ERA-Conference on Cross-border Divorce and Maintenance

From 25 to 27 February 2013 the Academy of European Law (ERA) will host a conference on "Cross-border Divorce and Maintenance: Jurisdiction and Applicable Law" in Dublin. The conference will provide information on the Brussels II bis Regulation, the Rome III Regulation as well as the Maintenance Regulation. Further information is available here. The programme reads as follows:

Monday, 25 February

- 08:45 Arrival and registration of participants

I. Cross-border divorce: jurisdiction and procedure

- 09:15 Opening session
- 09:45 Setting the scene: framework and key elements of cross-border cooperation in family matters
- 10:30 Coffee break
- 11:00 Cross-border divorce in the EU: jurisdiction, recognition andlis pendens
- 13:00 Lunch
- 14:30 Interaction of Regulation Brussels II bis with other EU legal instruments and mechanisms:
    - legal aid
    - service of documents
    - preliminary ruling procedure
    - alternative dispute resolution
- 15:30 Coffee break
- 16:00 Exercise I: Case studies on cross-border divorce
- 18:00 End of the first workshop day
- 19:30 Dinner

Tuesday, 26 February

II. Cross-border divorce: applicable law

- 09:00 Cross-border divorce in the EU: applicable law
- 10:30 Coffee break
- 11:00 The application of foreign law in a crossborder divorce case
- 12:00 Lunch
- 13:30 Exercise II: Case studies on the identification and application of foreign law in a divorce case
- 15:30 Coffee break

III. Cross-border maintenance

- 16:00 Jurisdiction and applicable law in crossborder maintenance cases
- 18:00 End of the second workshop day
- 19:30 Dinner

Wednesday, 27 February

- 09:00 Cooperation between Central Authorities and access to justice in cross-border maintenance cases
- 10:00 Exercise III: Case-study on a crossborder maintenance case
- 12:00 Coffee break

IV. EU initiatives on property regimes

- 12:30 The proposed legislation on property effects of marriage and registered partnership
- 13:00 Closing session
- 13:30 Lunch and end of the workshop

Issue 2012.4 Netherlands Private International Law on Family Law

The fourth issue of 2012 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht,* includes seven articles dedicated to the topic 'Party autonomy in international family law.'

Maarja Torga, Party autonomy of the spouses under the Rome III Regulation in Estonia – can private international law change substantive law?, p. 547-554. The abstract reads:

At the moment Estonia is preparing to join Council Regulation (EU)No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (hereafter: Rome III Regulation). Article 5 of the Rome III Regulation gives limited party autonomy to the spouses in divorce matters. However, regardless of the applicable law chosen by the parties, under Article 13 of the Rome III Regulation the Estonian courts would not have to grant a divorce if Estonian substantive law does not deem the marriage in question to be valid for the purpose of divorce proceedings. The present article evaluates the discretion of the Estonian judges to rely on Article 13 of the Rome III Regulation and the alternative courses of action for the spouses in order to avoid the application of the said provision. By using the Rome III Regulation as an example, the author takes the position that the extension of party autonomy in one field of Estonian private international law should lead to a gradual expansion of party autonomy in other fields of Estonian law, which at the moment is rather conservative in its treatment of non-traditional forms of marriage.

Ilaria Viarengo, The role of party autonomy in cross-border divorces, p. 555-561. The abstract reads:

The Rome III Regulation allows spouses to choose the law applicable to their divorce. This choice represents a relevant change for a field which is traditionally regulated by provisions from which the parties cannot derogate. First of all, the article analyses the reasons that justify optio juris *in the case of international divorce. The article furthermore examines the* optio juris *functioning and, in particular, it focuses on ways of assuring the full awareness of the parties and limitations to the choice. Although the Netherlands does not take part in the adoption of the Rome III Regulation, there are scenarios in which Dutch citizens might be affected by it, given that the Regulation has a 'universal' character. Finally, the article examines the role of the parties' will in determining the law which is applicable to the financial consequences of the divorce and in particular in the conclusion of prenuptial agreements.*

Janeen M. Carruthers, Party autonomy and children: a view from the UK, p. 562-568. The abstract reads:

This article examines the extent to which children, in proceedings affecting their transnational legal affairs, are entitled to express their views, and in what manner, at what time, and to what effect. Attention is paid to international standards set out in the United Nations Convention on the Rights of the Child, and to particular rules contained in international instruments such as Brussels II bis and the 1980 Hague Abduction Convention, and in unharmonised areas such as international family relocation. The influence which children increasingly may exert through the expression of their will is distinguished from the device of party autonomy as that concept generally is understood in private international law. The article shows that implementation of the policy of respecting children's views varies among legal systems, rendering important the matter of forum.

