Yves Fortier Chair at McGill

Applications are currently invited for the L. Yves Fortier Chair in International Arbitration and International Commercial Law tenable in the Faculty of Law, McGill University

The L. Yves Fortier Chair in International Arbitration and International Commercial Law, endowed in 2009, has been created through the generous support of Rio Tinto Alcan Inc., in order to bring a leading scholar and teacher in the field of international arbitration and commercial law to the Faculty of Law at McGill University. The Chair is named in honour of L. Yves Fortier, BCL'58, formerly Canada's Ambassador, Permanent Representative, Chief Delegate to the General Assembly of the United Nations and former Chairman of the Board of Alcan Inc.

The Faculty seeks applications from scholars of international reputation in the field of international commercial law and arbitration. The purpose of the Chair is to reinforce a Canadian locus for the study and research in these fields. Through his or her engagement in teaching and research, the chair holder will advance the understanding of theoretical and practical dimensions of international commercial law including trade and investment, formal and informal regulatory models, corporate governance and responsibility as well as dispute resolution. The chair holder will teach and supervise undergraduate students and graduate students at the master and doctoral levels in the Faculty of Law. The chair holder will endeavour to establish, where appropriate, relationships with other scholars, civil servants, international organizations and experts in non-governmental organizations.

Given the bilingual environment of McGill's Faculty of Law, the chair holder will be expected to evaluate written and oral work presented by students in both English and French.

The position is tenured and the Chair is fully endowed. In addition to a proven record as a teacher and a scholar, the successful candidate would ideally have experience interacting with international organizations and national governments. The salary and the academic rank will reflect the successful candidate's qualifications and experience. The term for the chair is seven years and is

renewable. The appointment would commence January or July 1, 2011.

The Faculty of Law at McGill University was established in 1848. Its undergraduate program represents an international benchmark for contemporary legal education, and leads to the joint award of the Bachelor of Civil Law (B.C.L.) and Bachelor of Laws (LL.B.) degrees. The graduate program comprises both a non-thesis master's degree and substantial research degrees at the master and doctoral levels. Through its research programs and pedagogical initiatives it reflects a central commitment to the study of legal traditions, comparative law and the internationalization of law. In conjunction with this overarching mission for the study of law at McGill University, four areas of academic priority have been identified by the Faculty: Transsystemic Legal Education; Trade, Mobility and Enterprise; Public Policy and Private Resources; and Human Rights and Legal Pluralism.

The L. Yves Fortier Chair in International Arbitration and International Commercial Law will be invited to stimulate research and teaching at the intersection of these four areas, and, in so doing, to contribute to the University's national and international profile as well as to the Faculty of Law's expertise in comparative law.

How to apply

Applications and nominations, accompanied by a complete curriculum vitae, are now invited and will be considered as of October 15, 2010. Applications should be addressed to Professor Geneviève Saumier, Chair, Staff Appointments Committee, Faculty of Law, McGill University. Applications should be sent by electronic mail to Linda.coughlin@mcgill.ca

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Perreau-Saussine on Rome II and

Defamation

Louis Perreau-Saussine is professor of law at the University of Nancy, France. His scholarship includes an article published at the Recueil Dalloz in May 2009 on Les mal aimés du règlement Rome 2: Les délits commis par voie de media.

1. The "Rome II" Regulation deals with harmonized conflict-of-law rules relating to non contractual obligations. Unfortunately, it was left incomplete as, *inter alia*, no consensus was reached on the suitable applicable law to non-contractual obligations arising out of violations of privacy and personality rights. However, the Commission made it clear that the debate should be re-open (cf. article 30 of the Regulation), and this is precisely the object of Mrs Wallis's *Working Document on the Amendement of Regulation EC N°864/2007 on the law applicable to non-contractual obligations*, which offers an insightful overview on the matter

2. As the *Working Document* points out that "the unification of Member State laws on non-contractual obligations arising out of violations of privacy and personality rights is not a feasible option at the present stage of European legal integration" (p.7), this paper will focus on the harmonization of conflict-of-laws rules in this area of law, and, more precisely, on what could be the conflict of law rule suitably include in the "Rome II" EC Regulation. In line with the general principles of the "Rome II" Regulation, the *Working Document* recalls that the conflict-of-law rule must be "neutral", *i.e*. independent from all the parties involved's interests – which is said to be "very difficult" (p. 9) – and insure legal security and predictability. Moreover, the non-contractual obligations arising out of violations of privacy must put up with two specific problems, namely the "distance publication problem" – the place of the event giving rise to the damage and the place where the damage materialises are not the same – and the "multiple publications problem" – the damage materialises in several places.

In the *Working paper*, several connecting factors are discussed:

– the "place in which the tort took place" (1);

– the "place in which the damage materialises" (2);

– the "place of the publisher's establishment" (3);

– a flexible rule based on choice of the applicable law either by the parties or the judge (4).

Scrutinizing both the *Working Document* and the *Mainstrat study*, it is clear that none of those four conflict-of-laws rule satisfies *per se* both the media organisation and the plaintiff's interests. The media organisations tend to reject conflict-law rules n°1-2-4, blaming their lack of predictability for the defendant, and advocate the use of connecting factor n°3. If this option satisfies the need for predictability and insures that both the "distance publication problem" and the "multiple publications problem" can be sorted out, such a rule is obviously ill-balanced in favour of the defendant, and cannot be chosen for that very reason.

3. When analysing the process which led to the exclusion of the scope of the "Rome II" EC Regulation of non-contractual obligations arising out of violations of privacy and rights relating to the personality, one of the most striking feature is how soon a *special* conflict law rule has been discussed, without having really challenged the suitability of the *general* rule of article 4 (connecting factor n° 2). On the contrary, considering, first, the general structure of the "Rome II" Regulation and, next, the general trend of the *Working Document,* and specially the list of the "things which need to be determined" (displayed in page 8), it is clear that:

– the general rule of article 4 cannot be set aside unless it has been proven that is not suitable for a category of torts: there should be good reasons to deviate from that rule.

– as the preliminary provisions of the Regulation put it (point 16), the general rule fulfils the legitimate expectations of both the publisher and the person harmed. Moreover, article 4.3 matches the need for flexibility mentioned in the *Working Document* (p. 10).

– most media organisations find it impossible to apply the general rule without adapting it.

4. That said, one of the main question is: what are the changes that ought to be brought to the general rule of article 4 to make it acceptable and applicable to non-contractual obligations arising out of violations of privacy and rights relating to the personality?

- **Article 4.1**:

Following the Commission and the European Parliament proposals, an exception to article 4.1 should be made for the right of reply, which should remain governed by the law of habitual residence of the defendant.

The *first objection* to the application of that rule to non-contractual obligations arising out of violations of privacy and rights relating to the personality is the "multiple publications problem": it can probably be solved by using the exception clause of article 4.3 which would allow the judge, in certain cases, to apply a single law to the whole case. The media's *second objection* to the general rule of article 4, concerns "the possibility of a journalist losing a case under a foreign law when the material published conforms with the law of their place of establishment". The *Working Document* wonders whether an "exception to the effect that a publisher should not be liable under a law that is contrary to the fundamental rights principles of its place of establishment" (p. 8) could be included. It is quite clear, however, that the drawbacks of such a rule would outweigh its advantages, for several reasons:

– first, some guidelines would have to be given as to what is a "fundamental rights principles", and, obviously, this expression must receive a narrow interpretation;

– secondly, it will need to decide which mechanism is at stake: does it mean that the forum will have to apply a foreign public policy rule (and in that case, it is not sure whether it will it be eager to enforce the public policy of a foreign state), or are those rules part of the "lois de police", in which case, the rule will be contrary to article 16 of the "Rome II" Regulation, which does not allow a judge to apply foreign mandatory rules…

– finally, can all the "laws of the place of establishment" be treated on the same level? One can understand that a mandatory rule of a Member state where the publisher is established, which shares some common principles with the forum (specially considering the principles settled by the European Convention of Human rights), could be applied by the forum, but what if the law of the place of establishment is very different from the law of the forum? What, specially, if the fundamental rights principles of that foreign country is contrary to the public policy of the forum? What if it appears to be contrary to a principle of EC law?

