (DIFC-LCIA) can only be achieved by a ratification Order of the Dubai International Financial Centre Courts (DIFC Courts). The first DIFC Courts-ratified arbitral award was recently approved for execution by the Dubai Courts under the 2009 Protocol of Enforcement that sets out the procedures for mutual enforcement of court judgments, orders and arbitral awards without a review on the merits, thus providing further uniformity and certainty in this arena.*

- **Christel Mindach:** Russland: Novellierter Arbitrageprozesskodex führt Sammelklagen ein
  - **Carl Friedrich Nordmeier:** Beschleunigung durch Vertrauen: Vereinfachung der grenzüberschreitenden Forderungsbeitreibung im Europäischen Rechtsraum - Tagung am 23./24.9.2010 in Maribor
  - **Mathäus Mogendorf.:** 16. Würzburger Europarechtstage am 29./30.10.2010
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# Illmer on Arbitration and Brussels I Revisited

Martin Illmer (Max Planck Institute for Comparative and PIL) has posted Brussels I and Arbitration Revisited - The European Commission's Proposal COM(2010) 748 final on SSRN. The abstract reads:

*In December 2010, the European Commission presented its long-awaited proposal for a reformed Brussels I Regulation. One of the cornerstones of the proposal is the interface between the Regulation and arbitration. In the first part, the article sets out the development of the exclusion of arbitration from the Regulation's scope up to the West Tankers and National Navigation cases. In the second, main part, the author, who is a member of the Commission's Expert Group on the arbitration interface, provides a detailed account and evaluation of the new lis pendens-mechanism established by the Commission proposal in order to effectively prevent parallel proceedings in the arbitration context. In the third, final part, the author scrutinizes the Commission proposal against the background of the Commission's Impact Assessment before concluding with a short resumé.*

The paper is forthcoming in the *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht*.

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## European Parliament Resolution on Brussels I

On September 7th, the European Parliament adopted a Resolution on the Implementation and the Review of the Brussels I Regulation.

The Resolution addresses many issues. On whether to abolish exequatur, the Parliament:

2. *Calls for the requirement for exequatur to be abolished, but considers that this must be balanced by appropriate safeguards designed to protect the rights of the party against whom enforcement is sought; takes the view therefore that provision must be made for an exceptional procedure available in the Member State in which enforcement is sought; considers that this procedure should be available on the application of the party against whom enforcement is sought to the court indicated in the list in Annex III to the Regulation; takes the view that the grounds for an application under this exceptional procedure should be the following: (a) that recognition is manifestly contrary to public policy in the Member State in which recognition is sought; (b) where the judgment was given in default of appearance, that the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; (c) that the judgment is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought, and (d) that the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; further considers that an application should be able to be made to a judge even before any steps are taken by way of enforcement and that if that judge rules that the application is based on serious grounds, he or she should refer the matter to the court indicated in the list in Annex III for examination on the basis of the grounds set out above; advocates the addition of a recital in the preamble to the effect that a national court may penalise a vexatious or unreasonable application, inter alia , in the order for costs;*

3. *Encourages the Commission to initiate a public debate on the question of public policy in connection with private international law instruments;*

4. *Considers that there must be a harmonised procedural time-frame for the exceptional procedure referred to in paragraph 2 so as to ensure that it is conducted as expeditiously as possible, and that it must be ensured that the steps which may be taken by way of enforcement until the time-limit for applying for the exceptional procedure has expired or the exceptional*

*procedure has been concluded are not irreversible; is particularly concerned that a foreign judgment should not be enforced if it has not been properly served on the judgment debtor;*

*5. Argues not only that there must be a requirement for a certificate of authenticity as a procedural aid so as to guarantee recognition, but also that there should be a standard form for that certificate; considers, to this end, that the certificate provided for in Annex V should be refined, while obviating as far as possible any need for translation;*

*6. Believes that, in order to save costs, the translation of the decision to be enforced could be limited to the final order (operative part and summary grounds), but that a full translation should be required in the event that an application is made for the exceptional procedure;*

Full text of the resolution after the break.