Anna Wysocka, How can a valid *profession iuris* be made under the EU succession Regulation? p. 569-575. The abstract reads:

In the near future, the Succession Regulation will unify international succession law in the EU. Containing rules which have a universal nature, starting from August 17, 2015 it will almost entirely replace international succession rules which are currently in force in the Member States. The Succession Regulation allows for a professio iuris*, which may be made even now as long as it complies with certain requirements. Which laws may be designated as applicable? In what form should a* professio iuris *be made? Which law applies to the material validity of the* professio iuris*? Must the choice of law be clearly expressed or may it be tacit? May it be modified or revoked? What if the* professio iuris *turns out to be invalid? The above questions are answered by comparing the provisions of the Succession Regulation with the Hague Convention, as well as domestic laws of countries currently allowing for* professio iuris*.*

Csongor István Nagy, What functions may party autonomy have in international family and succession law? An EU perspective, p. 576-586. The abstract reads:

The article examines, from an EU perspective, what functions and considerations may justify party autonomy in the fields of international family and succession law. The article argues that in family and succession law the main function of party autonomy should be to tackle the uncertainties related to the applicable law (predictability), to protect vested rights and to ensure the operation of the country-of-origin principle. It is also submitted that this function is less relevant regarding matters connected to legal systems that contain uniform choice-of-law

rules, like the Member States of the EU. Furthermore, the article also argues that in the EU the mutual recognition of the choice-of-law rules of the Member States may also justify party autonomy, especially in family and succession law.

Maria Hook, Party autonomy – yes or no? The 'commodification' of the law applicable to matrimonial property relations, p. 587-596. The abstract reads:

The party autonomy principle has met with some success in matrimonial property law, having been embraced, albeit with restrictions, by most civil law countries, but eschewed by the relevant statutory regimes of common law countries such as England and Australia. This article argues that the rationale for extending party choice to matrimonial property disputes is in need of re-examination. In particular, it submits that insufficient attention has been paid to the mechanism behind the party autonomy rule – the choice of law contract – and proposes a contractual framework of evaluation, founded on the choice of law agreement as a self-sufficient contract. This framework is used to determine whether, in the area of matrimonial property law, objective choice of law rules are mandatory in nature – that is, whether they seek to give effect to public policies that ought not be the subject of party choice. By importing contractual theory into the choice of law process, this article hopes to offer a principled alternative to the traditional, often narrowly-focused approach that has been taken to party autonomy in this area.

Sagi Peari, Choice-of-law in family law: Kant, Savigny and the parties' autonomy principle, p. 597-604. The abstract reads:

This article offers an explanation for the emerging popularity of the parties' autonomy principle in the area of family law. It will be argued that Friedrich Carl von Savigny's divergence from Kant in the area of family law is what underlies the reluctance of different jurisdictions to implement the parties' autonomy principle in this area. Accordingly, the adoption of this principle in the area of family law reflects a complete reversion of Savigny's choice-of-law theory to its Kantian roots.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (1/2013)

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

- ***Heinz-Peter Mansel/Karsten Thorn/Rolf Wagner***: "European conflict of laws: Progressing process of codification– patchwork of uniform law"

The article gives an overview on the developments in Brussels in the judicial cooperation in civil and commercial matters from November 2011 until November 2012. It summarizes current projects and new instruments that are presently making their way through the EU legislative process. It also refers to the laws enacted on a national level in Germany which are a consequence of the new European instruments. Furthermore, the article shows areas of law where the EU has made use of its external competence. The article discusses both important decisions and pending cases before the ECJ touching the subject matter of the article. In addition, the present article turns to the current projects of the Hague Conference as well.

- ***Stefan Leible/Doris Leitner***: "Conflict of laws in the European Directive 2008/122/EG"

The following essay is about the conflict of laws in the European Directive 2008/122/EG on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, being effective since 2/23/2008 and being transformed into German law since 1/17/2011, and its relevance for German law. After giving information about the regulation's history, scope and content, the authors make a detailed analysis on the directive's conflict of laws rule art. 12 par. 2 as well as its national transformation rule art. 46b EGBGB and demonstrate the differences to the former legal norms.