- **Article 4.2:**

The situation would be a journalist working in France sued for a publication in, say, England, concerning the privacy of a French-based 'celebrity'. No doubt that article 4.2 would satisfy the interest of both parties and should be applied in this field of law. Moreover, it would allow a French forum to take over the case and apply its own law, on the basis of both articles 2 and 5-3 of the "Brussels I" Regulation (even though the English tribunals would also have jurisdiction on the basis of article 5-3).

- **Article 4.3:**

The possibility of applying article 4 to non-contractual obligations arising out of violations of privacy and rights relating to the personality depends greatly on how the exception clause based on the "closest ties" is drafted and used. The uncertainty involved in a bare *closest ties* exception rule must be limited by giving clear guidelines to the judge as to how to use this exception clause in this field of law. As the *Working Document* puts it, the main drawbacks of the exception clause "could be overcome by including criteria upon which the test is to be based" (p. 8). The judge liberty could also be limited by the inclusion of a "forseeability clause", whereby a law of a country would be applied if the damage occurred in this country was foreseeable for the defendant.

Boskovic on Rome II and Defamation

Olivera Boskovic is a professor of law at the University of Orléans, France.

Many recent studies on defamation and violations of rights relating to personality assert that both jurisdiction and choice of law rules in this area are problematic. The following observations will mainly focus on choice of law.

However, it is worth saying that jurisdiction rules, laid down by the Brussels regulation (articles 2 and 5-3) seem globally satisfactory, even though one has to recognise that they need to be adapted to torts committed via the internet. The

mere possibility to access a website from the forum State should not be considered sufficient to found jurisdiction under article 5-3. Closer connection with the forum (through the idea of targeting) should definitely be required. This adaptation does not require legislative intervention, the ECJ can do it. However one problem remains. Under article 5-3 (as interpreted in *Shevill*) when jurisdiction is based on the place of damage, the remedy must be limited to damages arising in the forum State. The problem is that for some remedies, it is impossible or at least difficult to limit the remedy so that it does not have an impact in other countries (it is possible for damages, less so for injunctions). However the French *Yahoo* case (TGI Paris 20 nov. 2000, JCP 2000, Act, p. 2214) shows that it can be done.

Concerning choice of law, the situation is different. The working document of the European Parliament questions the necessity of legislative intervention and envisages the option of maintaining the status quo. It is submitted that this would be an unsatisfactory solution from the point of view of legal certainty. Whatever one thinks of the Rome II regulation and the rules it lays down, it can not be denied that its main objective, that is improving legal certainty, has been attained. The same reasons justify legislative intervention in the area of defamation, area in which conflict of law rules in the member States vary considerably.

Having said that, the main question is obviously what is the appropriate choice of law rule?

Several options had been envisaged during the elaboration of the Rome II regulation. Basically these were the law of the habitual residence of the victim, the law of the place of damage subject to certain exceptions and the law of the country to which the publication is principally directed. The first two were perceived as being more claimant-friendly and the last one as being more favourable to the media.

Actually the country to which the publication is principally directed is not as such, necessarily, more favourable to the media. What explained that perception was that the European Parliament proposed to apply the law of the country in which editorial control is exercised whenever it was not apparent to which country the publication was principally directed. This is definitely favourable to the media and in contradiction with the general orientation of the regulation which chose to give

relevance to the law of the place of damage as opposed to the law of the place of acting. The law of the country to which the publication is principally directed is a variant of the law of the place of damage and shall be discussed as such.

As for the law of the habitual residence of the harmed person, apart from the general criticism of being too favourable to the claimant three other criticisms were to be found. The first was uncertainty, based on the fact that celebrities' habitual residence is difficult to determine. This is very unconvincing. The second and third are linked. The idea is that this connecting factor makes it possible for a media to be held liable for behaviour perfectly legal in the place of acting and hence constitutes a danger for freedom of speech. The first part of the argument is correct, but this is true of any connecting factor other than place of acting, which precisely was rejected by EU authorities. Does the fact that the harmful act involves exercise of a fundamental right change something? Proponents of this argument think so. They take the example of foreign dictators who would become impossible to criticise under the law of their residence, which probably considers any criticism ipso facto defamatory. This would endanger freedom of speech. The argument seems slightly excessive. Surely, in such cases the public policy exception (ordre public) could apply and constitute a sufficient barrier against such laws.

However, there is one argument against the law of the habitual residence of the victim that seems valid. Defamation and violations of rights relating to the personality involve two fundamental rights: freedom of speech and the right to privacy. The way nations all over the world strike a balance between these rights is very different. Hence, it appears that each State should remain in charge of striking that balance for its own territory. This consideration points to the law of the place of distribution, that is the law of the place of damage. Of course this connecting factor needs adaptation in the context of the internet (distribution, as a positive action has no sense in this context). Mere accessibility of a website should not be considered as distribution. Some targeting should definitely be required (this problem would be avoided with the law of the habitual residence of the victim, rejected for aforementioned reasons).

So it appears that the general rule (article 4-1) could perfectly apply to defamation. This is not necessarily true for article 4§2. Initially, one could think that there is no reason to treat defamation and violation of rights relating to personality differently than other non contractual obligations. This would mean

that article 4§2 should apply. On second thought, several reasons come to mind. First of all, applying article 4§2 would hinder the possibility of each State striking the aforementioned balance as it thinks fit. Secondly, the general justification of the exception in favour of the parties' common habitual residence is that this law has closer ties with the case than the law of the place of the damage which is often fortuitous. But precisely, the place of damage in cases we are concerned with is not fortuitous (the media know where the defamatory article, for example, will be distributed), provided that place of damage in the context of internet be defined in a more demanding way.

However, this does not mean that common habitual residence would have no relevance whatsoever. It could certainly be taken into account by the court within the general "closest ties" exception. This exception provides for flexibility and allows for the application of several laws (of places of distribution) or one unique law (possibly of the parties' common residence) according to the circumstances.

This possible application of multiple laws is often seen as a serious disadvantage of the law of the place of damage rule. However, one may wonder why this is considered to be such a problem in this area, while it is accepted in others, such as unfair competition. In any case the existence of the general closest ties exception would allow to limit the negative effects of the place of the damage rules in extreme cases.

So at the end of the day, the only real problem with the place of damage rule is the internet and defining the place of damage in its context. It appears that it is probably preferable to leave this question to the courts and not lay down a final rule at this stage (although one can say that some targeting must be required).

In any case the public policy exception (ordre public) should apply and should be a sufficient barrier against laws which do not respect the requirement of the European Convention on human rights. No specific exception is needed.

Von Hein on Rome II and Defamation

Jan von Hein is professor of civil law, private international law and comparative law at the University of Trier, Germany.