*Many thanks to Jan von Hein for the tip-off.*

**European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI))**

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The European Parliament, - having regard to Article 81 of the Treaty on the Functioning of the European Union, - having regard to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters(1) (hereinafter "the Brussels I Regulation" or "the Regulation"), - having regard to the Commission's report on the application of that regulation (COM(2009)0119), - having regard to the Commission's Green Paper of 21 April 2009 on the review of the Brussels I Regulation (COM(2009)0175), - having regard to the Heidelberg Report (ILS/2004/C4/03) on the application of the Brussels I Regulation in the Member States and the responses to the Commission's Green Paper,

- having regard to its resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council - An area of freedom, security and justice serving the citizen - Stockholm programme(2), specifically the sections "Greater access to civil justice for citizens and business" and "Building a European judicial culture",

- having regard to the Union's accession to the Hague Conference on private international law on 3 April 2007,

- having regard to the signature, on behalf of the Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements on 1 April 2009,

- having regard to the case law of the Court of Justice, in particular Gambazzi v. DaimlerChrysler Canada (3), the Lugano opinion(4), West Tankers (5), Gasser v. MSAF (6), Owusu v. Jackson (7), Shevill (8), Owens Bank v. Bracco (9), Denlaueu (10), St Paul Dairy Industries (11) and Van Uden (12);

- having regard to the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters(13), Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims(14), Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure(15), Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure(16), Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations(17) and Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000(18),

- having regard to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)(19),

- having regard to the opinion of the European Economic and Social Committee of 16 December 2009,

- having regard to Rules 48 and 119(2) of its Rules of Procedure,

- having regard to the report of the Committee on Legal Affairs (A7-0219/2010),

A. whereas Regulation No 44/2001, with its predecessor the Brussels Convention, is one of the most successful pieces of EU legislation; whereas it laid the foundations for a European judicial area, has served citizens and business well by promoting legal certainty and predictability of decisions through uniform European rules - supplemented by a substantial body of case-law - and avoiding parallel proceedings, and is used as a reference and a tool for other instruments,

B. whereas, notwithstanding this, it has been criticised following a number of rulings of the Court of Justice and is in need of modernisation,

C. whereas abolition of *exequatur* - the Commission's main objective - would expedite the free movement of judicial decisions and form a key milestone in the building of a European judicial area,

D. whereas *exequatur* is seldom refused: only 1 to 5% of applications are appealed and those appeals are rarely successful; whereas, nonetheless, the time and expense of getting a foreign judgment recognised are hard to justify in the single market and this may be particularly vexatious where a claimant wishes to seek enforcement against a judgment debtor's assets in several jurisdictions,

E. whereas there is no requirement for *exequatur* in several EU instruments: the European payment order, the European small claims procedure and the maintenance obligations regulation(20),

F. whereas abolition of *exequatur* should be effected by providing that a judicial decision qualifying for recognition and enforcement under the Regulation which is enforceable in the Member State in which it was given is enforceable throughout the EU; whereas this should be coupled with an exceptional procedure available to the party against whom enforcement is sought so as to guarantee an adequate right of recourse to the courts of the State of enforcement in the event that that party wishes to contest enforcement on the grounds set out in the Regulation; whereas it will be necessary to ensure that steps taken for enforcement before the expiry of the time-limit for applying for review are not irreversible,

G. whereas the minimum safeguards provided for in Regulation No 44/2001 must be maintained,

H. whereas officials and bailiffs in the receiving Member State must be able to tell that the document of which enforcement is sought is an authentic, final judgment from a national court,

I. whereas arbitration is satisfactorily dealt with by the 1958 New York Convention and the 1961 Geneva Convention on International Commercial Arbitration, to which all Member States are parties, and the exclusion of arbitration from the scope of the Regulation must remain in place,

J. whereas the rules of the New York Convention are minimum rules and the law of the Contracting States may be more favourable to arbitral competence and arbitration awards,

K. whereas, moreover, a rule providing that the courts of the Member State of the seat of the arbitration should have exclusive jurisdiction could give rise to considerable perturbations,

L. whereas it appears from the intense debate raised by the proposal to create an exclusive head of jurisdiction for court proceedings supporting arbitration in the civil courts of the Member States that the Member States have not reached a common position thereon and that it would be counter-productive, having regard to work in progress in this area, to try to force this head,

M. whereas the various national procedural devices developed to protect arbitral jurisdiction (anti-suit injunctions so long as they are in conformity with free movement of persons and fundamental rights, declaration of validity of an arbitration clause, grant of damages for breach of an arbitration clause, the negative effect of the 'Kompetenz-Kompetenz' principle, etc.) must continue to be available and the effect of such procedures and the ensuing court decisions in the other Member States must be left to the law of those Member States as was the position prior to the judgment in *West Tankers*,

N. whereas party autonomy is of key importance and the application of the *lis pendens* rule as endorsed by the Court of Justice (e.g. in *Gasser*) enables choice-of-court clauses to be undermined by abusive "torpedo" actions,

O. whereas third parties may be bound by a choice-of-court agreement (for instance in a bill of lading) to which they have not specifically assented and this may adversely affect their access to justice and be manifestly unfair and whereas, therefore, the effect of choice-of-court agreements in respect of third parties needs to be dealt with in a specific provision of the Regulation,

