Now available: New edition of Volumes 10 and 11 of the „Münchener Kommentar“ on Private International Law

It has not yet been mentioned on this blog that Volumes 10 and 11 of the Munich Commentary on the German Civil Code (Münchener Kommentar zum Bürgerlichen Gesetzbuch), are now available in their sixth edition (2015). A standard German language treatise on both German and European private international law, the new edition contains a detailed article-by-article analysis of the Rome I, II and III Regulations (by Abbo Junker, Munich; Dieter Martiny, Hamburg/Frankfurt an der Oder); Ulrich Spellenberg, Bayreuth; Peter Winkler von Mohrenfels, Rostock), the Hague Protocol on Maintenance (Kurt Siehr, Hamburg/Zurich), the European Succession Regulation (Anatol Dutta, Regensburg), and the Hague Conventions on the Protection of Children and Adults (by Kurt Siehr, Hamburg/Zurich; Volker Lipp, Göttingen).

The sixth edition of Volumes 10 and 11 is the first edition that has been edited by our co-editor Jan von Hein (Freiburg/Germany) as the volume editor. Jan is the successor to Hans-Jürgen Sonnenberger (Munich) and has contributed to the commentary himself with a completely new section on the general principles of European and German private international law.

The new edition has been well received in the German literature (translations kindly provided by the volume editor):

„A battle cruiser of private international law has been set on a new course.“ (IPRax 2015, 387)

„…a truly indispensable work.“ (Ludwig Bergschneider, FamRZ 2015, 1364)

Further information is available on the publisher’s website.

Issue 2015.2 Nederlands Internationaal Privaatrecht

The second issue of 2015 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht,* includes the following contributions:

- Xandra Kramer, 'Editorial: Empirical legal studies in private international law' , p. 195-196.
- S.H. Barten and B.J. van het Kaar, ''Grensverleggend' derdenbeslag: over de reikwijdte van een Nederlands beslagverlof onder de Herschikking Brussel I', p. 197-204.

This article deals with the new opportunities that the revised Brussels Regulation ('Recast') may offer to claimants who wish to obtain a Dutch pre-judgment garnishee order against garnishees located in other Member States. Under the former Brussels Regulation, the recognition and enforcement of 'ex parte' provisional measures in another Member State than that of the courts ordering the measures fell outside the scope of Chapter III Brussels Regulation in accordance with the case law from the European Court of Justice (Denilauler/Couchet). The Recast, in contrast, allows the enforcement of 'ex parte' garnishee orders in other Member States, provided the court issuing the order has jurisdiction as to the subject-matter of the proceedings. However, the enforcement of a Dutch ex parte garnishee order in other Member States may give rise to practical difficulties. The Recast requires the ex parte judgment to be served upon the debtor before the enforcement (garnishment) takes place. It may therefore prove to be difficult for claimants to ensure that garnishment will take place only shortly after the garnishee order was served on the debtor in order to prevent the dispersal of funds by the debtor. It is argued that these problems may be solved by good coordination between the competent enforcement authorities of the Member States. However, in all likelihood, successful coordination by the creditor is only possible in the event of a limited number of garnishees involved.

In light of this abolition of impediments at the European level, the article considers whether Dutch national procedural law may restrict courts in the Netherlands from issuing extraterritorial garnishee orders against garnishees who do not have their domicile in the Netherlands. Based on the current guidelines and case law it is to be expected that the Dutch courts will exercise restraint when dealing with a request for an extraterritorial order. It is argued that, although Dutch law does require a certain connection with Dutch territory, the said connection may also be established if the creditor can make a reasonable case that one of the anticipated garnishees has its domicile within the Netherlands and that there are clear indications that the funds will be dispersed. This could, for instance, succeed if the debtor and garnishee are in a close relationship to one another (e.g. a parent company and its subsidiary).
It remains to be seen whether the Dutch courts are willing to issue orders against garnishees outside the Netherlands. If they are, this jurisdiction may soon offer a solution for creditors of Dutch parent companies having claims against their subsidiaries in other Member States. In the Netherlands it is relatively easy to obtain a prejudgment garnishee order. Under the Recast, even EU jurisdictions not familiar with a pre-judgment garnishee order will have to recognize and enforce a Dutch order.

- Miriam Kullmann, 'Tijdelijke grensoverschrijdende detachering en gewoonlijk werkland: over de verhouding tussen de Rome I-Verordening en de Detacheringsrichtlijn en de rol van de Handhavingsrichtlijn', p. 205-216.

The cross-border posting of workers involves the applicability of two EU laws: the Posting of Workers Directive 96/71/EC and the Rome I Regulation. In neither of these legal regulations are the terms 'temporariness' and the 'country in/from which the employee habitually carries out his work' concretised. This contribution aims at clarifying the meaning of these two terms in both legal regulations in the context of the temporary cross-border posting of workers. Moreover, it assesses the role of the Enforcement Directive, adopted in May 2014, supplementing the Posting of Workers Directive. The new Directive introduces a provision containing criteria by which to identify a 'genuine posting'. In practice it seemed that often no country where the work was being habitually carried out could be identified. The question then was whether the Posting of Workers Directive would be applicable and what role

Articles 8 and 9 Rome I Regulation would play in identifying the applicable law. In addition, the unclear relationship between the Posting of Workers Directive and the Rome I Regulation is analysed.

- Steven Stuij, 'De wetsontduiking in het ipr: de opleving van een leerstuk?', p. 217-225.

Recital 26 of the preamble to the EU Regulation (650/2012) on Succession and Wills allows national authorities to suppress evasions of the law by using the doctrine of fraude à la loi. The referral to this doctrine is an interesting development, since the Regulation is the first in a series of EU Regulations in the field of private international law to expressly mention fraude à la loi as a potential corrective mechanism. Besides, this doctrine is rather underdeveloped in Dutch private international law. It will therefore be interesting to analyse this doctrine and to assess its added value in contemporary (EU) private international law. First, several aspects of fraude à la loi will be scrutinised, as well as its acceptance in both Dutch and European private international law. Furthermore, the aforementioned point 26 of the preamble and its rationale will be focused upon. Finally, the relevance of fraude à la loi for contemporary private international law will be observed, with a special emphasis on the Dutch situation.

- E.C.C. Punselie, 'Verordening wederzijdse erkenning van Beschermingsmaatregelen in burgerlijke zaken', p. 226-228 (overview article)

In this article an overview is given of Regulation (EU) No. 606/2013 of the European Parliament and of the Council of 12 June 2013 on the mutual recognition of protection measures in civil matters and the way this regulation is implemented in the Netherlands. The Regulation provides for a mechanism by which a person at risk of violence can also rely on a protection measure issued against the person causing this risk in his or her home country – a member state of the European Union – when he or she travels or moves to another member state. For that purpose the protected person can achieve a certificate in the issuing member state with which the protection measure is recognised in another member state without any special procedure being required.

- Pauline Kruiniger, 'Book presentation: Pauline Kruiniger, Islamic Divorces in Europe: Bridging the Gap between European and Islamic Legal Orders, Eleven International Publishing, The Hague 2015', p. 229-230.

A Dutch-Moroccan woman has been repudiated in Morocco. She remarries a Moroccan man. Then she moves from the Netherlands to Belgium. Although the preceding repudiation had been recognized in the Netherlands, the Belgian authorities refuse to recognize that repudiation. Consequently she is still seen as being married to her former husband in Belgium and cannot bring her latest husband from Morocco to Belgium. There is discontinuity concerning her personal status and thus a limping legal relationship emerges.