Diana Wallis deserves praise for her lucid and insightful working document on a possible amendment of the Rome II Regulation with regard to violations of rights relating to the personality. In devising a conflicts rule for this special type of tort, one has to take into account that, although the Rome II Regulation is at present not applicable to this group of cases, the European legislators are no longer operating on a clean slate, because any new conflicts rule will have to fit into the basic doctrinal structure of the Regulation. Moreover, Recital No. 7, which mandates a consistent interpretation of Rome II and Brussels I is of particular importance here because of the ECJ's *Shevill* judgment (C-68/93), which established the so-called mosaic principle.

There are mainly two possible approaches: The first one would be to provide that the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality shall be the law of the country where the victim is habitually resident at the time of tort. This solution is popular in academia (for those who read German, I recommend the excellent contribution by my good friend Michael von Hinden to the *Festschrift* for Jan Kropholler [2008], p. 575), and a corresponding amendment of the Rome II Regulation has been recommended on February 19, 2010 by the German Council for Private International Law, a group of German P.I.L. professors advising the Federal Ministry of Justice (full disclosure: I am a member of this group, but did not participate in the vote on this issue). This proposal certainly has the virtues of simplicity and guaranteeing a protection of the victim in accordance with the social standards that he or she is accustomed to. With due respect, it has some drawbacks as well. From a political point of view, one must not forget that this approach has been on the table before, in the Commission's preliminary proposal for a Rome II Regulation of May 2002. It failed then, after protests from the media lobby, and I really doubt whether it would survive this time. From a doctrinal point of view, its main disadvantage is that V.I.P's – who are the main targets of the "yellow press" – frequently reside in tax havens. It would be a dubious irony of

European conflicts legislation if the laws of third states such as Switzerland or tiny Monaco were to govern the freedom of the E.U. press more often than the laws of the Member States. Such an approach would be insensitive to the legitimate interests of E.U. newspaper readers, TV viewers and other media consumers in accessing legal content. Finally, the habitual residence of the victim is out of tune with the jurisdictional principles of the ECJ's *Shevill* judgment.

A different solution would result from closely tracing the existing framework of Rome II. First of all, in line with Article 4(1), the place of injury (i.e. here: the distribution of the media content) should be paramount, unless there are good reasons to deviate from this rule. Following the example set by Article 5(1) on product liability, however, one should restrain this connection by way of a foreseeability defense, in order to take the legitimate interests of publishers into account. Moreover, party autonomy (Article 14), the common residence rule (Article 4(2)) and the closest connection exception (Article 4(3)) should be respected. A good reason to deviate from the place of injury exists with regard to the right of reply, because such relief should be granted swiftly and is interim in nature. This was already recognized both by the Commission and the Parliament in their earlier proposals of 2003 and 2005. A specific clause on public policy appears unnecessary, because Article 26 is fully sufficient to deal with any problems in this regard. A special clause safeguarding only the freedom of the press would be hard to legitimize in light of the fact that a lack of protection against violations of privacy may contravene human rights of the victim as well. It should be remembered that in the famous case of *Princess Caroline of Hanover v. Germany*, the Federal Republic was condemned by the European Court of Human Rights (judgment of June 24, 2004, application no. 59320/00) not because the Federal Constitutional Court had not respected the freedom of the press, but, on the contrary, because it had failed to protect the princess against intolerable intrusions of *paparazzi* into her private life. Apart from that, there should be a sufficiently flexible, general rule on violations of personality rights and no special rule concerning cyberspace torts. Frequently, potentially defamatory statements are often circulated via multiple channels (print and internet), so that differing outcomes are hard to justify. Any new rule should rather be slim and adaptable to technological developments rather than fraught with ponderous casuistics As far as the E-Commerce Directive is concerned, the precise demarcation between the Directive and Rome II should be left to Article 27 and the ECJ, where a pertinent case is currently pending (case C-509/09).

Specific problems arise in cases involving multi-state violations. Here, both the *Shevill* judgment and the model developed for multi-state restrictions of competition (Article 6(3)(b)) argue for a modified codification of the so-called mosaic principle. By adopting this approach, jurisdiction and the applicable law will regularly coincide, which saves time and costs for all the parties involved. For persons enjoying world-wide fame, it creates a welcome incentive to concentrate litigation in the defendant's forum. For rather unknown persons, it does not introduce any additional burden, because their reputation will usually only be affected in their home country anyway.

Taking the above considerations into account, I would like to propose the following rule, which builds upon earlier proposals and the existing regulation. Details concerning the interpretation of notions such as "reasonably foreseeable" or "direct and substantial" could be fleshed out in the recitals, where further guidance on public policy may be given, too.

> ***Article 5a Rome II – Privacy and rights relating to personality***
>
> *(1) Without prejudice to Article 4(2) and (3), the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, shall be the law of the country where the rights of the person seeking compensation for damage are, or are likely to be, directly and substantially affected. However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee substantial consequences of his or her act occurring in the country designated by the first sentence.*
>
> *(2) When the rights of the person seeking compensation for damage are, or are likely to be, affected in more than one country, and this person sues in the court of the domicile of the defendant, the claimant may instead choose to base his or her claim on the law of the court seised.*
>
> *(3) The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.*
>
> *(4) The law applicable under this Article may be derogated from by an agreement pursuant to Article 14.*

Belgian Judgment on Surrogate Motherhood

A lower court sitting in Belgium has recently been faced with a case of international surrogate motherhood. Two men married in Belgium had contracted with a woman living in California, who gave birth to twins in December 2008. One of the men was the biological father of the twins. In accordance with the laws of California, the birth certificate of the twins had been established mentioning the names of the two spouses as fathers. When the parents came back with their twin daughters in Belgium, the local authorities refused to give any effect to the birth certificate, in effect denying the existence of any parent-children relationship. The parents challenged this refusal before the Court of First Instance sitting in Huy.

In an opinion issued on the 22nd of March and yet unpublished, the court denied the request. Noting that what was at stake was not so much the recognition in Belgium of the decision by which the Superior Court in California had authorized, prior to the birth of the children, that the birth certificates mention the names of the two fathers, but rather the recognition of the birth certificates proper, the court applied the test laid down in Article 27 of the Code of Private International law, under which foreign acts relating to the personal status may only be recognized in Belgium provided they comply with the requirements of the national law which would be applicable to the relationship under Belgian rules. The court focused its ruling on one specific requirement of Article 27, i.e. public policy, mentioning the issue of *fraus legis* only briefly.

The parents had argued that since Belgian law allows the adoption of a child by two persons of the same sex, recognition of the birth certificates could not be held to be contrary to fundamental principles of the Belgian legal order. The court did not follow the parents. It first held that it should consider not only the birth certificates, but also the whole history of the dealings between the parents and the surrogate mother. The court thus examined the contract which had been concluded between the parties and noted that while such contract was invalid as

a matter of Belgian law, it was uncertain whether public policy could defeat such a contract validly concluded under foreign law. Turning to two important international conventions in force in Belgium, the court found that the practice of surrogate motherhood raised questions both under the Convention of the Rights of Children and under the European Convention on Human Rights. As to the first Convention, the court relied specifically on Article 7, which grants each child the right to know and be cared for by his or her parents. Turning to Article 3 of the European Convention, the court found that the fact that a surrogate mother is paid for her services is difficult to reconcile with human dignity. The Court also noted that countries which tolerate surrogacy arrangements insist on the absence of commercial motives for such arrangements. The court concluded on this basis that giving effect to the Californian birth certificates would violate fundamental principles and hence be contrary to public policy.