- ***Christoph Benicke***: "Haager Kinderschutzübereinkommen" – the

English abstract reads as follows:

The 1996 Hague Protection of Children Convention provides a modern legal instrument in the field of international child protection and overcomes the shortcomings of the 1961 Hague Protection of Minors Convention. International jurisdiction is primarily assigned to the authorities of the State of habitual residence of the child. In addition, a flexible consideration of the particularities of the case is made possible by the fact that the jurisdiction may be transferred to the authorities of a State with which the child has a close relationship e.g. based on nationality. The principle that the court applies its own law promotes rapid and effective procedures. Since the general jurisdiction lies with the authorities in the State of the habitual residence of the child, the law of the habitual residence of the child will be applied in most proceedings. This is consistent with the choice of law rule in Article 16, which establishes the applicable law outside the realm of protective measures. The Convention also includes a modern system for the recognition and enforcement of decisions from other Contracting States. The international jurisdiction of the authority which issued the decision can still be checked, but the recognizing State is bound in respect to the factual findings in the decision to be recognized. Once recognition and enforceability are certified, the foreign decision will be enforced under the same conditions as a national one. Difficult questions arise about the relationship between the Hague Child Protection Convention and the Brussels II regulation. Among Member States the Brussels II regulation displaces the Protection of Children Convention for the jurisdictional issues in most cases. The same is true for the recognition and enforcement of decisions from other Member States of the Brussels II regulation. On the other hand, the choice of law rules of the Protection of Children Convention apply in all procedures, even when the jurisdiction is based on the Brussels II regulation.

- ***Jan von Hein***: "Jurisdiction at the place of performance according to Art. 5 no. 1 Brussels I Regulation in the case of a gratuitous consultancy agreement"

The annotated judgment of the OLG Saarbrücken deals with the question whether a gratuitous consultancy agreement falls within the scope of Art. 5 no. 1 Brussels I Regulation. After establishing that the present decision concerns a contract and not a mere act of courtesy, it is discussed whether Art. 5 no. 1(b)

or Art. 5 no. 1(a) Brussels I Regulation is applicable to a gratuitous consultancy agreement. Subsequently, the reasons why the non-remuneration is the decisive factor for ruling out the application of Art. 5 no. 1(b) Brussels I Regulation are elaborated followed by some remarks concerning the determination of the place of performance of the obligation in question under Art. 5 no. 1(a) Brussels I Regulation. The possibility of establishing a concurring competence – a forum attractivitatis – of the court having special jurisdiction in contract for related tort claims e.g. resulting from product liability is analysed. The annotation concludes with final remarks on the revision of the Brussels I Regulation and the proposed changes concerning the jurisdiction at the place of performance.

- ***Markus Würdinger***: "Language and translation barriers in European service law – the tension between the granting of justice and the protection of defendants in the European area of justice"

The problem of languages implicates considerable obstacles in international legal relations. Regulation No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (European Regulation on the service of documents) provides in Article 8, in which cases the addressee may refuse to accept the document to be served. This right exists if the document is not written in, or accompanied by a translation into a language which the addressee understands (1. lit. a) or the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected (1. lit. b). The article analyses this statute on the basis of a judgment of the LG Bonn (District Court Bonn), formulates principles of interpretation and arrives at the conclusion that the language of correspondence has by right a great importance in commercial legal relations. Whoever engages here in a certain language and is able to communicate adequately in it, has in case of doubt not the right provided by Article 8 of the Regulation to refuse the acceptance of the document to be served.

- ***Christian Tietje***: "Investitionsschiedsgerichtsbarkeit im EU-Binnenmarkt" – the English abstract reads as follows:

More than 170 Bilateral Investment Treaties (BITs) exist between the EU Member States. In the last years several investment arbitrations were initiated by investors from EU Member States against other Member States. This has led to an intense legal and political discussion on intra-EU BITs with regard to their validity and enforceability as well as the effects of public international law on European Union Law in general. In this context, the EU Commission calls on the EU Member States to denounce the existing intra-EU BITs because of an alleged incompatibility with Union law. This contribution discusses and illustrates relevant legal issues of this debate based on a recent Decision of the Regional High Court of Frankfurt, Germany. The Court in its decision of 10 May 2012 intensively discussed the question of whether intra-EU-BITs are in violation of EU law and thus not applicable as a base for jurisdiction of an international tribunal. The Court convincingly rejects all arguments in this regard and declares intra-EU-BITs in full conformity with EU law.

- ***Johannes Weber***: "Actions against Company Directors from the Perspective of European Rules on Jurisdiction"

The interaction of European and International Company Law has until now been primarily viewed in the context of conflict of laws. The practice of national and European courts, however, indicates that issues of international jurisdiction are getting more and more important. Focusing on the Brussels I Regulation, this paper deals with jurisdiction on actions against company directors for breach of their duties. It argues that these actions fall within the scope of Art. 5 (1)(b) BR and that the courts both in the state of the company's statutory and administrative seat may claim competence.