Rauscher (ed.) on European Private International Law: 4th edition (2015) in progress

At the beginning of 2015, the publication of the 4th edition of *Thomas Rauscher's* commentary on European private international law (including international civil procedure), "Europäisches Zivilprozess- und Kollisionsrecht (EuZPR/EuIPR)", has started. So far, the volumes II (covering the EU Regulation on the European Order for Uncontested Claims, the Regulation on the European Order for Payment, the Small Claims Regulation, the Regulation on the European Account Preservation Order, the Service of Process and the Taking of Evidence Regulations as well as the Insolvency Regulation and the Hague Convention on Jurisdiction Agreements) and IV (covering, inter alia, Brussels II*bis*, the Maintenance Regulation and the new Regulation on mutual recognition of protective measures in civil matters) have been published. The various Regulations have been commented on by *Marianne Andrae, Kathrin Binder, Urs Peter Gruber, Bettina Heiderhoff, Jan von Hein, Christoph A. Kern, Kathrin Kroll-*

Ludwigs, Gerald Mäsch, Steffen Pabst, Thomas Rauscher, Martin Schimrick, Istvan Varga, Matthias Weller and *Denise Wiedemann*. Further volumes will cover Rome I and II as well as the Brussels I*bis* Regulation. This German-language commentary has established itself internationally as a leading, in-depth treatise on European private international law, dealing with the subject from a comprehensive, functional point of view and detached from domestic codifications. For more details, see here.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2015: Abstracts

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

Jochen Hoffmann, **"Button-click" Confirmation and Cross Border Contract Conclusion**
Section 312j paragraph 3 and 4 of the German Civil Code (BGB) addresses and secures effective consumer protection with regard to the issue of internet-related "cost traps". Cost traps are websites that are designed to lead to the conclusion of contracts without the consumer's awareness of an obligation to pay. At the same time this regulation transposes Art. 8 par. 3 of the Consumer Rights Directive into German law. In effect, this provision ensures that an e-commerce contract between a trader and a consumer cannot be concluded if the trader does not ensure that the consumer is made aware, prior to placing his order, that he is assuming an obligation to pay, in connection with internet contracts specifically by using an unambiguously labelled button. Since this regulation is applicable to all e-commerce contracts it not only applies to "cost traps", but also to legitimate internet trading. This article addresses the problems arising from the new provision for cross border contracts in the light of the applicable conflict of laws rules.

Jan von Hein, **Authorization Requirements for a Guardian's Transaction Concerning a Vulnerable Adult's Immovable Property – Jurisdiction and Conflict of Laws**

The Court of Justice excluded, in Case C-386/12 – Siegfried Janós Schneider, the applicability of the Brussels I-Regulation to a court's authorization that an adult's guardian required for a transaction concerning immovable property belonging to the adult (Article 1(2)(a) of the Regulation). In his case note, von Hein agrees with the Court's ruling because the authorization requirement was the main object of the proceedings. If the necessity to obtain an authorization arises merely as an incidental question in litigation related to property, however, the Regulation, including the forum rei sitae, remains applicable. Moreover, the author analyses which court is competent to rule on granting an authorization to an adult's guardian for the sale of immovable property and which law is applicable to this question. He looks at this problem both from the point of view of autonomous German PIL and of the Hague Convention on the International Protection of Adults. The article shows that autonomous PIL and the Hague conflicts rules differ considerably and that in the Hague Convention's framework, authorization requirements are treated in a very differentiated manner.

Astrid Stadler, **A uniform concept of consumer contracts in European civil law and civil procedure law? – About the limits of a comprehensive approach**

In "Vapenik", the ECJ had to decide whether Article 6 para 1 lit. d of Regulation 805/2004 prevents the confirmation of a judgment by default as a European enforcement order if the judgment was based on a c2c-relation and the plaintiff had not sued the defendant in the Member State where he was domiciled but in the courts where the contractual obligation had to be fulfilled. The question raised was whether Article 6 para 1 lit. d applied only to b2c situations or also to cases in which both parties were consumers. The ECJ denied the application of the provision based on the reasoning that the defendant was not a "weaker party". This interpretation of the EEO Regulation was deduced from the rationale of "consumer contracts" in the Brussels I Regulation, the Rom I Regulation and Directive 93/13. The ECJ, however, provided only a very cursory comparison of the underlying policies of consumer protection. Particularly the idea of granting consumers a preferential treatment with respect to international jurisdiction differs from the purpose of consumer protection in substantive law and conflict of laws. With respect to Regulation 805/2004 the ECJ's decision does not adequately

balance the interests of the two consumers involved and unnecessarily privileges the plaintiff. It increases the defendant's risk to suffer from a deficient cross-border service of documents without the chance of objecting to the enforcement of the judgment by raising grounds for non-recognition.

Jörg Pirrung, **Brussels IIbis Regulation and Child Abduction: Stones Instead of Bread ? – Urgent preliminary ruling procedure regarding the habitual residence of a child aged between four and six years**

After twelve mostly satisfactory decisions on the interpretation of the Brussels IIbis Regulation with respect to parental responsibility cases, the ECJ has given only conditional answers to the questions referred to it by the Irish Supreme Court. In this case it was not adequate to use the urgent preliminary ruling procedure instead of an expedited procedure. In substance, the Court interprets Articles 2 (11), 11 of the Regulation as meaning that, where a child was removed in accordance with a judgment later overturned by an appeal judgment fixing the child's residence with the parent living in the Member State of origin, the failure to return the child to that State following the latter judgment is wrongful, if it is held that the child was still habitually resident in that State immediately before the retention, taking into account the (subsequent) appeal and that the judgment authorising the removal was (only) provisionally enforceable. If it is held, conversely, that the child was at that time no longer habitually resident in the Member State of origin, a decision dismissing the application for return based on Article 11 is without prejudice to the application of the rules established in Chapter III of the Regulation relating to the recognition and enforcement of judgments given in a Member State. On the whole, the opinion of Advocate General Szpunar stating expressly that the fact that proceedings relating to the child's custody were still pending in the State of origin is not decisive as habitual residence is a factual concept and not depending on whether or not there are legal proceedings, seems more convincing than the judgment itself.

Marianne Andrae, **First decisions of the ECJ to the Interpretation of Article 12(3) Regulation (EC) No 2201/2003, Comment to Cases C 436/13 and C 656/13**

Article 12 (3) of Council Regulation (EC) No 2201/2003 of 27 November 2003 applies to separated matters of parental responsibility. The ECJ classifies this rule as a prorogation of jurisdiction for the holders of parental responsibility. This paper submits several arguments against this judgment. The jurisdiction of the

courts is always justified for the particular application and it does not continue after pending proceedings have been brought to a close. This acceptance must be obtained at the time the matter is seized to the courts including the specific issues of the proceeding. An agreement, after the matter was brought to court, does not justify jurisdiction. The tight time requirements must be transferred to the jurisdiction under Article 8 (1) of that regulation. An interpretation whereupon the requirements of the jurisdiction can be fulfilled after pendancy and which orientates to the best interests of the child remains for an amendment of the regulation.

Tobias Helms, **The independent contestability of interlocutory judgments on international jurisdiction in family law cases**
The Stuttgart Higher Regional Court correctly held in its judgment of May 6, 2014 that, contrary to the wording of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG), German courts can pass interlocutory judgments on questions of their international jurisdiction in all family law cases. This conclusion can rightly be reached – in light of the statutory history of the FamFG – by way of an analogous application of Sec. 280 of the Code of Civil Procedure (ZPO).

Rainer Hüßtege, **Grenzüberschreitende Wohngeldzahlungen**

Wulf-Henning Roth, **Applicable contract law in German-Danish trade**
Given the opt-out of Denmark from the Area of Freedom, Security and Justice, Danish courts do not apply the conflict rules of the Rome I-Regulation, but still the EC Convention on the Law Applicable to Contractual Obligations of 1980 (Rome Convention). As Germany has not yet given notice of a termination of the Rome Convention, it appears to be not beyond doubt whether in settings relating to Denmark German courts have to apply the conflict rules of the Rome I-Regulation, given its call for universal application (Article 2) and in the light of Article 24 (1), whereby the Rome Convention shall ("in the Member States") be deemed replaced by the Rome I-Regulation. In contrast, the OLG Koblenz, pointing to Article 1 (4), holds Article 24 (1) to be inapplicable in the specific case as Denmark may not be regarded as a "Member State". The Appellate Court applies the Rome Convention despite the fact that the German legislator has explicitly excluded the direct applicability of the Rome Convention.