P. whereas the Green Paper suggests that many problems encountered with the Regulation could be alleviated by improved communications between courts; whereas it would be virtually impossible to legislate on better communication between judges in a private international law instrument, but it can be promoted as part of the creation of a European judicial culture through training and recourse to networks (European Judicial Training Network, European Network of Councils for the Judiciary, Network of the Presidents of the Supreme Courts of the EU, European Judicial Network in Civil and Commercial Matters),

Q. whereas, as regards rights of the personality, there is a need to restrict the possibility for forum shopping by emphasising that, in principle, courts should accept jurisdiction only where a sufficient, substantial or significant link exists with the country in which the action is brought, since this would help strike a better balance between the interests at stake, in particular, between the right to freedom of expression and the rights to reputation and private life; whereas the problem of the applicable law will be considered specifically in a legislative initiative on the Rome II Regulation; whereas, nevertheless, some guidance should be given to national courts in the amended regulation,

R. whereas, as regards provisional measures, the Denlaueu case-law should be clarified by making it clear that *ex parte* measures can be recognised and enforced on the basis of the Regulation provided that the defendant has had the opportunity to contest them,

S. whereas it is unclear to what extent protective orders aimed at obtaining information and evidence are excluded from the scope of Article 31 of the Regulation,

*Comprehensive concept for private international law*

1. Encourages the Commission to review the interrelationship between the different regulations addressing jurisdiction, enforcement and applicable law; considers that the general aim should be a legal framework which is consistently structured and easily accessible; considers that for this purpose, the terminology in all subject-matters and all the concepts and requirements for similar rules in all subject-matters should be unified and harmonised (e.g. *lis pendens*, jurisdiction clauses, etc.) and the final aim might be a comprehensive codification of private international law;

*Abolition of exequatur*

2. Calls for the requirement for *exequatur* to be abolished, but considers that this must be balanced by appropriate safeguards designed to protect the rights of the party against whom enforcement is sought; takes the view therefore that provision must be made for an exceptional procedure available in the Member State in which enforcement is sought; considers that this procedure should be available on the application of the party against whom enforcement is sought to the court indicated in the list in Annex III to the Regulation; takes the view that the grounds for an application under this exceptional procedure should be the following: (a) that recognition is manifestly contrary to public policy in the Member State in which recognition is sought; (b) where the judgment was given in default of appearance, that the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; (c) that the judgment is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought; and (d) that the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; further considers that an application should be able to be made to a judge even before any step is taken by way of enforcement and that if that judge rules that the application is based on serious grounds, he or she should refer the matter to the court indicated in the list in Annex III for examination on the basis of the grounds set out above; advocates the addition of a recital in the preamble to the effect that a national court may penalise a vexatious or unreasonable application, *inter alia*, in the order for costs;

3. Encourages the Commission to initiate a public debate on the question of public policy in connection with private international law instruments;

4. Considers that there must be a harmonised procedural time-frame for the exceptional procedure referred to in paragraph 2 so as to ensure that it is conducted as expeditiously as possible, and that it must be ensured that the steps which may be taken by way of enforcement until the time-limit for applying for the exceptional procedure has expired or the exceptional procedure has been concluded are not irreversible; is particularly concerned that a foreign judgment should not be enforced if it has not been properly served on the judgment debtor;

5. Argues not only that there must be a requirement for a certificate of authenticity as a procedural aid so as to guarantee recognition, but also that there should be a standard form for that certificate; considers, to this end, that the certificate provided for in Annex V should be refined, while observing as far as possible any need for translation;

6. Believes that, in order to save costs, the translation of the decision to be enforced could be limited to the final order (operative part and summary grounds), but that a full translation should be required in the event that an application is made for the exceptional procedure;

*Authentic instruments*

7. Considers that authentic instruments should not be directly enforceable without any possibility of challenging them before the judicial authorities in the State in which enforcement is sought; takes the view therefore that the exceptional procedure to be introduced should not be limited to cases where enforcement of the instrument is manifestly contrary to public policy in the State addressed since it is possible to conceive of circumstances in which an authentic act could be irreconcilable with an earlier judgment and the validity (as opposed to the authenticity) of an authentic act can be challenged in the courts of the State of origin on grounds of mistake, misrepresentation, etc. even during the course of enforcement;

*Scope of the Regulation*

8. Considers that maintenance obligations within the scope of Regulation No 4/2009/EC should be excluded from the scope of the Regulation, but reiterates that the final aim should be a comprehensive body of law encompassing all subject-matters;