It is not yet known whether this ruling will be appealed. In any case, the parents will have to find an alternative solution to be recognized as such. They could turn to adoption, although this could prove difficult given that they have already had extensive contacts with the children. This is much probably not the last time a court is faced with this issue in Belgium.

Editors' note: Patrick Wautelet is a professor of law at Liege University.

Act of state doctrine, the Moçambique rule and the Australian Constitution in the context of alleged torture in Pakistan, Egypt and Guantanamo

Bay

In *Habib v The Commonwealth* [2010] FCAFC 12, a Full Court of the Federal Court of Australia considered whether the applicant's claim against the Commonwealth for complicity in alleged acts of torture committed on him by officials of the governments of Pakistan, Egypt and the United States was precluded by the act of state doctrine. The Court allowed the claim to proceed. In doing so, the Court has, it seems, concluded that the act of state doctrine cannot, consistently with the *Australian Constitution*, preclude an action against the Commonwealth based upon an allegation that the Commonwealth has exceeded its executive or legislative power.

The applicant was allegedly arrested in Pakistan a few days before the US commenced military operations in Afghanistan in October 2001. He alleged that while there, and afterwards in Egypt, he was tortured by Pakistani and then Egyptian officials, with the knowledge and assistance of US officials. He alleged that he was then transferred to Afghanistan and later Guantanamo Bay, where he was tortured by US officials. He alleged that Australian officials participated in his mistreatment. The applicant claimed damages from the Commonwealth based on the acts of the Australian officials. His claim was that the acts of the foreign officials were criminal offences under Australian legislation (which expressly had extraterritorial effect), that the Australian officials aided and abetted those offences, that this made them guilty of those offences under the Australian legislation, that committing those offences was outside the Australian officials' authority and that the Australian officials therefore committed the tort of misfeasance in public office or intentional infliction of indirect harm.

The Commonwealth contended that the Court could not determine the applicant's claim, because it would require the Court to sit in judgment on the acts of governments of foreign states committed on their own territories. This was said to infringe the act of state doctrine, as explained in decisions such as that of the United States Supreme Court in *Underhill v Hernandez* 168 US 250 (1897) and the House of Lords in *Buttes Gas and Oil Co v Hammer* [1982] AC 888. The doctrine has been approved by the High Court of Australia: *Potter v Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479; [1906] HCA 88; *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30; [1988] HCA 25.

The Full Court rejected the Commonwealth's contention. Jagot J (with whom Black CJ agreed) reviewed the US and UK cases and concluded that they recognised circumstances where the act of state of doctrine would not apply. In particular, she said that the UK cases supported the existence of a public policy exception where there was alleged a breach of a clearly established principle of international law, which included the prohibition against torture. She considered that the Australian authorities were not inconsistent with this approach and that it applied in this case. She also considered that the same result would be reached by considering the factors said to be relevant by the US Supreme Court in *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964).

More fundamentally, as noted above, Jagot J (again with Black CJ's agreement) concluded that for the act of state doctrine to prevent the Federal Court from considering a claim for damages against Australian officials based upon a breach of Australian law would be contrary to the *Australian Constitution*. This was because the *Constitution* conferred jurisdiction upon the High Court '[i]n all matters … in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party'. The Federal Court has been invested with the same jurisdiction by legislation.

Indeed, the other member of the Court, Perram J, based his decision entirely on this constitutional ground. In doing so, Perram J made the *obiter* comment that it would be similarly inconsistent with the *Constitution* to invoke the *Moçambique* rule in response to a claim which asserted that the Commonwealth had exceeded its legislative or executive power. He considered that a previous decision of the Full Court, *Petrotimor Companhia de Petroleos SARL v The Commonwealth* [2003] FCAFC 3; (2003) 126 FCR 354, which treated the act of state doctrine as going to whether there was a 'matter' within the meaning of the *Constitution*, was plainly wrong. Having reached this conclusion, it was unnecessary for Perram J to consider whether there was a human rights exception to the act of state doctrine. However, without reaching a definite conclusion, he considered the point in some detail, in particular the contrasting views of whether the act of state doctrine is a 'super choice of law rule' requiring the court to treat the foreign state acts as valid or a doctrine of abstention requiring the court to abstain from considering those acts.

This case represents a significant development in Australian law on the act of state doctrine and, so far as Perram J's comments are concerned, the

Moçambique rule. The position adopted by the Full Court is, at the least, contestable. If it is accepted that the *Moçambique* rule and the act of state doctrine are legitimate restraints on State Supreme Courts, which have plenary jurisdiction, why should they not also restrain the federal courts, which have limited jurisdiction? Not every restriction on the exercise of federal jurisdiction is unconstitutional: limitation periods, procedural rules, the requirement to plead a cause of action and the rules of evidence all do so. The *Moçambique* rule and the act of state doctrine were well understood principles at the time of federation. It seems surprising to suggest that the *Constitution* operates to oust those principles without any express words, simply because it sets out limits on federal power and contains a general conferral of jurisdiction on the High Court. Indeed, in the case of the Federal Court, the Court's jurisdiciton is provided not by the *Constitution* but by legislation, albeit picking up the words of the *Constitution*. The question is one of the construction of that legislation, not the *Constitution*, and whether *it* purported to oust those principles. In any event, both in the *Constitution* and the relevant legislation, reading the word 'matter' — which it is accepted contains limits on the Courts' jurisdiction (eg precluding advisory opinions) — as informed by, not ousting, the *Moçambique* rule and the act of state doctrine is at least arguably more consistent with the historical position.

It remains to be seen whether the Commonwealth seeks special leave to appeal to the High Court.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (2/2010)

Recently, the March/April issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

This issue contains some of the papers presented at the Brussels I Conference in

Heidelberg last December. The remaining papers will be published in the next issue.

Here is the contents:

- ***Rolf Wagner***: "Die politischen Leitlinien zur justiziellen Zusammenarbeit in Zivilsachen im Stockholmer Programm" – the English abstract reads as follows:

Since the coming into force of the Amsterdam Treaty in 1999 the European Community is empowered to act in the area of civil cooperation in civil and commercial matters. The "Stockholm Programme – An open and secure Europe serving and protecting the citizens" is the third programme in this area. It covers the period 2010–2014 and defines strategic guidelines for legislative and operational planning within the area of freedom, security and justice. This article provides an overview of the Stockholm Programme.

- ***Peter Schlosser***: "The Abolition of Exequatur Proceedings – Including Public Policy Review?"

The – alleged – basic paper to which reference is continuously made when exequatur proceedings and public policy are discussed is a so-called Tampere resolution. The European Council convened in a special meeting in the Finnish city in 1999 to discuss the creation of an area of security, freedom and justice in the European Union. The outcome of this meeting was not a binding text which would have been adopted by something like a plenary session of the heads of States and Governments. Instead, the document is titled "presidency's conclusion" and is a summary drafted by the then Finish president. It is a declaration of intention for the immediate future, pre-dominantly concerned with criminal and asylum matters and not binding on any European legislator. As far as "civil matters" are concerned, the "presidency's conclusion" reads as follows: "In civil matters the European Council calls upon the Commission to make a proposal for further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgment in the requested state. As a first step, these intermediate procedures should be abolished for titles in respect of small consumer or commercial claims and for certain judgments in the fields of family litigation (e.g. on maintenance claims and visiting rights). Such decisions would be automatically