Malte Kramme, **Conflict law aspects of the successor's responsibility for**

debts of the acquired business, before and after the Rome-Regulations
The German Federal Court of Justice deals, in its decision of 23 October 2013, with several current questions in the field of private international law. Firstly, the court adopts a position on the question of which conflict rule applies to the liability claim against the successor to a mercantile business carrying on the business under an identical trade-name (section 25 para. 1 sentence 1 German Commercial Code). Furthermore, the court decided which law applies to forfeit and limitation of claims underlying the United Nations Convention on Contracts for the International Sale of Goods. As the court applied the old legal regime prior to the entry into force of the Rome-Regulations, the article focuses on the question of how the case has to be solved under the new legal regime. This analysis shows that the Regulations "Rome I" and "Rome II" do not cover the law of obligations in an exhaustive manner. Remaining gaps need to be filled applying nonunified German private international law.

Dieter Henrich, **Children of Surrogate Mothers: Whose Children?**
The legal parentage of children, born by surrogate mothers and handed over to the intended parents, is a highly debated question. Strictly forbidden in Germany, surrogacy is allowed in other countries. In a case of children born by a surrogate mother in California the German intended fathers (a same sex couple) applied for recognition of the decision of the California court, which established a parent-child relationship between the child and the couple. While the lower courts in Germany denied the application because of incompatibility with German public policy (cf KG IPRax 2014, 72) the Bundesgerichtshof (the Federal Court of Justice) decided in favour of the applicants, but restrained explicitly the recognition on cases of foreign court decisions and to cases, where at least one of the intended parents is the biological parent of the child. So the recognition of foreign birth certificates (e.g. from the Ukraine) is still an open question as well as the recognition of parentage decisions, if neither of the intended parents is a biological parent.

Susanne Lilian Gössl, **Constitutional Protection of ‚Limping' Marriages and the ‚Principle of Approximation'**
The Court decides how to treat a "limping" marriage which is not valid under German law but nevertheless falls in the scope of and is therefore protected by the concept of "marriage" of the German Constitution (Art. 6 para. 1 Basic Law). The article examines how the German status registration law over the last four

decades has subsequently been adapted to the needs of cross-border status questions.

Susanne Lilian Gössl, **Adaptation of Status Registration Rules in Cases of ‚Limping' Status**

The subject of this article is how to handle the birth registration of a child born by a surrogate mother according to German and Swiss law. Both legal systems are absolutely opposed to surrogacy but also under the obligation to protect the child's right to know his/her decent. The Swiss Court found a possibility to resolve the resulting legal tension. The author shows that the court's resolution, an adaptation of the national civil status registry law, is a mechanism which has already been frequently used by German courts in other situations of "limping" status. She proposes to extend that existing jurisprudence to cases of cross-border surrogacy.

Alexander R. Markus, **Jurisdiction in Matters Relating to a Contract Under the Brussels/Lugano Regime: Agreements on the Place of Performance of the Obligation in Question and the Principle of Centralisation of Jurisdiction**

According to the Swiss Federal Supreme Court, parties can by agreement only specify the place of performance of the characteristic obligation under article 5(1)(b) of the 2007 Lugano Convention; contractual specifications of the place of performance of non-characteristic obligations are irrelevant in terms of jurisdiction.

Jörn Griebel, **Investment Arbitration Awards in Setting Aside Proceedings in the US – Questions Regarding the Review of Local Remedies Clauses Within Investment Treaties**

National setting aside proceedings are more and more often concerned with investment arbitration awards. This is due to a constant rise of investment arbitration proceedings. Although two thirds of all investment disputes are adjudicated according to the ICSID rules, which provide for a special review mechanism, the remaining awards may be subject to review before national courts. The US Supreme Court decision had to decide on the degree of review in a dispute concerning local remedies clauses within an investment treaty and the possible impact of such clauses on the consent to arbitrate. The Court held that it had no competence to review the award in respect of such clauses.

German Federal Labour Court on Foreign Mandatory Rules and the Principle of Cooperation among EU Member States

by Dr. Lisa Günther

Dr. Lisa Günther, a lawyer at TaylorWessing, has kindly provided us with the following note on the recent reference for a preliminary ruling made by the German Federal Labour Court (see Giesela Rühl's earlier post on the Court's press release here). Günther is the author of a doctoral dissertation on the applicability of foreign mandatory rules under Rome I and II that was accepted by the University of Trier (Die Anwendbarkeit ausländischer Eingriffsnormen im Lichte der Rom I- und Rom II-Verordnungen, Verlag Alma Mater, Saarbrücken 2011; more details are available here).

On February 25, 2015, the German Federal Labour Court referred three questions relating to the interpretation of Art. 9 and Art. 28 Rome I Regulation to the CJEU. In the context of a wage claim made by a Greek national who is employed by the Greek State at a Greek primary school in Germany, the German Federal Labour Court faced the problem whether to apply the Greek Saving Laws No 3833/2010 and 3845/2010 Laws as overriding mandatory provisions although the employment contract is governed by German law.

The Greek Saving Laws are the result of the implementation of agreements between Greece and the institutions formerly known as the "Troika" (EU, ECB, IMF) regarding the granting of credits in the context of Greece's financial difficulties. The Saving Laws are supposed to ensure that Greece meets the obligations contained in Art. 119 ff. TFEU, particularly in Art. 126 TFEU. These obligations have been specified by Council Decision 2010/320/EU of 10 May 2010. The Greek Saving Laws result in payment cuts in the public sector. The Greek

claimant demands payment of the difference between his original salary and the sum that has been reduced in accordance with the Greek Saving Laws.

As the employment contract was concluded in 1996, amended in writing in 2008 and lasted at least until December 2012, the German Federal Labour Court first raises the question as to whether the application of the Greek Saving Laws is subject to Art. 9 of the Rome I Regulation as far as the the temporal scope of the Regulation is concerned. If Art. 9 Rome I Regulation is applicable in this sense, the German Federal Labour Court raises the further question as to whether Art. 9 (3) Rome I Regulation implicitly prohibits the application of the Greek Saving Laws because Art. 9 (3) Rome I Regulation only covers overriding mandatory provisions of the place of performance and – according to the German Federal Labour Court – Germany is the relevant place of performance in this case.

Thus, the temporal scope of application of the Rome I Regulation must be the starting point of legal analysis. According to Art. 28 of the Rome I Regulation, the Regulation applies to contracts concluded as from 17 December 2009 (cf. the corrigendum published in OJ 2009, No. L 309, p. 87). As the employment contract was – initially – concluded in 1996, the answer in the negative seems quite clear. The previous instance, the Regional Labour Court of Nürnberg, thus decided that the Rome I Regulation is in fact not applicable. The German Federal Labour Court, however, argues that an autonomous interpretation of the term "concluded" is necessary because the Member States have different understandings of when an employment contract is actually "concluded". Particularly, the German Federal Labour Court points out that such an autonomous interpretation must take into account the fact that employment contracts are continuous obligations. Also, the Court emphasizes that it may be necessary not only to include the very first conclusion of an employment contract into the scope of Art. 28 Rome I Regulation, but to interpret the term "concluded" in a way that amendments or changes (i.e. alteration of the gross salary or legislative measures such as the measures of the Greek legislature in question) to an existing employment contract also lead to the application of the Rome I Regulation.

Nevertheless, the wording of Art. 28 Rome I Regulation is rather inflexible in referring to contracts *concluded* as from 17 December 2009 but not to contracts merely *continuing* after 17 December 2009. Also, the legislative procedure shows that the drafters decided consciously against a retroactive effect of the Rome I

Regulation (cf. *von Hein*, in: Thomas Rauscher [ed.], EuZPR/EuIPR, Munich 2011, Art. 8 Rome I para.16). While Art. 24 (3) of the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005) 650 final, provided for a limted retroactive effect, this transitional provision was deleted and did not become a part of the final Rome I Regulation. The interpretation that it is sufficient for the applicability of the Rome I Regulation to simply continue a contract after 17 December 2009, however, would result in precisely such a retroactive effect. Against this background, a conscious choice of the contracting parties to substantially modify and/or actually renew their contract should be the minimum requirement for the intertemporal application of the Rome I Regulation.

Should the CJEU affirm the intertemporal application of the Rome I Regulation, the second question referred to the CJEU will become decisive. The characterization of the Greek Saving Laws as overriding mandatory provisions as such does not seem to pose any difficulties. Both the requirements of German case law as well as the definition now contained in Art. 9 (1) Rome I Regulation ("*provisions the respect for which is regarded as crucial by a country for safeguarding its public interest, such as its political, social or economic organisation, to such an extent that they are applicable to any situation within their scope, irrespective of the law otherwise applicable to the contract*") – which provides guidance regardless of whether the Rome I Regulation is applicable or not – are met if taking into consideration genesis, wording as well as the policy of the Greek Saving Laws.