9. Strongly opposes the (even partial) abolition of the exclusion of arbitration from the scope;

10. Considers that Article 1(2)(g) of the Regulation should make it clear that not only arbitration proceedings, but also judicial procedures ruling on the validity or extent of arbitral competence as a principal issue or as an incidental or preliminary question, are excluded from the scope of the Regulation; further considers that a paragraph should be added to Article 31 providing that a judgment shall not be recognised if, in giving its decision, the court in the Member State of origin has, in deciding a question relating to the validity or extent of an arbitration clause, disregarded a rule of the law of arbitration in the Member State in which enforcement is sought, unless the judgment of that Member State produces the same result as if the law of arbitration of the Member State in which enforcement is sought had been applied;

11. Considers that this should also be clarified in a recital;

*Choice of court*

12. Advocates, as a solution to the problem of "torpedo actions", releasing the court designated in a choice-of-court agreement from its obligation to stay proceedings under the *lis pendens* rule; considers that this should be coupled with a requirement for any disputes on jurisdiction to be decided expeditiously as a preliminary issue by the chosen court and backed up by a recital stressing that party autonomy is paramount;

13. Considers that the Regulation should contain a new provision dealing with the opposability of choice-of-court agreements against third parties; takes the view that such provision could provide that a person who is not a party to the contract will be bound by an exclusive choice-of-court agreement concluded in accordance with the Regulation only if: (a) that agreement is contained in a written document or electronic record; (b) that person is given timely and adequate notice of the court where the action is to be brought; (c) in contracts for carriage of goods, the chosen court is (i) the domicile of the carrier; (ii) the place of receipt agreed in the contract of carriage; (iii) the place of delivery agreed in the contract of carriage; or (iv) the port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; considers that it should further be provided that, in all other cases, the third party may bring an action before the court otherwise competent under the Regulation if it appears that holding that party to the chosen forum would be blatantly unfair;

*Forum non conveniens*

14. Suggests, in order to avoid the type of problem which came to the fore in *Owusu v. Jackson*, a solution on the lines of Article 15 of Regulation No 2201/2003 so as to allow the courts of a Member State having jurisdiction as to the substance to stay proceedings if they consider that a court of another Member State or of a third country would be better placed to hear the case, or a specific part thereof, thus enabling the parties to bring an application before that court or to enable the court seized to transfer the case to that court with the agreement of the parties; welcomes the corresponding suggestion in the proposal for a regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession(21);

*Operation of the Regulation in the international legal order*

15. Considers, on the one hand, that the question whether the rules of the Regulation should be given reflexive effect has not been sufficiently considered and that it would be premature to take this step without much study, wide-ranging consultations and political debate, in which Parliament should play a leading role, and encourages the Commission to initiate this process; considers, on the other hand, that, in view of the existence of large numbers of bilateral agreements between Member States and third countries, questions of reciprocity and international comity, the problem is a global one and a solution should also be sought in parallel in the Hague Conference through the resumption of negotiations on an international judgments convention; mandates the Commission to use its best endeavours to revive this project, the Holy Grail of private international law; urges the Commission to explore the extent to which the 2007 Lugano Convention(22) could serve as a model and inspiration for such an international judgments convention;

16. Considers in the meantime that the Community rules on exclusive jurisdiction with regard to rights in rem in immovable property or tenancies of immovable property could be extended to proceedings brought in a third State;

17. Advocates amending the Regulation to allow reflexive effect to be given to exclusive choice-of-court clauses in favour of third States' courts;

18. Takes the view that the question of a rule overturning *Owens Bank v. Bracco* should be the subject of a separate review;

*Definition of domicile of natural and legal persons*

19. Takes the view that an autonomous European definition (ultimately applicable to all European legal instruments) of the domicile of natural persons would be desirable, in order in particular to avoid situations in which persons may have more than one domicile;

20. Rejects a uniform definition of the domicile of companies within the Brussels I Regulation, since a definition with such far-reaching consequences should be discussed and decided within the scope of a developing European company law;

*Interest rates*

21. Considers that the Regulation should lay down a rule so as to preclude an enforcing court from declining to give effect to the automatic rules on interest rates of the court of the State of origin and applying instead its national interest rate only from the date of the order authorising enforcement under the exceptional procedure;

*Industrial property*

22. Considers that, in order to overcome the problem of "torpedo actions", the court second seized should be relieved from the obligation to stay proceedings under the *lis pendens* rule where the court first seized evidently has no jurisdiction; rejects the idea, however, that claims for negative declaratory relief should be excluded altogether from the first-in-time rule on the ground that such claims can have a legitimate commercial purpose; considers, however, that issues concerning jurisdiction would be best resolved in the context of proposals to create a Unified Patent Litigation System;