recognized throughout the Union without any intermediate proceedings or grounds for refusal of enforcement. This could be accompanied by the setting of minimum standards on specific aspects of civil procedural law. "The conclusion does no say whether it would be advisable to generally abolish intermediate procedures. It only states that intermediate procedures should be further "reduced". If one takes the view that the "first step" of reduction should be followed by a second or third one, one could refer to the regulation on "Creating a European Enforcement Order for Uncontested Claims" and to the regulation on "Creating a European Order for Payment Procedure". Not a single word mentions that at the end of all steps taken together the intermediate procedure or any control whatsoever in the requested state shall become obsolete and that even the most flagrant public policy concern shall become irrelevant. The need for a residuary review in the requested state is powerfully demonstrated by a recent ruling of the French Cour de Cassation: A woman resident in France had been ordered by the High Court of London to pay to the Lloyd's Society no less than £ 142,037. The judgment did not give any reasons for the order except for stating that "the defendant had expressed its willingness not to accept the claim and that the judge accepted the claim pursuant to rule 14 par. 3 of the Civil Procedure Rules." The relevant text of this provision is drafted as follows: "Where a party makes an admission under rule 14.1.2 (admission by notice in writing), any other party may apply for judgment on the admission. Judgment shall be such judgment as it appears to the court that the applicant is entitled for on the admission." The judgment neither revealed at all the dates of the respective admissions made during the proceedings although the defendant had expressed its willingness to defend the case nor referred to any document produced in the course of the proceedings. One cannot but approve the ruling of the French Cour de Cassation confirming the decision of the Cour d'Appel of Rennes. The courts held that the mere abstract reference to rule 14 of the Civil Procedure Rules was tantamount to a total lack of reasons and that the recognition of such a judgment would be incompatible with international public policy. Further, that the production of documents such as a copy of the service of the action could not substitute the lacking reasoning of the judgment. The importance of the possibility to invoke public policy when necessary to hinder recognition of a judgment was evident also in the earlier Gambazzi case of the European Court of Justice (ECJ). In that case the defendant was penalized for contempt of court by an exclusion from further participation in the proceedings. The reason for the measure was the

defendant's violation of a freezing and disclosure order. The ECJ ruled that in the light of the circumstances of the proceedings such a measure had to be regarded as grossly disproportionate and, hence, incompatible with the international public policy of the state where recognition was sought. In its final conclusions, general advocate Kokott emphasized that a foreign judgment cannot be recognized if the underlying proceedings failed to conform to the requirement of fairness such as enacted in Art. 6 of the European Convention on Human Rights. It is worth noting that also Switzerland refused to enforce the English judgment. The Swiss Federal Court so decided because after having changed its solicitor, Gambazzi's new solicitor was refused to study the files of the case. Even in the light of the pertinent case law regarding a very limited review in the requested state and the known promptness and efficiency of exequatur proceedings, the Commission still intends to abolish this "intermediate measure". In its Green Paper it literally states:" The existing exequatur procedure in the regulation simplified the procedure for recognition and enforcement of judgment compared to the previous systems under the 1968 Brussels Convention. Nevertheless, it is difficult to justify, in an internal market without frontiers that citizens and businesses have to undergo the expenses in terms of costs and time to assert their rights abroad." The context reveals that the term "the expenses" relates to the expenses of the exequatur procedure. However, the European Union is not the only internal market covering multiple jurisdictions. How is the comparable issue dealt with in other integrated internal markets? This is to be shown in the first part of this contribution. In the second part, I shall analyze in more detail and without any prejudice the ostensibly old-fashioned concept of exequatur.

- ***Paul Beaumont/Emma Johnston***: "Abolition of the Exequatur in Brussels I: Is a Public Policy Defence Necessary for the Protection of Human Rights?"

The principle of mutual recognition of judicial decisions and the creation of a genuine judicial area throughout the European Union was endorsed in Tampere in October 1999. Thus, one of the primary objectives of the Brussels I is to enhance the proper functioning of the Internal Market by encouraging free movement of judgments. It is clear that in Tampere the European Council wanted to start the process of abolishing "intermediate measures" ie the declaration of enforceability (exequatur). It went further and said that in

certain suggested areas, including maintenance claims, the "grounds for refusal of enforcement" should be removed. It did not specifically require the abolition of intermediate measures in relation to Brussels I and certainly did not require the abolition of the "grounds for refusal of enforcement" in Brussels I. The European Council in Brussels in December 2009, after the entry into force of the Lisbon Treaty and with the adoption of the Stockholm Programme, is still committed to the broad objective of removing "intermediate measures". This is a process to be "continued" over the 5 years of the Stockholm Programme from 2010–2014 but not one that has to be "completed". The European Council no longer says anything about abolishing the "grounds for refusal of enforcement". Article 73 of the Brussels I Regulation obliged the European Commission to evaluate the operation of the Regulation throughout the Union and to produce a report to the European Parliament and the Council. In 2009 the Commission produced such a Report and a Green Paper on the application of the Regulation, which proposes a number of reforms. One of the main proposals concerns the abolition of exequatur proceedings for all judgments falling within the ambit of the Regulation. Brussels I is built upon the foundation of mutual trust and recognition and these principles are the driving force behind the proposed abolition of exequatur proceedings. Article 33 of Brussels I states that no special procedure is required to ensure recognition of a judgment in another Member State. At first glance this provision seems to imply that recognition of civil and commercial judgments within the EU is automatic. The reality is however, somewhat more complex than that. In order for a foreign judgment to be enforceable, a declaration of enforceability is required. At the first instance, it involves purely formal checks of the relevant documents with no opportunity for the parties or the court to raise any of the grounds for refusal of enforcement. An appeal against the declaration of enforceability by the judgment debtor will trigger the application of Articles 34 and 35 which provide barriers to the recognition and enforcement of judgments. According to the European Court of Justice (ECJ), any such obstacle must be interpreted narrowly, "inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the [Regulation]" The overwhelming majority of cases are successful and if the application is complete, then the decision is likely to be made within a matter of weeks. The Commission is of the view that given the high success rate of applications, the exequatur proceedings merely hinder free movement of judgments at the expense of the enforcement creditor and provide for delays for the benefit of the male fides judgment debtor. It is with this in

mind that the Commission asks whether, in an Internal Market without frontiers, European citizens and businesses should be expected to sacrifice time and money in order to enforce their rights abroad. It is argued that in the Internal Market, free movement of judgments is necessary in order to ensure access to justice. Exequatur proceedings can create tension between Member States, creating suspicion and ultimately destroying mutual trust. It will be seen however, that total abolition of exequatur proceedings would effectively mean judgments must be recognised in every case with no ground for refusal unless the grounds for refusal are moved to the actual enforcement stage. Total abolition of the grounds for refusing enforcement would result in an unfair bias in favour of the judgment creditor to the detriment of the judgment debtor. The Commission on the one hand proposes to abolish the exequatur procedure provided by Brussels I but on the other hand, suggests that some form of "safeguard" should be preserved. The Green Paper tentatively suggests that a special review a posteriori could be put in place which would in effect create automatic recognition of a judgment reviewable only after becoming enforceable. Such an approach would enhance judicial co-operation and aid progressive equivalence of judgments from other Member States. Yet it is questioned whether allowing an offending judgment to be enforced in the first place, only to review it a posteriori is the most effective way of dealing with the problem. It is instead argued that a provision similar to that of Article 20 of the Hague Child Abduction Convention could strike a fair balance between the interests of the judgment creditor and debtor.As Brussels I stand it is open to the judgment debtor to appeal the declaration of enforceability. The appellant may claim a breach of public policy or lack of due process in the service of the documents instituting proceedings which may amount to a breach of Article 6 of the European Convention on Human Rights (ECHR). The grounds to refuse recognition of a foreign judgment are restrictive and under no circumstances may the "substance" of the judgment be reviewed. Such a review of the substance would seriously undermine the mutual trust between courts of the European Union. However, the public policy exception does allow States to uphold essential substantive rules of its own system by refusing to enforce judgments from other EU States that infringe the fundamental principles of its own law. The question is whether Member States will be prepared to abandon the "public policy" defence and thereby give up this right to protect the fundamental principles of their substantive law? Will they be content to have a defence that simply focuses on protecting the fundamental rights of the

defendant?