If Art. 9 Rome I Regulation is not applicable *ratione temporae*, the German Federal Labour Court considers taking the Greek Saving Laws into account as a matter of fact within the scope of the German lex causae. This approach complies with how German courts used to consider third country overriding mandatory provisions before the Rome I Regulation entered into force. As Art. 7(1) of the Rome Convention on the law applicable to contractual obligations from 19 June 1980 was never adopted in Germany, the German courts had to rely on blanket clauses in the lex causae allowing such consideration within the framework of substantive law rather than applying them pursuant to conflict of laws rules. The German Federal Labour Court, however, raises the question as to whether Art. 9 Rome I Regulation now excludes taking Greek Saving Laws into account. This question is a result of the unfortunate restrictions of Art. 9 Rome I Regulation.

Whereas Art. 9(2) Rome I Regulation concerns the application of overriding mandatory provisions of the law of the forum – in this case German law –, Art. 9(3) Rome I Regulation limits the application of overriding mandatory provisions to the provisions of the place of performance, stating that "*[e]ffect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding provisions render the performance of the contract unlawful. […].*" While the Rome I Regulation does not provide a definition of the "place of performance", therefore not answering the question whether the relevant place of performance is the place of performance of the characteristic performance of the contract only or whether each performance has to be considered separately, the German Federal Labour Court seems to have determined that Germany must be regarded as the place of performance for the payments of the Greek state within the meaning of Art. 9(3) Rome I Regulation. Therefore, the question as to whether Art. 9(3) Rome I Regulation actually prohibits the application of overriding mandatory provisions which are neither overriding mandatory provisions of the lex fori nor of the place of performance becomes crucial.

Both the wording as well as the genesis of Art. 9(3) Rome I Regulation suggest that the direct application of overriding mandatory provisions which are not part of the law of the place of performance on a conflict of laws level is – unfortunately – not possible. The Member States could not agree on a provision comparable to Art. 7(1) of the Convention on the law applicable to contractual obligations from 19 June 1980 which provided for the application of third country overriding mandatory provisions with which the situation has a close connection (cf. Art. 8(3) of the proposal COM(2005) 650 final) but deliberately restricted the scope of Art. 9 (3) to overriding mandatory provisions of the place of performance.Still, Art. 9 (3) Rome I Regulation should not prohibit indirectly considering the content of third country overriding mandatory provisions as a matter of fact within the scope of blanket clauses of the substantive lex causae:

First, the indirect consideration of third country overriding mandatory provisions as a matter of fact should not be equated with a direct application on a conflict of laws level. Therefore, the conflict of law provisions of the Rome I Regulation cannot prohibit the consideration of third country overriding mandatory provisions on the substantive law level. Thus, even if the CJEU approves of the

application of the Rome I Regulation *ratione temporae*, the German Federal Labour Court will not be prevented from considering the Greek Saving Laws within blanket clauses of the German lex causae – which is exactly how German courts considered third country overriding mandatory provisions before the Rome I Regulation entered into force.

Secondly, the German Federal Labour Court raises the question whether it is actually obliged to apply the Greek Saving Laws pursuant to the principle of sincere cooperation between Member States. This principle provides for the Member States to assist each other in full mutual respect in carrying out tasks flowing from the Treaties, Art. 4 (3) TEU. It is questionable whether Art. 4 (3) TEU as part of the primary law actually obligates the Member States to apply any overriding mandatory provision of other Member States simply due to the fact that another Member State's s legislature enacted them without any further statutory basis providing for such an application. However, as the Greek Saving Laws in question have their origins in obligations arising from the TFEU as well as a council decision, the situation might be regarded differently in the given case, especially because the situation affects the entire European Union. In this case, both Art. 4 (3) TEU as well as reasons of legal policy might actually oblige the German Federal Labour Court to apply the Greek Saving Laws to the claim for payment in question. Now it is up to the CJEU to decide.

Sandra Wandt on Party Autonomy in European Private International Law

Sandra Wandt has published an interesting doctoral thesis (in German) on „Party Autonomy in European Private International Law – A Study on the Main Codifications regarding Coherence, Completeness and Regulatory Efficiency" (*Rechtswahlregelungen im europäischen Kollisionsrecht – Eine Untersuchung der Hauptkodifikationen auf Kohärenz, Vollständigkeit und rechtstechnische*

Effizienz; PL Academic Research, Frankfurt/Main 2014). The thesis was accepted *summa cum laude* by the law faculty of the Ludwig-Maximilians-University in Munich under the supervision of Professor Dr. Abbo Junker. In her thesis, Wandt provides for an exhaustive analysis of the various rules on party autonomy found in the current EU Regulations on PIL, i.e Rome I, II, III and the Succession Regulation as well as in the Hague Maintenance Protocol and the proposal on marital property. She deals in particular with inconsistencies concerning the admissibility of a free choice of law, the requirements for a valid agreement on the chosen law and the limits imposed on the parties‘ choice. The book is a valuable contribution to the ongoing debate about achieving a more coherent codification of pervasive issues in European private international law. For those who are interested in further details, the introductory chapter is available here.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2015: Abstracts

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

Moritz Brinkmann, **„Clash of Civilizations“ oder effektives Rechtshilfeinstrument? Zur wachsenden Bedeutung von discovery orders nach Rule 28 U.S.C. § 1782(a)**
The author analyses two recent decisions by U.S. federal courts on Rule 28 U.S.C. § 1782(a). Under this rule a court may grant judicial assistance with respect to a foreign or international tribunal by ordering the respondent “to give his testimony or statement or to produce a document or other thing”. The decision of the District Court for the Southern District of New York in In re Kreke concerns inter alia the question whether discovery under § 1782(a) is available also with respect to documents which are not located in the U.S. The CONECEL case, decided by the Court of Appeals for the Eleventh Circuit, touches upon the highly contested

issue whether under § 1782(a) judicial assistance may also be obtained with respect to arbitration tribunals.

Peter Mankowski, **International Jurisdiction in Insurance Matters: Professional Lessor as Injured Party and Standardized, not Case-by-case Assessment of Need of Protection**

The injured party can sue its opponent's liability insurer at its own domicile under Art. 11 II in conjunction with Art. 9 I lit. b Brussels I Regulation/Art. 13 II in conjunction with Art. 11 I lit. b Brussels Ibis Regulation. This holds true also where the injured party is not a natural person but a legal entity. Likewise, it does not matter whether the injured party is a professional. Generally, the protective regimes of the Brussels I/Ibis Regulations including the regime governing insurance matters apply irrespective of whether any protected party deserves protection measured by a concrete yardstick. Conversely, the standard is abstract and typical in line with efficiency, legal certainty and predictability of jurisdiction.

Carl Friedrich Nordmeier, **Coordination of parallel proceedings according to Art. 27 Brussels I Regulation and exclusive jurisdiction – including an analysis of the scope of Art. 22 no. 1 Brussels I Regulation**

Parallel proceedings are coordinated by Art. 27 Brussels I Regulation on the ground of the principle of priority according to which the court first seized examines its international jurisdiction. The present judgment breaks this principle if the court second seized bases its jurisdiction on an in rem claim (Art. 22 no. 1 Brussels I Regulation). In the first part, this article argues that Art. 22 no. 1 Brussels I Regulation covers neither proceedings for the consent to register the transfer of ownership with the German Land Register nor proceedings for a declaration that the exercise of the right of pre-emption under German Law was ineffective and invalid. The second part shows that the reason for strengthening the court second seized – which can be identified in Art. 31 no. 2 Brussels I Regulation (recast) as well – is the protection of the especially close link between the matter in dispute and the place of trial. In contrast, the reliability to predict the (non-)recognition of the judgment which the court first seized may hand down cannot serve as a justification to break the principle of priority. Other potential reasons of non-recognition than the infringement of an exclusive jurisdiction do not allow the court second seized to continue its proceedings.