- ***Bernd Reinmüller/Alexander Bücken:*** "The scope of an arbitration clause in the event of a "brutal termination of an existing business relationship" under French Law"

The contribution deals with a decision by the Cour de Cassation (1ère civ. of 8 July 2010 – Case no. 09-67.013) on the scope of an arbitration clause in respect of damage claims on grounds of a "brutal breach" of a trade relation- ship.

Art. L 442-6 I 5 of the French Commercial Code stipulates that persons engaged in a trade or business who "brutally" breach an established trade relationship

are obliged to compensate the ensuing damages. This provision serves for the upholding of law and order (ordre public) and as part of the French law of torts it is not subject to the disposition of the parties.

The Cour de cassation held that an action based on this legal norm can be covered by a contractual arbitration clause regardless of its tortious nature and its coercive character, because it has a sufficient contractual reference. This presupposes a sufficiently broad formulation of the arbitration clause.

- ***Wilfried Meyer-Laucke***: "Zur Frage der Anerkennung russischer Urteile auf dem Gebiet des Wirtschaftsrechts" – the English abstract reads as follows:

Up to now no Russian judgments have been admitted in the Republic of Germany and declared enforceable due to the rule that this can only be done in case reciprocity is ensured. The same rule is applied in the Russian Federation. It let into a dead end.

However, things have changed. Since 2006 Russian arbitrage-courts handling commercial matters have admitted foreign judgments to be enforced in Russia despite the lack of international agreements. Following this line the arbitrage-court of St. Petersburg has applied this practice to an order of the local court of Frankfurt a.M. by which a bankruptcy procedure has been opened, and has based its grounds on general rules in particular on Art. 244 of the Arbitrage Procedure Rules. These grounds are given in accordance with the jurisdiction of the High Arbitrage Court of Russia. Thus, it can be taken as granted for the German jurisdiction that reciprocity is ensured from now on as far as judgments of arbitrage-courts are concerned.

- ***Francis Limbach***: "About the End of the "Witholding Right" in French International Law of Succession"

The "withholding right" ("droit de prélèvement") has been a singular instrument in French international private law for nearly 200 years. In succession cases where foreign (i.e. non-French) law of succession applied and a French citizen was to inherit as a legal heir, the withholding right aimed to protect the latter from disadvantages related to applicable foreign provisions.

Thus, if it occurred that his share determined by foreign law was less than what he would have received under French law, his withholding right entitled him to seek adequate compensation by "withholding" assets of the estate located on French territory. Criticized for decades in scholarly literature as a "nationalist rule", the provision pertaining to the withholding right has eventually been declared unconstitutional by the French Constitutional Council on August 5th, 2011 on the grounds of un- equal treatment of French and foreign nationals. The present article aims to determine the impact of this decision on French international law of succession, especially on French-German cross-border cases.

- ***Erik Jayme/Carl Zimmer*** on the question whether there is a need for a Rome Regulation on the general part of the European PIL:"Brauchen wir eine Rom 0-Verordnung? – Überlegungen zu einem Allgemeinen Teil des Europäischen IPR"
- ***Erik Jayme*** on methodical questions of European PIL: "Systemfragen des Europäischen Kollisionsrechts"
- ***Jan Jakob Bornheim*** on the conference on the European law on the sale of goods held in Tübingen on 15./16.6.2012: "GPR-Tagung zum Gemeinsamen Europäischen Kaufrecht und Kollisionsrecht in Tübingen, 15./16.6.2012"

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2012)

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

- ***Dorothee Einsele***: "Overriding Mandatory Provisions in Capital Market Law – Does the Rome I Regulation Need a Special Rule Regarding Harmonized European Law?"

Capital market legal provisions can often be qualified as overriding mandatory rules in the sense of art. 9 (1) Rome I Regulation. However, third country provisions regulating the capital market are rarely applicable because they are usually not captured by art. 9 (3) Rome I. The question is whether this is different as to provisions of other EU/EEA Member States that are based on harmonized European capital market law. Since the relevant European directives separate the competence to regulate the case and allocate it to the different Member States, the relevant implementing provision of the competent Member State has to be applied or to be taken into account by the other Member States. This is true irrespective of the law applicable to the rest of the case, and could be clarified in recital 40 of Rome I.