23. Considers that the terminological inconsistencies between Regulation No 593/2008 ("Rome I")(23) and Regulation No 44/2001 should be eliminated by including in Article 15(1) of the Brussels I Regulation the definition of "professional" incorporated in Article 6(1) of the Rome I Regulation and by replacing the expression "contract which, for an inclusive price, provides for a combination of travel and accommodation" in Article 15(3) of the Brussels I Regulation by a reference to the Package Travel Directive 90/314/EEC(24) as in Article 6(4)(b) of the Rome I Regulation;

*Jurisdiction over individual contracts of employment*

24. Calls on the Commission to consider, having regard to the case-law of the Court of Justice, whether a solution affording greater legal certainty and suitable protection for the more vulnerable party might not be found for employees who do not carry out their work in a single Member State (e.g. long distance lorry drivers, flight attendants);

*Rights of the personality*

25. Believes that the rule in *Shevill* needs to be qualified; considers, therefore, that, in order to mitigate the alleged tendency of courts in certain jurisdictions to accept territorial jurisdiction where there is only a weak connection with the country in which the action is brought, a recital should be added to clarify that, in principle, the courts of that country should accept jurisdiction only where there is a sufficient, substantial or significant link with that country; considers that this would be helpful in striking a better balance between the interests at stake;

*Provisional measures*

26. Considers that, in order to ensure better access to justice, orders aimed at obtaining information and evidence or at preserving evidence should be covered by the notion of provisional and protective measures;

27. Believes that the Regulation should establish jurisdiction for such measures at the courts of the Member State where the information or evidence sought is located, in addition to the jurisdiction of the courts having jurisdiction with respect to the substance;

28. Finds that "provisional, including protective measures" should be defined in a recital in the terms used in the *St Paul Dairy* case;

29. Considers that the distinction drawn in *Van Uden*, between cases in which the court granting the measure has jurisdiction over the substance of the case and cases in which it does not, should be replaced by a test based on the question of whether measures are sought in support of proceedings issued or to be issued in that Member State or a non-Member State (in which case the restrictions set out in Article 31 should not apply) or in support of proceedings in another Member State (in which case the Article 31 restrictions should apply);

30. Urges that a recital be introduced in order to overcome the difficulties posed by the requirement recognised in *Van Uden* for a "real connecting link" to the territorial jurisdiction of the Member State court granting such a measure, to make it clear that in deciding whether to grant, renew, modify or discharge a provisional measure ordered in support of proceedings in another Member State, Member State courts should take into account all of the circumstances, including (i) any statement by the Member State court seized of the main dispute with respect to the measure in question or measures of the same kind, (ii) whether there is a real connecting link between the measure sought and the territory of the Member State in which it is sought, and (iii) the likely impact of the measure on proceedings pending or to be issued in another Member State;

31. Rejects the Commission's idea that the court seized of the main proceedings should be able to discharge, modify or adapt provisional measures granted by a court from another Member State since this would not be in the spirit of the principle of mutual trust established by the Regulation; considers, moreover, that it is unclear on what basis a court could review a decision made by a court in a different jurisdiction and which law would apply in these circumstances, and that this could give rise to real practical problems, for example with regard to costs;

*Collective redress*

32. Stresses that the Commission's forthcoming work on collective redress instruments may need to contemplate special jurisdiction rules for collective actions;

*Other questions*

33. Considers, on account of the special difficulties of private international law, the importance of Union conflicts-of-law legislation for business, citizens and international litigators and the need for a consistent body of case-law, that it is time to set up a special chamber within the Court of Justice to deal with references for preliminary rulings relating to private international law;

34. Instructs its President to forward this resolution to the Council and the Commission.

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# Latest Issue of “Praxis des Internationalen Privat- und Verfahrensrechts” (5/2010)

Recently, the September/October issue of the German law journal “Praxis des Internationalen Privat- und Verfahrensrechts” (**IPRax**) was published.

Here is the contents:

- **Peter Mankowski:** “Ausgewählte Einzelfragen zur Rom II-VO: Internationales Umwelthaftungsrecht, internationales Kartellrecht, renvoi, Parteiautonomie” - the English abstract reads as follows:

*The Rome II Regulation is up for regular review in the near future. Some of its rules deserve closer consideration. This relates in particular to Art. 7 on environmental liability which does not address the paramount question to which extent permissions granted by one Member State influence liability. Insofar a detailed solution by way of recognition is proposed. Another field open for reform is party autonomy under Art. 14. Insofar a number of proposals is submitted generally attempting to bring Art. 14 better in line with other rules of Community law. A systematic restructuring of Art. 6 (3) on competition law is advocated for, too. In contrast, it does not appear to alter anything with regard to the exclusion of renvoi.*

- **Beate Gsell/Felix Netzer:** “Vom grenzüberschreitenden zum potenziell grenzüberschreitenden Sachverhalt - Art. 19 EuUnterhVO als Paradigmenwechsel im Europäischen Zivilverfahrensrecht” - the English abstract reads as follows:

*This article sheds light on a new development in European Civil Procedure Law caused by Article 19 Regulation (EC) No 4/2009 of 18 December 2008 on maintenance obligations. It illustrates the differences between Article 19 Regulation (EC) No 4/2009 and related Articles in the Regulations on the*

*European enforcement order for uncontested claims, the European order for payment procedure and the European small claims procedure. The authors demonstrate that Article 19 (EC) No 4/2009 provides the defendant with an autonomous right to apply for a review of a national court's decision in order to compensate the abolition of the *exequatur*. Thereby European Civil Procedure Law does not confine its scope to cross-border cases, but, on the grounds of an only potential Europe-wide recognition and enforcement of judgements, intervenes in merely national procedures as well. After discussing the consequences of this principle change in European Civil Procedure Law, the authors doubt the EU's competence under Article 65 EC or Article 81 TFEU to intervene in national procedure law as regulated in Article 19 (EC) No 4/2009.*

- **Anne Röthel/Evelyn Woitge:** “Das ESÜ-Ausführungsgesetz - effiziente Kooperation im internationalen Erwachsenenschutz” - the English abstract reads as follows:

*The coming into force of the Hague Convention on the International Protection of Adults on 1 January 2009 gives reason to examine the German Implementation Act. Its purpose is to include the regulations of the Convention into the internal German system for the protection of adults who are suffering from an impairment or an insufficiency in their personal facilities and therefore are not able to safeguard their own interests. In this article, the authors show the major content of the Implementation Act and discuss how the rules on jurisdiction, applicable law and international recognition and enforcement of protective measures laid down by the Convention fit into existing German law. Also, they highlight the concept of administrative co-operation between member states drawn up by the Convention and put into effect by national law.*

- **Jörn Griebel:** “Einführung in den Deutschen Mustervertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen von 2009” - the English abstract reads as follows:

*The article comments on the new German Model BIT (bilateral investment treaty) of 2009. After a general description of its content, some changes of the new model in comparison to its predecessors are addressed. Against the background of various models by other states, the question will be raised as to whether some necessary changes were omitted. It is also discussed to what*

*degree different approaches to reforming model BITs are due to political reasons and/or different approaches to treaty drafting.*

- **Axel Metzger:** “Zum Erfüllungsortgerichtsstand bei Kauf- und Dienstleistungsverträgen gemäß der EuGVVO” - the English abstract reads as follows:

*The Car Trim decision of the ECJ puts a spotlight on two important and yet unsettled questions regarding the jurisdiction at the place of performance in sales and service contracts under Art. 5 Nr. 1 lit. b Brussels I Regulation. The author agrees with the Court’s ruling that contracts for the supply of goods to be manufactured or produced should be characterised as sales contracts as long as the purchaser has not supplied the materials. However, the ruling should not be generalised to all types of mixed contracts with service components. The Car Trim decision is also correct in localising the place of performance in case of a sale involving carriage of goods at the place where the purchaser obtained actual power of disposal over the goods at the final destination and not at the place at which the goods are handed over to the first carrier for transmission to the purchaser. Finally, the author examines some of the general questions on autonomous interpretation of Art. 5 Nr. 1 lit. b Brussels I Regulation raised by the Court.*

- **Ben Steinbrück:** “Internationale Zuständigkeit deutscher Gerichte für selbstständige Beweisverfahren in Schiedssachen” - the English abstract reads as follows:

*The author comments on a decision of the Higher Regional Court Düsseldorf (7 February 2008 - I-20 W 152/07), which deals with the competence of German courts to preserve evidence for use in foreign arbitration proceedings. The court ruled that parties who agree that their dispute shall be resolved by a foreign arbitral tribunal pursuant to a foreign law derogate the German courts’ international jurisdiction to make (interim) orders in independent proceedings for the taking of evidence (“selbständiges Beweisverfahren”). This decision is not in line with German arbitration law. According to §§ 1025 Abs. 2, 1033 of the German Code of Civil Procedure German courts arbitration agreements conferring jurisdiction on a foreign arbitral tribunal do not affect the German courts’ competence to grant interim relief. It follows that these competences,*

*including the power to preserve evidence, can only be excluded by an explicit agreement to that effect.*

- **Rolf A. Schütze** on the principle of reciprocity in relation to South Africa: “Zur Verbürgung der Gegenseitigkeit im Verhältnis zu Südafrika”
- **Peter Kindler**: “Zum Kollisionsrecht der Zahlungsverbote in der Gesellschaftsinsolvenz” - the English abstract reads as follows:

*Under German law, the managing director of a company is obliged to reimburse the company any payment that has been made to a third party - e.g. a creditor or a shareholder - after the company's insolvency or over-indebtedness (see, e.g. sec. 64 of the law pertaining to private companies ltd. by shares - GmbHG).<sup>1</sup> The Berlin Kammergericht holds that this rule of law also applies to a managing director of a company registered abroad - in this case a British Ltd. - with its centre of main interests in Germany (sec. 3 of the EC Regulation 1346/2000 on cross border insolvency). The author welcomes this decision.*

- **Fabian Wall**: “Enthält Art. 21 Abs. 1 AEUV eine „versteckte“ Kollisionsnorm?” - the English abstract reads as follows:

*According to the judgment of the European Court of Justice in the case “Grunkin and Paul”, Article 21 TFEU (ex Article 18 TEC) awards the right to every citizen of the Union that each Member State has to recognise a surname which has been formerly determined and lawfully registered in a civil register of another Member State. Until now, it is uncertain how the demand of the Court of Justice can be implemented in German practice. This is demonstrated by a case decided recently by the Higher Regional Court of Munich. The legal question is whether Article 21 TFEU should be interpreted as a target which leaves the national authorities the choice of form and methods of implementation or whether Article 21 TFEU should be interpreted as a “hidden” conflict of laws rule which is directly applicable in all Member States.*

- **Martin Illmer**: “La vie après Gasser, Turner et West Tankers - Die Anerkennung drittstaatlicher anti-suit injunctions in Frankreich” - the English abstract reads as follows:

*The strong winds from Luxembourg blowing in the face of anti-suit injunctions have extinguished the remedy within the territorial and substantive scope of the Brussels I Regulation. Yet, anti-suit injunctions are not dead even within the European Union. Rather, the focus shifts to the remaining areas of operation. One of these areas concerns anti-suit injunctions issued by non-member state courts against parties initiating proceedings before member state courts. Since the Brussels I Regulation does not cover extra-territorial scenarios, the rationale of the ECJ's judgments in Gasser, Turner and West Tankers does not apply. Faced with such an anti-suit injunction, it is entirely up to the national law of the respective Member State whether or not to recognize it. While the Belgian and German courts had refrained to do so in the past, the French Cour de Cassation in a recent straight forward judgment has had no difficulty in recognizing and enforcing an anti-suit injunction of a US state court (Georgia).*

- **Ulrich Spellenberg** on Art. 23 Brussels I Regulation: “Der Konsens in Art. 23 EuGVVO - Der kassierte Kater”
- **Carl Friedrich Nordmeier**: “Portugal: Änderungen im internationalen Zuständigkeitsrecht” - the English abstract reads as follows:

*By art. 160 of law n. 52/2008 of 28 of August 2008, Portugal reformed its autonomous rules on jurisdiction, art. 65 and 65-A of the Civil Procedure Code. This contribution gives a short overview of the new rules, focussing especially on the applicability in time.*

- **Christoph Benicke**: “Die Neuregelung des internationalen Adoptionsrechts in Spanien” - the English abstract reads as follows:

*With the law 54/2007 of 28 December 2007 the Spanish legislator has enacted a special law on international adoption which encompasses rules on jurisdiction, applicable law and the recognition of foreign adoption decisions in Spain. The new law has the advantage that it summarizes the scattered arrangements into one piece of legislation. It also represents a step forward in that the transformation of a weak foreign adoption in a strong adoption is now possible. But the reform remains half hearted as it restricts the recognition of a weak foreign adoption to cases where none of the parties has the Spanish nationality. In addition, both the conflict of laws rule and the rules on the recognition of foreign adoption decisions are substantively implausible. Most*

*schemes have been taken over from the existing legal situation which had in great part been formed by decisions of the General Directorate of public registries and of the notary system (Dirección General de los Registros y del Notariado) without of systematic guideline. Significantly, there are many technical shortcomings in the legislation. Overall, the new law fails to create a modern, autonomous international adoption law. This is all the more striking since the motives express the aim to reach the standard of the Hague Adoption Convention of 1993.*

- **Viviane Reding** on the European Civil Code and PIL: “Zum Europäischen Zivilgesetzbuch und IPR”
- **Rolf Wagner**: “Die zivil(verfahrens-)rechtlichen Komponenten des Aktionsplans zum Stockholmer Programm” - the English abstract reads as follows:

*The “Stockholm Programme - An open and secure Europe serving and protecting the citizens” covering the period 2010-2014 defines strategic guidelines for legislative and operational planning within the area of freedom, security and justice. Recently the European Commission finalized an action plan. The action plan entails lists of measures with time limits implementing the Stockholm Programme. The article provides an overview on this action plan.*

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## **Yearbook of Private International Law, vol. XI (2009)**

✘ The **XI volume (2009) of the Yearbook of Private International Law** (YPIL), published by Sellier - European Law Publishers in association with the Swiss Institute of Comparative Law (ISDC), is out. The Yearbook, edited by *Andrea Bonomi* and *Paul Volken*, contains a huge number of articles, national reports, commentaries on court decisions and other materials, up to nearly 650 pages.