Hannes Wais, **The concept of a particular legal relationship in Article 23 Brussels I Regulation and application of Article 5 No. 1 Brussels I**

Regulation in matters relating to a non-competition clause
The Higher Regional Court of Bamberg had to deal with mainly two questions: Whether, pursuant to Art 23 (I) Brussels I Regulation, choice of court agreements in sales contracts had a binding effect for a dispute arising from negotiations over a distribution agreement between the same parties (1), and whether a claim, based on an alleged violation of a non-competition agreement, qualified as contractual, pursuant to Art 5 No. 1, or as tort, pursuant to Art 5 No. 3 Brussels I Regulation (2). The court answered the first question in the negative. With respect to the second question, the court held that this claim, even though it may qualify as tort under national law, had to be qualified as contractual under the Brussels I Regulation.

David-Christoph Bittmann, **The legitimacy of substantive objections against a European Enforcement Order in the state of enforcement**
In its judgment of 21/11/2014 the Oberlandesgericht Cologne had to deal with the controversial question whether it should be permitted to a debtor to contest a European Enforcement Order in the state of enforcement by the way of substantive objections, raised in a remedy like the Vollstreckungsabwehrklage according to § 767 of the German Code of Civil Procedure (ZPO). To answer this question, the Oberlandesgericht had to deal with two issues: First, the Senate stated that the courts of the state of enforcement have jurisdiction for such remedies according to art. 22 no. 5 of Reg. (EC) 44/2001. In its argumentation the Oberlandesgericht refers to the judgment of the ECJ in the case Prism Investments BV. Second, the Senate stated, that § 1086 ZPO, which gives a debtor the possibility to raise substantive objections by the way of the Vollstreckungsabwehrklage, is not in contrast to the provisions of Reg. (EU) 805/2004. This judgment is in line with the majority of legal writers. An analysis of the wording, the systematic and the objective of Reg. (EU) 805/2004 shows however, that § 1086 ZPO violates European Law, because the regulation concentrates substantive objections at the courts of the state of origin. A comparison with the procedure of declaration of enforceability according to Reg. (EC) 44/2001 confirms this result.

Leonhard Hübner, **Cross-border change of legal form – implementation of ECJ's Vale judgment into German law**
The following article discusses the national implementation of the cross-border change of legal form by means of transfer of the statutory seat against the

background of the Vale judgment of the ECJ. First, it treats the issues arising in case of a cross-border change of legal form to Germany. These include the missing legal foundation, the treatment of the de-registration of the company from the foreign register, and the protection of the stakeholders. It then examines the reverse situation – the cross-border change of legal form to a foreign country.

Thomas Rauscher, **Unbilligkeit bei Versorgungsausgleich mit Auslandsbezug**

Both decisions in comment apply the hardship clause in article 17 (3) (2) introductory law to the civil code (EGBGB). The article explains intertemporal and substantial consequences of the coming into force of the Rome III-Regulation on the law applicable to divorce as far as the distribution of pension rights (Versorgungsausgleich) is concerned. As to the boundaries between the international hardship clause under article 17 (3) 2, the material hardship clause (para 27 Law on the Distribution of Pension Rights, VersAusglG) and forfeiture of rights the author favors a narrow interpretation of the scope of application of the international clause.

Kurt Siehr, **Habitual Residence of Abducted Children before and after Their Return**

Two children, born in 2002 and 2003, had been abducted by their mother from La Palma (Spanish Canary Islands) to Germany. Both parents had custody rights (patria potestad) according to Spanish law. In Germany the parents agreed on 13 February 2013 that the children had to be returned to La Palma. In March 2013 the children were brought back by their mother. In La Palma the Spanish court declined jurisdiction because, according to Spanish law, the mother is entitled to take the children to Germany. She returned with them to Germany and here the father applied for enforcement of the agreement of 13 February 2013 and for an order to return the children to La Palma. The mother argued that she had already performed her obligation by returning the children to La Palma in March 2013. The father, however, objected and was of the opinion, supported by a decision of the Court of Appeal of Karlsruhe of 14 August 2008, that a child is only returned if it had established habitual residence in the state of origin. But this was not the case in the present situation because the children, after a short visit in La Palma in March/April 2013, returned to Germany. The Court of Appeal for the German State of Schleswig-Holstein (Oberlandesgericht in Schleswig), seized of this matter, finally decided that the duty of the mother to return the children had been

performed in March 2013. The establishment of a new habitual residence in the state of origin is not necessary for the performance of the duty to return. Therefore no new return order is given by the court. – Discussed is the habitual residence of an abducted child before and after return to the country of origin from which the child has been abducted. Mentioned is also the English case O v. O (Abduction: Return to Third Country), [2013] EWHC 2970 (Fam), in which the "return" of a child was ordered to a country (USA) from which the child had not been abducted and in which the child was not habitually resident immediately before being abducted. The child had to be "returned" to the state in which the parents agreed to establish their new habitual residence after having given up their former habitual residence in Australia.

Alexandra Hansmeyer, **Legal effects of a third party notice (Streitverkündung) filed in German court proceedings on court and arbitration proceedings in China**

As the world's second largest economy and its largest exporter, China's manufacturers occupy an increasing number of positions across the supply chains of a wide range of industries. With Chinese manufactured or processed products being sold globally, many international product liability cases require bringing claims up the supply chain against Chinese manufacturers. Third party notices ("Streitverkündung") provide a mechanism for courts to recognize specific aspects regarding such claims made in a preceding court proceeding. The article examines the legal impact of third party notices filed in German court proceedings against a Chinese party on subsequent proceedings in Chinese civil courts or by the China International Economic and Trade Arbitration Committee ("CIETAC"). The article concludes that according to the current Chinese law and state of jurisprudence, third party notices have no legally binding effect on subsequent proceedings in China, neither with regard to ordinary courts, nor with regard to CIETAC arbitrations. Further, even if a Chinese party accedes to German court proceedings, such action, according to Chinese contract law, cannot be deemed as an implicit waiver of an arbitration clause in an underlying Chinese law contract.

Marc-Philippe Weller/Alix Schulz, **Maintenance obligations and Legal kidnapping – Jurisdiction at the illegally established habitual residence?**

The following article discusses "habitual residence" as a ground for jurisdiction in maintenance claims according to Art. 5 Nr. 2 Brussels-I-Regulation as well as

pursuant to Art. 3 of the Regulation n° 4/2009 on maintenance obligations. In cases of legal kidnapping by one of the parents, it may be worth discussing whether habitual residence can be established in the destination state, even if the change of the child's living environment itself has been illegal.

Carl Zimmer, **The change in the habitual residence under the 2007 Hague Maintenance Protocol**
The Austrian Supreme Court's case gave rise to two crucial questions concerning the application of the Hague Maintenance Protocol from 2007: First, whether a change of habitual residence may already occur as from the moment of relocation to another State and secondly, whether Art. 4 para 3 or Art. 3 para 1 Hague Maintenance Protocol applies when, at the moment of commencement of proceedings, the maintenance creditor and the maintenance debtor have their habitual residence in the same state. While the second instance court addressed both questions, the Austrian Supreme Court did not: the father's appeal was dismissed because of a lack of motivation. The author supports the solution of the second instance court to grant the claimant a choice of procedure with regard to Art. 4 para 3 Hague Maintenance Protocol. The court's concept of habitual residence based on a fixed time-criterion, however, seems questionable.

French Same-Sex Marriage, a Strange International Public Policy

By Dr. François Mailhé, maître de conferences, Paris II

Last month, on January 28, the French Cour de cassation decided on a new "Same-sex Marriage" Act international case. After "Thalys babies" in September, the issue was about the authorization to wed a French and a Moroccan nationals, the last of whom citizen of a country prohibiting same-sex marriages.

THE DECISION

The facts were simple indeed. Two men, Dominique, French, and Mohammed, Moroccan, wanted to get married in Jacob-Bellecombette, in the suburbs of Chambéry, France, the city of the 1968 Winter Olympics. The Same-sex Marriage Act had just been passed in Parliament, and it was understood as having created a "right to marry" for all, that is for homosexual as well as heterosexual couples (the Act is also known as the "Marriage for all" Act), and for foreigners and French alike. Indeed, Article 202-1 Civil code (C.Civ.) read, at the time:

"*The qualities and conditions necessary to be able to contract marriage are governed, for each spouse, by his personal law.*

Nevertheless, two persons of the same sex may contract marriage when, for at least one of them, either his personal law, or the law of the State within which he has his domicile or his residence, permits it".