- ***Stefan Leible/Michael Müller:*** "Die Anknüpfung der Drittwirkung von Forderungsabtretungen in der Rom I-Verordnung" – the English abstract reads as follows:

The article deals with the assignment of claims according to Art. 14 of the Rome I Regulation. The focus lies with the third-party effects of an assignment. The pending revision envisioned in Art. 27 (2) of the Rome I Regulation as to the third-party effects of an assignment prompts the discussion which law should apply to an international assignment in this regard. The article mainly addresses three options: the law of the assignor's habitual residence, the law of the assigned claim or the law of the contract of assignment. The final vote of the Special Committee among the options provided for in the annex of the article reflects a continuing diversity of opinions.

- ***Michael Grünberger:*** "Relative Autonomie und beschränkte Einheitlichkeit im Gemeinschaftsmarkenrecht" – the English abstract reads as follows:

The Community trade mark is a specific European Union intellectual property right with an unitary character and equal effect throughout the Union. In an aversion of the principle of subsidiarity, Union law depends on member state's

procedural and substantive law in order to enforce the rights granted by the Community Trade Mark Union effectively. Thus, there is tension between the uniform nature of the substantive rules on the Community trade mark as well as its uniform judicial protection and the means to achieve these goals. The ECJ's decision resolves two issues: (1st) The scope of the prohibition against further infringement issued by a Community trade mark court with territorial jurisdiction over the entire Union extends to the entire area of the Union. However, if the trade mark proprietor restricts the territorial scope of its action or, if the use of the sign at issue does not affect the functions of the trade mark, the court must limit the territorial scope of its injunction. (2nd) The Community trade mark court must order coercive measures to ensure compliance with its injunction. Their territorial scope is identical to the scope of the injunction. The article also tries to answer the remaining questions regarding the jurisdiction for adopting and/or for quantifying or otherwise assessing the coercive measure pursuant to the court's lex fori and how to enforce a coercive measure adopted and assessed by a Community trade mark court in the territory of another member state.

- ***Peter Schlosser:*** "Death-blow to the so-called „Supplementary Interpretation of Contracts („ergänzende Vertragsauslegung") in the Case of Invalid Terms in Consumer Contracts?"

The focus of the ruling (C-618/10) – and its explosive force – is on the reply to the second question of the referring court. The issue – often coming up in judicial practice relating to general contract terms – is: what is the content of the remaining contract should one of its pre-drafted terms had turned out to be invalid. Mostly, indeed, the respective term is to be taken for non-existing without any adaptation of the contract other than by taking recourse to general legal rules. However, to apply this approach slavishly without any element of a supplementary solution leads sometimes to inacceptable injustice, for example to excessive windfall benefits for hundreds of thousands of consumers. Therefore, the Spanish law vested the courts with a discretionary power (and not a mandatory one, as the translation into some of the languages of the Union, including the English language, makes us believe) to grant a modification of the incriminated term, which power is termed as "facultades moderadoras". According to the Court of the Union to grant such a power contravenes the Directive on Abusive Contract Terms.

The author is very critical with this narrow-minded approach of the European Court's ruling. This narrow-mindedness is the consequence of the total refusal to take into consideration the solutions which the legislations and courts of the Member States (particularly in Germany and Austria) had developed for the purpose of avoiding said excessive injustice. Hence, his proposition is to develop an understanding of the ruling as narrow as possible. According to him one must strictly stick to the Court's words "[…] which allows a national court […] to modify that contract […]" (in the official Spanish original: "atribuye al juez nacional […] la facultad de integrar dicho contrato modificando el contenido de la cláusula abusiva".). Therefore, even in consumer contracts the following must still remain permissible:

1. Often the national legislation implementing the Directive is stricter than the Directive itself. Hence, it is possible that under such a national legislation a contractual term is taken for inadmissible, notwithstanding the fact that its content does not amount to the shocking degree to be qualified as "abusive". In such a case the ruling of the court does not apply.

2. The very Court of the Union makes it clear that for dealing with the remaining part of the contract the national court must take recourse to "the interpretive methods recognized by domestic law", "taking the whole body of domestic law into consideration". Since in German and Austrian law dealing with a gap in a contract, even if the gap is due to the inadmissibility of a contract term, is a matter of contract interpretation rather than of a court's "modifying power" the court which is disposing of such an approach may still take recourse to it.

3. The main argument of the Court of the Union is the proposition that the Directive must be implemented in a manner to built up a "dissuasive effect" for the co-contracting party of the consumer. In many situations, however, a mitigating power of the court cannot possibly have any influence on the dissuasive effect to be established by the implementation of the Directive. This is particularly the case when the co-contracting party of the consumer had been loyal and has adapted its terms to the case law and where thereafter, however, the courts tighten the latter.