- ***Horatia Muir Watt***: "Brussels I and Aggregate Litigation or the Case for Redesigning the Common Judicial Area in Order to Respond to Changing Dynamics, Functions and Structures in Contemporary Adjudication and Litigation"

Recent litigation relating to the recognition and enforcement of US class action judgments or settlements under Member States' common private international law (still applicable to relationships with third States), along with current trends in their domestic legislation towards the acceptance of representative, class or group actions, herald a whole set of new issues linked to the appearance of collective redress within the common area of justice. It is the thesis of this paper that the Brussels I Regulation in its present form is ill-equipped to deal with the onslaught of aggregate claims, both in its provisions on jurisdiction and as far as the free movement of judgments and settlements is concerned. It may well be that the same could be said for the conflict of laws rules in Regulations Rome I and Rome II, which were also designed to govern purely individual relationships. Indeed, one may wonder whether the difficulties which arise under this heading are not the sign of an at least partial obsolescence of the whole European private international law model, insofar as it rests upon increasingly outdated conceptions of the dynamics, function, structure and governance requirements of litigation and adjudication. Although this conclusion may seem radical, it is in fact hardly surprising. Indeed, as it has been rightly observed, within the civilian legal tradition which is the template for the conceptions of adjudication and jurisdiction underlying the Brussels I Regulation (like the other private international law instruments applicable in the common area of justice), the recourse to group litigation, which is now beginning to appear in the European context as one of the most effective means of improving ex post accountability of providers of mass commodities freely entering the market, represents a "sea-change" in legal structures, away from exclusive reliance on public enforcement.

- ***Burkhard Hess***: "Cross-border Collective Litigation and the Regulation Brussels I"

The European law of civil procedure is guided by the "leitmotiv" of two-party-

proceedings. Litigation is generally regarded as taking place between one specific plaintiff and one specific defendant. Especially Article 27 JR (JR = Brussels I Regulation) which concerns pendency and Articles 32 and 34 No. 3 JR which address res judicata and conflicting judgments, are based on this concept. However, the idea of collective redress is not entirely new to European cross border litigation. Article 6 No. 1 JR explicitly states that several connected lawsuits can be brought to the courts of a Member State where one of the defendants is domiciled. When related actions are pending in different Member States, the court which was seized later may stay its proceedings. By providing for a discretionary stay, Article 28 JR also includes situations of complex litigation. Several cases concerning the JR have dealt with collective redress. The most prominent case is VKI ./. Henkel. In this case, an Austrian consumer association sought an injunction against a German businessman. Another example is the Lechouritou case, where approximately 1000 Greek victims of war atrocities committed during WW II sued the German government for compensation. The famous Mines de Potasse d'Alsace case involved damages caused to dozens of Dutch farmers by the pollution of the river Rhine. It goes without saying that in addition to the case law presented, several cross-border collective lawsuits have been filed in the Member States. These lawsuits mainly deal with antitrust and (less often) product liability issues. Finally, the Injunctions Directive 98/27/EC permits consumer associations from another state to institute proceedings for the infringement of consumer laws in the Member State where the infringement was initiated. However, this directive has not been very successful. It has only been applied in a few cross-border cases.

- ***Luca G. Radicati di Brozolo***: "Choice of Court and Arbitration Agreements and the Review of the Brussels I Regulation"

Similarities and differences between choice of court and arbitration agreements in the perspective of the review of Regulation (EC) 44/2001Choice of court agreements and arbitration agreements have much in common. Both involve the exercise of party autonomy in the designation of the judicial or arbitral forum for the settlement of disputes and have the effect of ousting the default jurisdiction. Both aim to ensure predictability and to allow the parties to choose the forum they consider best suited to adjudicate their dispute. The importance of these goals is by now largely acknowledged especially in international

commercial transactions. Although it has not always been a foregone conclusion that parties could exclude the jurisdiction of local courts in favor of foreign ones or of arbitration, today most systems recognize the role of procedural party autonomy in this context. Also the policy reasons for favoring party autonomy in the choice of forum are largely similar for both types of agreements. Because of the broad recognition of the crucial role of these agreements, there is a growing concern that their effects are not sufficiently guaranteed in the European Union. It is not uncommon that proceedings are brought before a court of one member State in alleged violation of a choice of the courts of another member State or of arbitration by litigants who appear to attempt to circumvent these agreements by exploiting the perceived inefficiencies of some courts, or their reluctance to enforce such agreements effectively. In a number of well known, the European Court of Justice has found itself unable – quite correctly, in light of the existing text of Regulation (EC) 44/2001 (the "Brussels Regulation") – to accept interpretations aimed at preventing such situations, foremost amongst which anti-suit injunctions. Partly for these reasons forum selection and arbitration agreements (and more generally arbitration) are amongst the topics on which the Commission has invited comments in the Green Paper on the review of the Regulation.

- ***Urs Peter Gruber***: "Die neue EG-Unterhaltsverordnung" – the English abstract reads as follows:

Actually, the relevant rules on jurisdiction, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations are contained in the Brussels I Regulation. In the near future, a new Regulation, which specifically deals with maintenance obligations, will apply. This new Regulation will bring about several significant changes. It will considerably strengthen the position of the maintenance creditor, in particular in the field of recognition and enforcement of decisions. It will contain rules on issues, which up to now have been left to the national legislators. Therefore, it can be said that the new Regulation marks a new level of integration in the field of European civil procedure.

- ***Ansgar Staudinger***: "Streitfragen zum Erfüllungsortsgerichtsstand im Luftverkehr" – the English abstract reads as follows:

In case of carriage of passengers by air the Bundesgerichtshof has to interpret article 5 (1) lit. b Brussels I-Regulation. In the author's view the grounds as well as the conclusion deserve absolute consent. However there persist several questions: The location of the place of the arrival or departure in the state, where the defendant carrier is domiciled or in a Non Member State of the EU does not a priori exclude the application of article 5 (1) lit. b Brussels I-Regulation including its passenger's voting right. The customer factual only stay an option for that place, which neither corresponds with the defendants domicile nor a EU-Non Member State. Are both connection factors located outside the Member State, remains a recourse to article 5 (1) lit. a Brussels I-Regulation. Waiving the courts jurisdiction for the place of performance of the obligation in question by a standard form contract through the carrier and stipulating an exclusive conduct of a case in the Member State of his domicile seems to be improper in terms of the Council Directive 93/13/EEC on unfair terms in consumer contracts respectively §§ 307 (1), 310 (3) no. 3 of the "Bürgerliches Gesetzbuch" opposite to consumers, which are domiciled in the EU-Member State of the arrival or departure. This applies particularly when claims according to the Regulation (EC) No. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights are concerned.