Obviously, since Dominique was French and they both lived in France, the condition of Article 202-1 C.civ. was fulfilled. Unforunately, it was not applicable to the case. Indeed, France and Morocco have signed a bilateral convention, on August 10, 1981, concerning personal and family status and judicial cooperation. Sure enough, this "right to wed" therefore knew exceptions, those compelled by the pyramid of norms: where there existed provisions of international source providing solutions for conflict of marriage law, these solutions would prevail over Article 202-1 C.civ. It had actually even been expressly written down in the draft Act, only to be later written off by the Senate on the ground that the principle of hierarchy of norms enshrined in Article 55 of the Constitution made it irrelevant.

That was until January 28, 2015. In a highly advertised decision, the Cour de cassation decided that:

« […] *if, according to Article 5 of the Franco-Moroccan Convention* […] *substantial conditions such as prohibitions to marriage, are governed for each future spouse by the law of the State he is a citizen of, its Article 4 outlines that one of the contracting States laws may be set aside by the courts of the other State if it is manifestly incompatible with its public policy ;* […] *that is the case of the applicable Moroccan law opposed to the marriage of two persons of the same-sex when, for at least one of them, either his personal law, the law of the State of his domicile or that of his residence allows it* ».

Dominique and Mohammed are therefore allowed to wed. What now?

AN ANALYSIS

At first glance the decision may appear complex but on the whole quite conventional. The Court, after all, only uses the public policy exception allowed by the Convention itself. The solution, therefore, would be specific to the Convention itself, and Morocco only could be concerned by the decision.

The originality of this exception, though, is surprising. This public policy exception is not an absolute exception. It doesn't purport to create an absolute "right to wed". Instead, it depends upon the recognition of same-sex wedding in one of the following States: that of the domicile, the residence or the nationality of at least one of the spouses. This originality calls for three observations, the first about conflict of norms, the second about the scope of this exception, the last about the nature and development of this kind of exception in Europe.

1/ The first observation concerns the phrasing of the public policy clause at play. Indeed, if the Cour de cassation refers to Article 4 of the Convention to justify this surprising exception, its wording is actually grounded in Article 202-1 C.civ. itself. Comparing both this paragraph of the decision and the second paragraph of Article 202-1 C.civ. makes the relationship quite obvious: the exact same words were employed for both of them. Of course, one could say any public policy exception is the political safety valve that Courts may design as they think fit. Why not designing on the basis of Article 4 of the Convention what is now written in Article 202-1 C.civ.? The blog format is perfect for such an assertion since this seems open to debate, but I would like to propose a negative answer.

In its letter, first, Article 4 is designed as a quite classical public policy exception. "*The law of one of both States applicable under the Convention may only be set aside by the Courts of the other State if it is manifestly incompatible with its public policy*". Words have some weight, though, and it seems necessary to notice that it requires a "manifest" incompatibility. The discussion of this word's value in the context of Article 21 Rome I Regulation should at least raise the attention. And anyway, how can a violation of a public policy exception be "manifest" if it requires checking a potentially foreign law?

In its spirit, second, the solution is nothing less than a levelling of the situations. The Cour de cassation refused to differentiate situations according to the applicable norms when, apart from the nationality of the parties, the situations

don’t differ. But isn’t it the purpose of such conventions to treat citizens differently when their States together agreed to do so? Should the teleological rationale of such mechanism (to exclude the applicable law to defend certain values) eventually level down any and all such clauses, even those more restrictive than the others?

2/ This leads me to the second observation: this exception cannot be limited to the Franco-Moroccan convention. France has ratified identical bilateral conventions with Poland, Vietnam and the former Yugoslavia (which now concerns Slovenia, Bosnia, Serbia and Montenegro). Laos, Cambodia, Tunisia, Madagascar and Algeria have each also entered into similar conventions and though this last group of conventions has no public policy clause, it is still considered available in the silence of the texts. Citizens from all these countries now beneficiate from this “right to wed”, even if their countries either ignore or even penalize homosexuality: the policy reasons for which Article 202-1 C.civ. took the guise of the convention are not specific to French-Moroccan relations.

3/ The third observation is more about of this very “specific clause of public policy” (Rigaux and Fallon, n°7.54) that was first developed in Belgium (Article 46, Private International Law Act, 2004) and served as an inspiration to the French Act.

There is an ambiguity as to the nature of this clause. In France, some have characterized it as a positive public policy exception, defending the “right” implemented in the law instead of negatively protecting some values of the society. Noting that Article 202-1 C.civ. does not stop at setting aside the prohibitive law but actually gives the exact answer to the problem, some have characterized it as a substantial provision, not a conflict one. Actually, the debate doesn’t seem of great importance : it may be both. Since the effect of the rule is an exclusion of the applicable law to be replaced by the Court’s lex fori, it is a public policy exception. Since the effect of the rule is to make sure same-sex marriages are not declared void or prevented in France on this specific ground, it is a substantive rule. When a substantive provision may exclude the application of an opposite foreign solution, the border between notions gets blurred.

But whatever the characterization of the clause, its originality needs to be emphasized. Because they defend what is perceived as a sort of individual right still very variously regarded abroad, Article 202-1 C.civ. as well as Article 46

Belgian law are not absolute in their rejecting prohibitive foreign laws. They require a connection to a State which defends the same right. It looks, therefore, like an application of *Inlandsbeziehung*. But this is a very special one, since *Inlandsbeziehung* requires a unilateral connection with the State of the forum. Here the connection is bilateral, with any State which accepts same-sex marriages. It is as if the French and Belgian legal systems defended that solution only insofar as it gets support from a State that is connected to the case. Truly enough, this State will most often be the French State itself, since the several connecting factors listed in Article 202-1 C.civ. will frequently lead to that country. But a French judge asked to decide on the alleged invalidity of a same-sex marriage of two Moroccan nationals, residing and married in the Netherlands, would have to set aside Moroccan law on this public policy ground because *Dutch law* recognizes same-sex marriages. If this clause is a real public policy clause, and public policy clauses defend values of the connected legal order, then this clause doesn't defend *French* values. It defends the values of an international community, and stands as a sort of truly international public policy, a transnational public policy…

Food for thoughts, and I hope for reactions on this blog.

Third Issue of 2014'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 2014 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features one article, the transcript of a public interview celebrating the 120th Anniversary of The Hague Conference on Private International Law, and three comments.

Cristina Campiglio, Professor at the University of Pavia, examines the issue of assisted procreation and recent jurisprudence in **"Norme italiane sulla procreazione assistita e parametri internazionali: il ruolo creativo della giurisprudenza"** (Italian Provisions on Assisted Procreation and International Parameters: The Creative Role of the Courts).

> *Law No 40/2004 on medically assisted conception was adopted to fill-in a major gap in the Italian legal system, putting an end to the so-called "procreative wild west". However, its provisions had left the majority's expectations largely unfulfilled. The decade following the entry into force of the law was marked by a number of – national and international – judicial decisions which produced a progressive attrition of the law's prohibitions. The interaction between the Italian Constitutional Court and the European Court of Human Rights has thus made it possible for judges to consent – in part and as a matter of urgency – to requests of couples who, being carrier of a genetic disease, are willing to have children while avoiding to incur into the risk of transmitting the disorder. Pivotal was certainly decision No 151/2009 whence the Constitutional Court relativized the protection of the embryo. For their part, in 2012 the European Court judges emphasized the disproportion in the Italian legislation of the protection of the embryo, as compared to the other interests at stake. This creative case-law, by assimilating supranational principles, sacrifices the certainty of the law in the name of equitable justice, overcoming the inaction of the Italian Parliament.*

Fausto Pocar, Professor Emeritus at the University of Milan and Editor in Chief of the *Rivista* and *Hans van Loon*, Secretary General of the Hague Conference, in the transcript of a public interview walk us through the many and significant achievements of The Hague Conference on Private International Law in **"The 120th Anniversary of The Hague Conference on Private International Law"** (in French and English).