- ***Christian Heinze/Stefan Heinze***: "Striking off a foreign company

branch from the German commercial register”

As a result of the freedom of establishment in the European Internal Market, companies are increasingly expanding beyond national borders and establish branches in other Member States. Under the Eleventh Council Directive 89/666/EEC, these branches are subject to registration and compulsory disclosure in the Member State of establishment. The following article discusses a judgment of the Oberlandesgericht Frankfurt a.M. which had to decide whether the German branch of an English private company limited by shares could be struck from the German commercial register according to the German procedural rules which provide for deletion from the register if a company does not own any assets. The article supports the negative answer given by the Frankfurt court and discusses alternative ways to clear commercial registers of “phantom branches” of inoperative foreign companies.

- ***Bettina Heiderhoff***: “Habitual Residence of Newborns – Application of German PIL in Cases of Same-sex Parents and of Surrogacy”

The two cases have different factual backgrounds. One concerns a married, same-sex couple seeking recognition of double motherhood to a girl that was born by one of the spouses. The child was born in Spain, where both women were recorded as mothers in the birth register. In the other case a child was born via a surrogate mother in India and the intended parents want to bring it to Germany.

By applying the general rules of PIL, and in particular Art. 19 EGBGB, both cases boiled down to the question of where a new-born has its habitual residence. While this was relatively easy to determine with respect to a girl born from a German mother, with a German habitual residence, and merely a few weeks of factual residence in Spain, it was more difficult in the case of the Indian child. Habitual residence does not depend on legal parenthood, but on the real-life situation. It is important to consider where the baby lives and is cared for. As the period of time that the Indian child will spend in India is open-ended, one would probably rule for habitual residence in India. That decision, however, may have the consequence that the child might leave India immediately, as an Indian residence leads to the application of Indian law and, thereby, most probably to the parenthood of the intended German parents.

Both cases feature strong political aspects which are not, however, mirrored in the decisions. While it seems safe to say that Germany should open up to the recognition of double motherhood or fatherhood in same-sex couples, it is much more complicated to determine the correct position in respect of surrogacy. However, when a child has already been born, and surrendered, by the surrogate mother, and she shows no further interest in the infant, while the intended parents wish to obtain legal parenthood and raise the child, German ordre public must not be used to prevent them so doing or force them to leave the child behind.

- ***Götz Schulze***: "The principal habitual residence"

The decision concerns the disputed question among commentators of whether a person can have several habitual residences at the same time and if so, according to which criterion one of the habitual residences takes precedence over the other.

The wife concerned in the case was a Norwegian national. She demanded maintenance under Art. 18 para. 4, 17 para. 1 sentence 1 in conjunction with Art. 14 para. 1 EGBGB (Introductory Act to the Civil Code), her husband was German. Until their separation the couple lived together in Germany. Thereafter the woman moved out of the matrimonial home and lived with the couple's 17- and 11-year-old children in Norway. Following the separation the husband split his time between stays with his children in Norway and Germany, where he operated a nightclub with his brother. The Higher Regional Court of Oldenburg denies a change of the habitual residence to Norway and thereby a mutual habitual residence in this country. However, the court leaves the question unanswered as to whether the application of German law is here based on a relative weighting of the habitual residences or whether Art. 5 para. 1 sentence 1 EGBGB concerning multistate nationalities is to be applied equally.

If a clear classification in favour of a country is not possible and if the grouping of contacts leads – as in this case – to an impasse, a multiple habitual residence must be assumed. The principal habitual residence is to be determined by an accordant application of Art. 5 para. 1 sentence 1 EGBGB. The decisive factors are nationality and continuity of living conditions.

- ***Dagmar Coester-Waltjen***: "Die Abänderung von Unterhaltstiteln – Intertemporale Fallen und Anknüpfungsumfang" – the English abstract reads as follows:

The decision of the Nürnberg Court of Appeal concerned the modification of a post-divorce maintenance order. The court rightly applied German family law to the maintenance obligation of the former husband towards his divorced wife. However, some tricky questions arose in determining the applicable law. This applies with regard to the transitional rules of the EU Maintenance Regulation (Art. 75), the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (Art. 22). The Maintenance Regulation applies only to proceedings initiated from 18 June 2011 on. As in this case the proceedings for modification were instituted already in December 2010, neither the EU Regulation nor the Hague Protocol 2007 applied. However, if the proceedings had been instituted as from 18 June 2011 on, then the rules of the Hague Protocol would have determined the law applicable to maintenance claimed even for periods prior to the entry into force of the protocol – despite the general rule of sec. 22 Hague Protocol 2007. This transitional rule of the „Council decision of 30 November 2009 on the Conclusion by the EU Commission of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations" (OJ L 331 16/12/2009 p.17) is easily overlooked. Other problems concerned the determination of the law applicable to the modification of maintenance orders and to the conflict between several maintenance obligations.