- ***Rolf Wagner***: "Die Entscheidungen des EuGH zum Gerichtsstand des Erfüllungsorts nach der EuGVVO – unter besonderer Berücksichtigung der Rechtssache Rehder" – the English abstract reads as follows:

The article deals with the place of performance as a base for jurisdiction. There has been a lot of case law by the ECJ concerning Art. 5 No. 1 Brussels Convention: According to this case law, in general the place of performance had to be determined for each obligation separately (de Bloos-rule) according to choice of law rules of the forum (Tessili-rule). This system, however, has been strongly criticised. Thus, after long discussions during the negotiations concerning the revision of the Brussels Convention, a new wording was found for Art. 5 No. 1 Brussels Regulation, even though it was a compromise: The Brussels Regulation now defines at least the place of performance for the majority of contracts in international trade, i. e. for contracts for the sale of goods and contracts for the provision of services. Therefore it does not come as a surprise that the ECJ has been asked to give guidance in the interpretation of

this definition. The present article comments on three important judgments by the ECJ connected to this question. In particular the author analyses in depth the judgment given in Rehder: In this case, the ECJ determined the place of performance with regard to contracts for the transport of passengers. Thus the author concludes that the European legislator neither could nor will be able to find a perfect solution. Therefore, patience is required with regard to the interpretation of the new definition because there are still open questions which have to be answered by the ECJ.

- ***Gilles Cuniberti***: "Debarment from Defending, Default Judgments and Public Policy"

The origin of the Gambazzi case is to be found in the collapse of a Canadian investment company, Castor Holding Ltd., at the beginning of the 1990s. Castor had been incorporated in Montreal in 1977. Its first president was a German-born Canadian businessman named Karsten von Wersebe. In the 1980s, however, its main manager became a German national named Otto Wolfgang Stolzenberg. Marco Gambazzi was a Swiss lawyer who had specialized in assets management. He first invested in Castor, and was then offered to become a member of the board of directors of the company. In 1992, however, Castor was declared insolvent. Dozens of suits followed. First, the trustee (syndic) sought to challenge payments made by Castor before 1992. He focused on a Can$ 15 million distribution of dividends to shareholders at the end of 1990, which he was eventually able to claim back after establishing that the company was already insolvent in 1990. More importantly, many investors sued the auditors of Castor, Coopers & Lybrand, who had certified its accounts between 1978 and 1991. After more than ten years of litigation, there was still no judgment on the merits, which led the Montreal Court of appeal to conclude that "it is not exaggerated to say that the Castor Holding case has been an exceptional one in Canadian legal history, a genuine judicial derailment". In 1996, a remarkable decision was made by a handful of Canadian investors. DaimlerChrysler Canada and certain pension and other benefit funds that it had established for its employees decided to initiate proceedings in London against four individuals formerly involved in the management of Castor (Stolzenberg, Gambazzi, von Wersebe and Banziger) and more than thirty corporate entities allegedly related to them. The plaintiffs argued that they had been defrauded by the defendants in Canada, and thus sought restitution. The reason why the

proceedings were brought to England is unclear. There was virtually no connection between the case and the United Kingdom. The only exception was that Stolzenberg once owned a house in London, as he owned others in Paris and, it seems, Germany, Canada and South America. But even that house, which was the sole connecting factor which was likely to give jurisdiction to the English court over the entire case and the thirty-six defendants, was sold before the defendants were served with the writ instituting the proceedings in March 1997. Unsurprisingly, therefore, the jurisdiction of the English court was challenged. The case went up to the House of Lords which eventually ruled that the date which mattered to appreciate whether one defendant was domiciled in England and could thus be the anchor allowing to drag an infinite number of co-defendants to London was the time when the writ was issued by the English court. In this case, that meant May 1996, because the English court had permitted the plaintiffs to postpone service of the writ in order to enable them, first, to conduct ex parte hearings of several days for the purpose of convincing the court that it should grant a world wide freezing order, and, second, to carefully prepare simultaneous service so that none of the defendants could escape the English trial by initiating parallel proceedings elsewhere. The only reasonable explanation for choosing to bring the case to England is the availability of powerful interim measures which have turned London into a magnet forum for international fraud cases. English world wide freezing orders and, even more importantly, English disclosure orders seem to be remarkably and uniquely efficient in the process of tracing stolen assets, so much so that an English court once called them one of the two nuclear weapons of English civil procedure. If other jurisdictions have not been able to tackle as efficiently the issue of international frauds, alleged victims cannot be blamed for seeking justice where it can effectively be achieved. But the quest for justice, or for making England the jurisdiction of choice, cannot justify everything. In this case, available nuclear weapons were used to their full capacity. This certainly enabled plaintiffs to secure a decisive victory. But this was at the costs of the fairness that the English legal system ought to have afforded to the defendants.

- ***Herbert Roth*** on the ECJ's judgment in case C-167/08 (Draka NK Cables Ltd.): "Das Verfahren über die Zulassung der Zwangsvollstreckung nach Art. 38 ff. EuGVVO als geschlossenes System"
- ***Christian Heinze***: "Fiktive Inlandszustellungen und der Vorrang des

europäischen Zivilverfahrensrechts" – the English abstract reads as follows:

Some EU Member States' national procedural laws allow or used to allow service on defendants domiciled in another EU Member State by a form of "fictitious" service within the jurisdiction. Under these provisions and certain further requirements, service may be deemed to take effect at the moment when a copy of the document is lodged with a national authority or at the time when it is sent abroad for service, irrespective of the time when the recipient actually receives the copy. Even if the national law deems this form of service to take effect within the jurisdiction, the following article argues that the practice is incompatible with Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents, because it impairs the effectiveness of the European rules, in particular as concerns the date of service.

- ***Yuanshi Bu***: "Danone vs. Wahaha – Anmerkungen zu Schiedsverfahren mit chinesischen Parteien" – the English abstract reads as follows:

The legal feud between Danone and Wahaha, both being leading beverage manufacturers in the Chinese market, had developed into one of the most significant investment disputes in the history of the People's Republic of China. A number of arbitration proceedings and civil actions were filed inside and outside China. In particular, several arbitration proceedings pending before the Swedish Chamber of Commerce since May 2007, the outcome of which was supposed to largely decide that of the disputes between the two parties, had drawn considerable public attention. Despite the surprising settlement shortly before the arbitration tribunals rendered their decisions, the disputes between Danone and Wahaha offer a valuable opportunity to inquire into the law and practice of arbitration relating to foreign investments in China. This case note will first comment on the award of a Chinese domestic arbitration proceeding dealing with one of the major issues of the whole disputes – the ownership of the trademark "Wahaha" – and then discuss questions that were relevant to the proceeding in Stockholm.

- ***Boris Kasolowsky/Magdalene Steup***: "Insolvenz in internationalen Schiedsverfahren – lex arbitri oder lex fori concursus" – the English

abstract reads as follows:

The article deals with a recent English Court of Appeal decision which addresses the effects of the insolvency of a party to pending arbitration proceedings.The Court of Appeal concluded that the effects were to be determined by reference to English law and considered that the arbitration tribunal acted well within its jurisdiction when it ordered the proceedings to be continued. In reaching this Conclusion the Court of Appeal just as the arbitral tribunal and the High Court relied on the European Insolvency Regulation which forms part of English law. Being the first major court of an EU Member State to address the question of the insolvency of a party to pending arbitration proceedings by reference to the European Insolvency Regulation, the judgment is likely to serve as a signpost for what is to be expected in other Member States. The article further considers the likely impact of this particular decision on the future practice of choosing arbitration seats, and possibly also the timing for commencing arbitration proceedings. In doing so, the authors will consider in particular the decision of the Swiss Bundesgericht which, by contrast to the English Court of Appeal judgment, concludes that the relevant company law/the lex concursus (i.e. the provisions of law applicable to the party that happens to have become insolvent in the course of the proceedings) are decisive for the purposes of determining the effects of the insolvency of one of the parties on the continuation of the proceedings.