> *On the occasion of a workshop convened for the celebration of the 120th Anniversary of the Hague Conference on Private International Law, the Editor in Chief of the Rivista Fausto Pocar and the Secretary General of the Hague Conference Hans van Loon held a public interview on the achievements of the Conference – from its foundation, to the establishment of the Permanent Secretariat in 1955, to modern days – as well as its future goals. The detailed*

report of the interactive and captivating dialogue that ensued to this encounter spans from the efforts and challenges of transforming the Conference into a global organization, to the Conference's achievements in the unification of conflict of law rules and in the effective enhancement of inter-State cooperation in civil procedure matters as well as in judicial and administrative assistance. Providing valuable examples of the Conference's tangible impact on the States' effort to establish and achieve common goals in private international law matters, this interview provides a precious and rare insight on the Conference's activity and mechanisms shared by two of the most significant contributors to the Conference's activity in modern times.

In addition to the foregoing, three comments are featured:

Eva De Götzen, PhD at the University of Milan, addresses cross-border employment contracts and relevant connecting factors in light of the ECJ's recent case-law in **"Contratto di lavoro, criteri di collegamento e legge applicabile: luci e ombre del regolamento (CE) n. 593/2008"** (Employment Contract, Connecting Factors and Applicable Law: Lights and Shadows of Regulation (EC) No 593/2008).

The article faces several issues concerning the choice-of-law rules, provided for by the Rome Convention and the Rome I Regulation, in employment matters. In the first place, an overview of the special connecting factors devoted to employment contracts set forth by the abovementioned uniform instruments is given and their current interpretation (see the Koelzsch, Voogsgeerd and Schlecker cases) is analyzed. In this respect, the article focuses on the relationship between the connecting factors of the locus laboris and the engaging place of business as well as on the interpretational difficulties arising from the application of the so-called escape clause. Moreover, the issue concerning the role played by some Recitals of the Rome I Regulation and by collective agreements in determining the law applicable to relationships between private parties in addition to the rules at hand will be addressed as well. The final question the article refers to is to assess whether the application of the conflict-of-laws rules in employment matters restricts the fundamental freedoms provided for by the EU Treaties or whether it strikes a balance between the free movement of workers and services in the EU internal market and the protection of the weaker party.

Giovanni Zarra, PhD candidate at the University of Naples "Federico II", analyses anti-suit injunctions in jurisdictional conflicts within the European boarders and in the international context in **"Il ricorso alle anti-suit injunction per risolvere i conflitti internazionali di giurisdizione e il ruolo dell'international comity"** (Recourse to Anti-Suit Injunctions to Solve Conflicts on Jurisdiction and the Role of International Comity).

This article analyses the anti-suit injunction, an equitable tool used by common law courts in order to restrain a party from commencing or continuing a national judgement or an arbitral proceeding abroad, the issuance of which is seen by many foreign courts as an offence and an attempt to their sovereignty. After having described the development and the main features of the anti-suit injunction, this article focuses on the possibility and the opportunity for English courts to issue anti-suit injunctions in jurisdictional conflicts within the European boarders and in the international context. With particular regard to intra-EU conflicts of jurisdiction, this article mainly focuses on the effects of the new Regulation (EU) No 1215/2012, whose Recital 12, according to certain scholars, might be interpreted as recognising again the power of English courts to issue anti-suit injunctions after the Court of Justice of the European Union forbade the use of such orders under Regulation (EC) No 44/2001. This article argues that, in a context of global economy, anti-suit injunctions should be used only in exceptional circumstances, in particular when their issuance is in accordance with the principle of international comity, which is proposed as the criterion that should usually guide common law judges when considering issuing an anti-suit injunction. In light of the above, the article eventually tries to make a practical assessment of the situations in which the use of anti-suit injunctions is permitted by the principle of international comity.

Cristina Grieco, PhD Candidate at the University of Macerata, addresses the new Italian legislation on e-proceedings in **"Il processo telematico italiano e il regolamento (CE) n. 1393/2007 sulle notifiche transfrontaliere"** (Italian E-Proceedings and Regulation (EC) No 1393/2007 on the Service in the Member States of Documents in Civil and Commercial Matters).

This paper analyzes the new Italian legislation on e-proceedings and the admissibility of the use of electronic instruments for the transmission of judicial documents in compliance with European requirements. The enquiry starts from

the scope of application of Regulation No 1393/2007, as outlined by the ECJ in its Alder judgment. First, this paper provides an overview of the rules laid down by the Italian Code of Civil Procedure concerning cross-border notifications, in order to analyze the impact of the legislation on e-proceedings on existing domestic legislation. Then, this study attempts a brief overview of the level of computerization of justice achieved by the Member States and of the initiatives undertaken by the European institutions in this respect. Lastly, the present work explores the possibility of encompassing the tools of electronic communication within the scope of application of Regulation No 1393/2007, with regard to a literal and a systematic interpretation of the relevant provisions. The enquiry focuses particularly on the possibility, at present, to use the tools available for the computerized transmission of judicial documents within the European judicial area and on whether any obstacles to such use are attributable to legal grounds rather than to purely technical considerations.

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale. This issue is available for download on the publisher's website.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2014)

The latest issue (November/December) of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (IPRax) contains the following articles:

- ***Rolf Wagner:*** "The new programme in the judicial cooperation in civil matters – a turning point?"

Since the entry into force of the Amsterdam Treaty in 1999 the European Union

is empowered to act in the area of cooperation in civil and commercial matters. This article describes the fourth programme in this area. It covers the period 2015–2019. The author provides an overview of the history and content of the new programme in so far as the area of civil and commercial law is concerned. Furthermore, he explains how this programme differs in conceptual terms from its predecessors.

- ***Michael Stürner/Christoph Wendelstein:*** "The law governing arbitral agreements in contractual disputes"

The article deals with the law governing arbitral agreements in contractual disputes. As such agreements are excluded from the material scope of application of Regulation Rome I, a conflict of laws approach has to be found in national law. Under German law, none of the existing black-letter private international law rules apply. Various connecting factors are conceivable (e.g. law of the seat of the arbitration, law governing the arbitration). Given the close connection between the arbitral agreement and the main contract, the article suggests that the law applicable to the latter will also determine the former. That applies, of course, only if the parties did not (explicitly or implicitly) choose the law applicable to the arbitral agreement.

- ***Katharina Hilbig-Lugani***: "Das gemeinschaftliche Testament im deutsch-französischen Rechtsverkehr – Ein Stiefkind der Erbrechtsverordnung" – The English abstract reads as follows:

Mutual wills have troubled German doctrine before a European instrument came along and they continue to do so under the Succession Regulation 650/2012. The Regulation lacks an explicit provision. The focus of the present contribution lies on the discussion whether a mutual will is subject to the conflict of law rule on agreements as to succession (article 25 of Regulation 650/2012) or subject to the general provision on dispositions upon death (article 24 of Regulation 650/2012). The concepts of "mutual will" and "agreement as to succession" on the European level are far from being clear. Though less favorable, the more convincing arguments – including wording, systematics and legislative history – argue in favor of the application of article 24 Regulation 650/2012.

- ***Peter Kindler***: "Corporate Group Liability between Contract and Tort under the Brussels I Regulation"

The judgment of the CJEU of 17 October 2013 (C-519/12 – OTP Bank vs. Hochtief) confirms the consolidated case law on art. 5(1)(a) Brussels I Regulation regarding the contractual nature of the matter. The liability has to derive from "obligations freely assumed" by one party towards another. According to the Court there is no such freely assumed obligation when the claim is based on a provision of national law imposing a liability on the controlling shareholder of a corporation for the debts of such corporation in case of its failure to disclose the acquisition of control to the commercial register. Astonishingly, the CJEU goes beyond the question referred for the preliminary ruling by the Hungarian Kúria and also gives its views on art. 5(3) Brussels I Regulation. Under this provision, in matters relating to tort, a person domiciled in a Member State may be sued in the courts of the place where the "harmful event" occurred. In this regard, the judgment is incomplete as far as causation is concerned. It remains unclear which could be the defendant's conduct that caused the "harmful event".