- ***Martin Gebauer***: "Forum non Conveniens, Foreign Plaintiffs and International Forum Selection Agreements"

One of the most important normative objections against the forum non conveniens doctrine lies in the concern that it attributes a stronger presumption of convenience to the forum chosen by a domestic plaintiff, whereas the suit of a foreign plaintiff is significantly more often dismissed on the basis of forum non conveniens. On the other hand, many courts do not attach importance to the (domestic) defendant's domicile in the forum state when dismissing a suit on the basis of forum non conveniens. This kind of different treatment is confirmed in Cessna Aircraft where the Court of Appeals for the 11th Circuit seems to presume that a foreign plaintiff does not choose to

litigate in the United States for convenience.

In Wong v. Party Gaming, the Court of Appeals for the 6th Circuit decided that federal and non state law applies to the enforceability of forum selection agreements in diversity cases. The question had raised unsettled issues under the Erie doctrine. The reasoning of the Court also demonstrates the impact of a forum selection clause on the forum non conveniens analysis.

- ***Dieter Martiny:*** "Beachtung ausländischer kulturgüterrechtlicher Normen im internationalen Schuldvertragsrecht" – the English abstract reads as follows:

The case note analyses a judgment of the Austrian Supreme Court of Justice (Oberster Gerichtshof, OGH) in a case concerning the sale of a Chinese cultural object in Austria which was alleged to have been illegally imported from China via Hong Kong. While it is undisputed that China's Regulations of cultural objects are internationally mandatory rules in the sense of Article 7 para. 1 of the 1980 Rome Convention on the law applicable to contractual obligations, it is difficult to determine whether the other prerequisites are met which would allow the rules under the Convention to be taken into account. Particularly, the „close connection" is hard to define. However, under the circumstances of the case the Court's correctly reasoned that there was no close connection. The second possible path for the protection of foreign cultural objects, a determination that the contract is immoral under Austrian substantive law, was also rejected and the contract was upheld. Under the new Article 9 para. 3 Rome I Regulation on the law applicable to contractual obligations foreign overriding mandatory rules may also be given effect under certain conditions which are not easy to define in cases of illegal exports. The case note discusses the continuing legitimacy of taking foreign mandatory laws into account under national substantive law as a factor for immorality such that the nullity of the contract may result.

- ***Sabine Corneloup***: "Zur Unterscheidung zwischen Bestimmungen, von denen nicht durch Vereinbarung abgewichen werden darf, und dem ordre public-Vorbehalt bei internationalen Arbeitsverträgen" – the English abstract reads as follows:

Pursuant to Art. 6 n 1 of the Rome Convention, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable in the absence of choice. In the decision of the French Cour de cassation the issue was the mandatory character of French prescription rules. The parties had chosen Spanish law under which the claim of the employee was subject to a limitation period of 20 days whereas the time limit set by French law was of 30 years. The Cour de cassation holds Spanish law to be applicable since the employee has not been deprived of the right of access to the court. This motivation is to be criticized.

- ***Christa Jessel-Holst***: "Approximation of the Macedonian Law with the Rome II-Regulation"

The present contribution discusses the amendment of 2010 to the Macedonian Private International Law Act of 2007. The purpose of this amendment consists in the introduction of the concept of habitual residence as a connecting factor and in the harmonization of Macedonian PIL with the Rome II-Regulation. The Macedonian legal definition of habitual residence is analyzed in comparison with existing models in Belgium, Bulgaria and Romania and contrasted to countries that have decided against a legal definition, like Germany, Turkey or Poland. Before the background of the case Mercredi ./. Chaffe, the introduction of a time-based delimination (Art. 12a MacePILAct: six months period) for establishing habitual residence is criticized. The implementation of the Rome II-Regulation has for the most part been effected verbatim. However, some inconsistencies remain (e.g. renvoi, infringement of intellectual property). The Rome I-Regulation has so far not been integrated in Macedonia. The contribution also addresses ongoing reforms of PIL in other countries of the region.

- ***Burkhard Hess*** on the conference on the revision of the Brussels I Regulation: "Mailänder Tagung zur Revision der Verordnung Brüssel I, 25./26.11.2011"
- ***Nicolas Nord/Gustavo Cerqueira*** on the conference at the University of Tsinghua on international contracts under the new Chinese PIL: "Internationale Verträge nach dem neuen chinesischen IPR-Gesetz: ein

rechtsvergleichender Blick aus Europa – Tagung an der Universität Tsinghua am 28./29.3.2011”

- ***Elsabe Schoeman:*** “New Zealand Conflict of Laws Electronic Database”

Muir Watt on Kate Provence Pictures

Horatia Muir Watt is a professor of law at Sciences-po Paris Law School.