Here's the full list of contributions (available as .pdf on the publisher's website, where the volume can be purchased, also in electronic format):

## **Doctrine**

- *Erik Jayme*, Party Autonomy in International Family and Succession Law: New Tendencies;
- *Ralf Michaels*, After the Revolution - Decline and Return of U.S. Conflict of Laws;
- *Diego P. Fernández Arroyo*, Private International Law and Comparative Law: A Relationship Challenged by International and Supranational Law;
- *Koji Takahashi*, Damages for Breach of a Choice-of-Court Agreement: Remaining Issues;
- *Eva Lein*, A Further Step Towards a European Code of Private International Law: The Commission Proposal for a Regulation on Succession;
- *Giulia Rossolillo*, Personal Identity at a Crossroads between Private International Law, International Protection of Human Rights and EU Law;
- *Urs Peter Gruber / Ivo Bach*, The Application of Foreign Law: A Progress Report on a New European Project;
- *Juan José Alvarez Rubio*, Contracts for the International Carriage of Goods: Jurisdiction and Arbitration under the New UNCITRAL Convention 2008.

## **Private International Law in China - Selected Topics**

- *Yongping Xiao / Weidi Long*, Contractual Party Autonomy in Chinese Private International Law;
- *Qisheng He*, Recent Developments with Regards to Choice of Law in Tort in China;
- *Renshan Liu*, Recent Judicial Cooperation in Civil and Commercial Matters between Mainland China and Taiwan, the Hong Kong S.A.R. and the Macao S.A.R.;
- *Weidong Zhu*, Law Applicable to Arbitration Agreements in China;
- *Yongping Xiao*, Foreign Precedents in Chinese Courts;
- *Guoqiang Luo (Steel Rometius)*, Crime of Law-Bending Arbitration in Chinese Criminal Law and Its Effects on International Commercial Arbitration;

- *Fang Xiao*, Law Applicable to Arbitration Clauses in China: Comments on the Chinese People's Supreme Court's Decision in the *Hengji Company* Case.

## **National Reports**

- *Didier Operti Badán / Cecilia Fresnedo de Aguirre*, The Latest Trends in Latin American Private International Law: the Uruguayan 2009 General Law on Private International Law;
- *Jeffrey Talpis / Gerald Goldstein*, The Influence of Swiss Law on Quebec's 1994 Codification of Private International Law;
- *Yasuhiro Okuda*, Initial Ownership of Copyright in a Cinematographic Work under Japanese Private International Law;
- *Elisabeth Meurling*, Less Surprises for Spouses Moving Within the Nordic Countries? Amendments to the 1931 Nordic Convention on Marriage;
- *Andreas Fötschl*, The Common Optional Matrimonial Property Regime of Germany and France - Epoch-Making in the Unification of Law.

## **News from UNCITRAL**

- *Jenny Clift*, International Insolvency Law: the UNCITRAL Experience with Harmonisation and Modernisation Techniques.

## **Court Decisions**

- *Zeno Crespi Reghizzi*, 'Mutual Trust' and 'Arbitration Exception' in the European Judicial Area: The *West Tankers* Judgment of the ECJ;
- *Mary-Rose McGuire*, Jurisdiction in Cases Related to a Licence Contract Under Art. 5(1) Brussels Regulation: Case-Note on Judgment ECJ Case C-533/07 - *Falco Privatstiftung and Thomas Rabitsch v. Gisela Weller-Lindhorst*;
- *Antonio Leandro*, *Effet Utile* of the Regulation No. 1346 and *Vis Attractiva Concursum*. Some Remarks on the *Deko Marty Judgment*;
- *Ben Steinbrück*, Jurisdiction to Set Aside Foreign Arbitral Awards in India: Some Remarks on an Erroneous Rule of Law;
- *Gilberto Boutin*, *Forum non conveniens* and *Lis alibi pendens* in International Litigation in Panama.

## **Forum**

- *Fabrizio Marongiu Buonaiuti, Lis Alibi Pendens* and Related Actions in Civil and Commercial Matters Within the European Judicial Area;
- *Caroline Kleiner, Money in Private International Law: What Are the Problems? What Are the Solutions?;*
- *Benedetta Ubertazzi, Intellectual Property and State Immunity from Jurisdiction in the New York Convention of 2004.*

See also our previous posts on the 2006, 2007 and 2008 volumes of the YPIL.

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