- ***Christian Koller:*** "Conflicting Goals in European Insolvency Law: Reorganization vs. Territorial Liquidation"

In the Christianapol-case the ECJ had to resolve the conflict between main insolvency proceedings, aiming at the restructuring of the debtor, and secondary proceedings, which must be winding-up proceedings under the European Insolvency Regulation. The ECJ's solution is mainly based on the interpretation of the provisions of the Insolvency Regulation dealing with the coordination of proceedings. It does not, however, take sufficient account of the effects of restructuring measures approved by the court in the main insolvency proceedings. This contribution, therefore, discusses the effects the recognition of a restructuring plan approved by the court in the main insolvency proceedings might have on the opening of secondary proceedings.

- ***Wulf-Henning Roth***: "IZPR und IPR – terra incognita" – The English

abstract reads as follows:

The judgment of the Oberlandesgericht Karlsruhe, in its substance, deals with the much debated issue whether and under what conditions agreements on costs and charges that go along with the conclusion of an insurance contract may be regarded as void. Issues of private international law are given short shrift. In this regard however, the judgment of the renowned Appellate Court reveals an astonishing ignorance of the fundamentals of European private international law: Instead of applying Regulation No. 44/2001 the Court turns to the German law of jurisdiction; and, with regard to substance (claim based on contract; voidness of the contract; claim based on precontractual misinformation), neither the Rom I- nor the Rom II-Regulation is even mentioned. Instead, the Court bases its judgment on the Rome Contracts Convention of 1980 whose direct applicability has been explicitly excluded by German legislation.

- ***Christoph A. Kern***: "Jurisdiction based on the place of performance according to Art. 5(1) Brussels I 2001/Art. 7(1) Brussels I 2012 when a contract combines the sale of real estate with the seller's obligation to construct business premises and find financially strong tenants"

The Düsseldorf Court of Appeal held that a contract combining the sale of real estate with the seller's obligation to construct business premises on the land and to find financially strong tenants is a contract on the provision of services in the sense of Art. 5(1) lit. b 2nd indent Brussels I 2001 (Art. 7(1) lit. b 2nd indent Brussels I 2012). This holding might have been driven by the court's wish not to apply the traditional rule in Art. 5(1) lit. a Brussels I 2001 (Art. 7(1) lit. a Brussels I 2012), according to which the place of performance must be determined with reference to the primary obligation in question. In the eyes of the commentator, the obligations to construct certain premises and to find solvent tenants normally do not affect the qualification of the contract as a sale of real estate, even more so if these obligations cannot be enforced directly by the buyer but their only sanctions are a condition precedent and a right of withdrawal. The commentator sees a parallel to contracts on the supply of goods to be manufactured according to requirements specified by the buyer, which have been qualified as sales contracts by the ECJ in the case C-381/08 (Car Trim).

- ***Angelika Fuchs**:* "Direct claim and assignment after cross-border traffic accident"

Following the respective judgment of the CJEU (C-347/08), a German court decided that a federal state in Germany, acting as the statutory assignee of the rights of the directly injured party in an international motor accident, may not bring an action directly in the courts of its Member State against the insurer of the person allegedly responsible for the accident, when that insurer is established in another Member State. The court argues that – other than the injured party itself – the federal state cannot be considered to be a weaker party and can therefore not rely on the combined provisions of Articles 9(1)(b) and 11(2) of the Brussels I Regulation. The following article explains what impact the assignment of rights has on the interpretation of different rules of jurisdiction.

- ***Martin Gebauer:*** "The Autocomplete Features of „Google" and the Infringement of Personality Right – Jurisdiction to Adjudicate and Choice of Law"

In its recent "Google"-decision, the German Federal Supreme Court (FSC) ruled that German courts have jurisdiction to adjudicate under Section 32 of the German Code of Civil Procedure in an action brought against Google Inc., a company seated in California, USA, for the infringement of personality rights by means of the autocomplete feature offered by "Google.de". The FSC also held that German law applied. For the first time after the "eDate Advertising" ruling of the European Court of Justice (ECJ), the FSC had the opportunity to synchronize the approach of its own case law, in terms of the German autonomous rules of jurisdiction, with the approach developed by the ECJ. Without picking it out as a central theme, the FSC approach differs from the approach of the ECJ. Whereas the ECJ is looking for the place where the alleged victim has its centre of interests, the FSC requires that the forum state be the place where the diverging interests of both parties collide. This test is applied both to the question of jurisdiction to adjudicate and to the question of choice of law (under autonomous German conflict rules). Mainly for three reasons, the FSC in the long run should bring its case law more in line with the "eDate-doctrine" of the ECJ: First, the centre of interests of a person is more predictable as a ground of jurisdiction than the place of colliding interests.

Second, jurisdiction to adjudicate and choice of law fit together in the sense that a court having jurisdiction under the Brussels Regulation for the alleged infringement of personality rights should preferably be empowered to apply the law of the forum. Third, the coordination of parallel proceedings within the EU is closely linked to the scope of the jurisdictional rules in the member states. Coordination works better when these rules resemble each other even in cases where the defendant is domiciled in a third state.

- ***Andreas Engel:*** "Conflict of Laws in Property Law: Statutory Limitation and Changes in the Applicable Law"

In a lawsuit for the recovery of a classic car which was originally sold in Germany and then went missing after the Second World War, only to later reappear in the U.S. where it was sold at an auction in California and then re-transferred to Germany for an exhibition, the Oberlandesgericht Hamburg had to grapple with diverging national laws. Under Californian law, but not under German law, the pertinent period of limitation is not deemed to accrue until the discovery of the whereabouts of the article, and there is no tacking of previous possessors.

According to German conflict-of-law rules regarding property, German law was applicable for the recovery claim and its limitation. However, even the special provision of art. 43 para. 3 EGBGB does not allow for a retroactive modification of final legal determinations arrived at pursuant to a law formerly applicable. A final legal determination of facts in that sense can also be of a negative nature. In the given case, this meant that German property law had to respect and uphold the Californian decision as to when the period of limitation began to accrue.

- ***Bettina Heiderhoff:*** "Return of the child in case of child's objection under the Hague Child Abduction Convention"

The decisions mainly concern issues of Art. 13(2) Hague Child Abduction Convention. In both cases, the children were relatively old (between 11 and 16 years) and objected to the return.

In the ECHR case, the court order to return the children to their mother in

England was not enforced by the French authorities following an unsuccessful mediation meeting between the mother and the children. The ECHR held that France should have tried harder to influence the position of the children (para. 94). The OGH found that even at the age of 15 it was necessary for the courts to assess the individual maturity of the child.

In fact, Art. 13(2) Child Abduction Convention must be interpreted in a narrow way. Only where a child possesses the necessary maturity, and is objecting in a determined and distinct manner, may the return be refused by the authorities. While it must be deplored that Art. 13(2) is so imprecise, courts should still try to establish a clear line. For children below a certain age (one might consider the age of 10, for instance) the necessary maturity should, generally, be denied. Correspondingly, there might also be an age above which maturity is assumed without further investigation (this might be appropriate for children of 13 years and older).

Only where a child has been unduly influenced by the abducting parent is there reason for an attempt to change the child's opinion.

- ***Hans Jürgen Sonnenberger:*** "Transkription einer von zwei Italienern in den USA – New York – geschlossenen gleichgeschlechtlichen Ehe in das italienische Personenstandsregister" – The English abstract reads as follows:

For the first time in Italy the Tribunale of Grosseto ordered the transcription of an Italian same-sex couple's marriage, who was wedded abroad. This note analyzes the decision, demonstrates the development of Italian and European case law and evaluates it in the light of the reasoning of the Tribunale.

- ***Christa Jessel-Holst:*** "Recodification of the Private International Law of Montenegro"

The contribution analyses the new Montenegrin Act on Private International Law of 23 December, 2013, as the first comprehensive PIL-reform in a Yugoslav successor state. The Act regulates conflict of laws as well as procedural international law in 169 articles. EU-harmonization is a main objective of the reform. Habitual residence is introduced as a connecting factor, for which a

legal definition is provided. The scope of party autonomy is considerably expanded. Novelties include inter alia a general escape clause and a provision on overriding mandatory rules. Issues like maintenance, personal name, agency or intellectual property are regulated for the first time, others have been totally reformed. The reciprocity requirement for the recognition of foreign judgments has been abolished. For the recognition of foreign arbitral awards it is referred to the New York UN-Convention of 1958. For Montenegro, the new Act replaces the Yugoslav codification of 1982.