- ***Erik Jayme*** on the meeting of the European Group for Private International Law in Padua in September 2009: "Die Vereinheitlichung des Internationalen Privat- und Verfahrensrechts in der Europäischen Union: Tendenzen und Widerstände Tagung der „Europäischen Gruppe für Internationales Privatrecht" (GEDIP) an der Universität Padua"
- ***Marc-Philippe Weller*** on the Heidelberg symposium on the occasion of the 75th birthday of Prof. Dr. Dr. h.c. mult. Erik Jayme: "Symposium zu Ehren von Erik Jayme"

Choice of Law in American Courts 2009

Once again, Dean Symeon Symeonides has compiled his annual choice of law survey. Here is the abstract:

"This is the Twenty-Third Annual Survey of American Choice-of-Law Cases. It is written at the request of the Association of American Law Schools Section on Conflict of Laws and is intended as a service to fellow teachers and students of conflicts law, both within and outside the United States. Its purpose is to inform, rather than to advocate.

The Survey covers cases decided by American state and federal appellate courts from January 1 to December 31, 2009, and posted on Westlaw before the end of the year. Of the 1,490 conflicts cases meeting both of these parameters, the Survey focuses on those cases that may contribute something new to the development or understanding of conflicts law – and particularly choice of law.

For the conflicts afficionados, 2009 brought many noteworthy developments, including the enactment of the second choice-of-law codification for tort conflicts in the United States, and a plethora of interesting cases, such as the following:

– Several cases brought under the Alien Torts Statute (ATS) involving human rights abuses in foreign sites, including Iraq's Abu Ghraib prison, one case denying a Bivens remedy to a victim of "extraordinary rendition," and one case allowing an ATS action against an American pharmaceutical company for nonconsensual medical experiments on children in Nigeria;

– Two cases holding that the Holy See was amenable to suit under the tortious activity exception of the Foreign Sovereign Immunity Act for sexual abuses allegedly committed by clergymen in the United States;

– Two cases declaring unconstitutional two California statutes (dealing with Nazi looted artwork and the Armenian Genocide, respectively) as infringing on the Federal Government's exclusive power over foreign affairs;

– Several cases dealing with the recognition of same-sex marriages and their

implications on issues of parentage, adoption, and child custody; Several cases striking down (and a few enforcing) class-action or class-arbitration waivers in consumer contracts;

– A Minnesota case holding that Panama's blocking statute did not prevent dismissal on forum non conveniens grounds an action arising from events occurring in Panama; and

– A case of legal malpractice for mishandling a conflicts issue, a case involving alienation of affections and "criminal conversation," and the usual assortment of tort, product liability, and statute of limitation conflicts."

The full survey is available for free here.

Thanks to Dean Symeonides for providing this valuable resource on the state of American conflicts law.

18th International Congress of Comparative Law: Washington D.C.

On July 25 through August 1, 2010, the 18th International Congress of Comparative Law will be held at the Ritz-Carlton Hotel in Washington D.C. Sponsored by the International Academy of Comparative Law and the American Society of Comparative Law, it will be jointly hosted by American University Washington College of Law, George Washington University Law School and Georgetown Law Center. The topics of this year's Congress include:

I. A. Legal history and ethnology
Legal culture and legal transplants

I. B. General legal theory
Religion and the secular state

I. C. Comparative law and unification of laws
Complexity of transnational sources

I. D. Legal education
The role of practice in legal education

II. A. Civil law
Catastrophic damages-liability and insurance
Surrogate motherhood
Same-sex marriages

II. B. Private international law
Consumer protection in international transactions
Recent private international law codifications

II. C. Civil procedure
Cost and fee allocation rules
Collective actions

II. D. Agrarian and environmental law
Climate change and the law

III. A. Commercial law
The regulation of private equity, hedge funds and state funds
Harmonization of finance leases by UNIDROIT
Corporate governance
Insurance contract law between business law and consumer protection

III. B. Intellectual property law
The balance of copyright in comparative perspective
Jurisdiction and applicable law in intellectual property

III. C. Labour law
The prohibition of discrimination in labour relations (age discrimination)

III. D. Air and maritime law
The law applicable on the continental shelf and in the exclusive economic zone

IV. A. Public international law
The protection of foreign investment

International law in domestic systems: a comparative approach

IV. B. Constitutional law
Foreign voters
Constitutional courts as “Positive Legislators”

IV. C. Public freedoms and human rights
Plurality of political opinions and the concentration of media
Are human rights universal and binding? Limits of universalism

IV. D. Administrative law
Public-private partnerships

IV. E. Tax law
Regulation of corporate tax avoidance

V. A. Penal law
Corporate criminal liability

V. B. Criminal procedure
The exclusionary rule

VI. Computers
Internet crimes

There will also be Special Sessions dedicated to law and development, torture and cultural relativism, comparative perspectives on the role of transparency in administration of law, protection of privacy from the media, comparative family law, comparative constitutional law, and comparative and international government procurement law. Sessions dedicated to regional studies will include a “Panel on Africa: Comparative Private Law and Transitional Social Justice,” a “Panel on Latin America: Comparative Legal Interpretation,” and a “Panel on the Middle East: Islamic Finance and Banking in Comparative Perspective.”

Registration information is available here, and a detailed agenda is available here. Note that early-bird registration ends on January 30. Updates to the agenda and schedule will follow on this site.

Dámaso Ruiz-Járabo Colomer

Advocate General Dámaso Ruiz-Jarabo Colomer has passed away in Luxembourg. Born in 1949, Mr Dámaso Ruiz-Jarabo Colomer was Judge and then Member of the Consejo General del Poder Judicial (General Council of the Judiciary of Spain). He worked as professor of Administrative Law and served as Head of the Private Office of the President of the Consejo General del Poder Judicial. He was an ad hoc Judge at the European Court of Human Rights and Judge at the Tribunal Supremo (Supreme Court of Spain) from 1996. Since 19 January 1995 he was also Advocate General at the Court of Justice. Among his writings we may recall the book "El Juez nacional como juez comunitario" (Civitas, 1993), or the articles "Los derechos humanos en la Jurisprudencia de Tribunal de las Comunidades Europeas" (Poder Judicial, 1989, pp. 159-184); "Técnica Jurídica de protección de los derechos humanos en la Comunidad Europea" (Revista de Instituciones Europeas, 1990, pp. 151-186); "La jurisprudencia del Tribunal de Justicia sobre la admisibilidad de las cuestiones prejudiciales" (Revista del Poder Judicial, 1997, pp. 83-114); "La réforme de la Cour de Justice opérée par le Traité de Nice et sa mise en oeuvre future" (Revue Trimestrielle de Droit Euopeen, 2001, pp. 705-725); "Los Tribunales constitucionales ante el Derecho comunitario" (Estudios de Derecho Judicial, 2006, pp. 185-202), or the recent "El Tribunal de Justicia de la Unión Europea en el Tratado de Lisboa" (Noticias de la Unión Europea, 2009, pp. 31-40). As Advocate General he worked in many fields, including Private International Law. He will be remembered among us for his opinion in cases as Lechouritou (as. C- 292/05, on the Brussels Convention), Deko Marty (as. C- 339/07, on Regulation num. 1346/2000 of 29 May 2000 on insolvency proceedings) Roda Golf (as. C-14/08, concerning Regulation num. 1348/2000 on the service of documents).

May he rest in peace.