*Cachez ce sein…*It seems to me that this case – which is perhaps less intrinsically interesting, even from a conflict of laws perspective, than other recent instances in which the cross-border exercise of the freedom of press is challenged in the name of competing values, such as *Charlie Hebdo* and the satirical caricatures of Mahomet, or *The Guardian* and the *Trasfigura* super-injunction – serves to illustrate the relative indifference of the content of the relevant choice of law rules when fundamental rights are in balance. As so much has already been written about possible additions to Rome II in privacy or defamation cases, I shall concentrate on what could be called the *Duchess of Cambridge hypothesis:* whatever the applicable rules, the only real constraint on adjudication in such an instance, and the only real arbiter of outcomes, is the duty of the court (assumed to be bound, whatever its constitutional duties, by the European Convention on Human Rights, or indeed the Charter if Rome II were in the end to cover censorship issues) to carry out a proportionality test in context.

One might start with a few thoughts about the balance of equities in this case. Back at the *café du commerce* (or the ranch, or the street, or indeed anywhere where conventional wisdom takes shape), the debate is usually framed in moral terms, but remains inconclusive, neither side inspiring unmitigated sympathy. On the one hand, invasion of privacy of public figures by the gutter press (however

glossy) can on no account be condoned. If the royal couple were stalked in a private place by prying *paparazzi*, then the immediate judicial confiscation of the pictures by the *juge des référés* was more than justified. Of course, there is clearly a regrettable voyeur-ism among the general public that supports a market for pictures of intimate royal doings. The real responsibility may lie therefore with those governments which have failed adequately to regulate journalistic practices. On the other hand (so the debate goes), the main source of legitimacy of devoting large amounts of public resources to fund the essentially decorative or representational activities of national figures abroad (whether royals, ambassadors or others) lies in the reassuring, inspiring or otherwise positive image thus projected, which in turn serves to divert attention from domestic difficulties, to smooth angles in foreign policy etc. Surely the Duchess of Cambridge, who appears to have been driven from the start by a compelling desire to enter into this role, should have taken particular care to refrain from endangering the public image of niceness of which the British royal family places its hope for survival? Moreover, she can hardly claim not to be accustomed to the prying of the gutter press at home – although of course, in England, the medias may be more easily gagged (see *Trasfigura*), and have apparently agreed in this instance to remain sober, in the wake of last year's hacking scandals and in the shadow of pending regulation. And so on…

The circularity of this imagined exchange is not unlinked to the well-known difficulties encountered in the thinner air of legal argument. The conflict involving the invasion of privacy of public figures (including those who otherwise capitalize on publicity), and claims to journalistic freedom of expression (albeit by paparazzi whose profits rise in direct proportion to the extent to which they expose the intimacy of the rich and famous), is both a *hard case* (in terms of adjudication of rights) and a *true conflict* (in terms of the conflict of laws). As to the former, of course, there is no more an easy answer in this particular case than an adequate way of formulating general legal principle. If these unfortunate photographs do not provide a convincing enough example, the (less trivial?) *Charlie Hebdo* case reveals a conflict of values and rights which is equally divisive and ultimately insoluble from "above", that is, in terms of an overarching, impartial determination of rights and duties. Take Duncan Kennedy's *A Semiotics of Legal Argument* (Academy of European Law (ed.),?*Collected Courses of the Academy of European Law*, Volume Ill. Book 2, 309-365): all the oppositional pairs of conventional argument-bites can be found here, within the common clusters of

substantive or systemic legal arguments (morality, rights, utility or expectations, on the one hand; administrability and institutional competence, in the other), as well as all the various "operations" which they instantiate. Thus, when challenged with invasion of privacy, *Closer* responds, predictably, by denial ("no, we did not cross the bounds, the royals were visible through a telescopic lense"); counter-argument ("well, we merely made use of our fundamental freedom in the public interest"); the formulation of an exception to an otherwise accepted principle ("yes, we admit that the pictures were unauthorized, but these were public figures whose deeds are traditionally of public interest"); then finally by "shifting levels" from the fault/not fault to the terrain of the reality of injury. How could anyone possibly complain about pictures which were both esthetic and modern, and which will undeniably contribute to bring glamour to the somewhat fuddy-duddy, or goody-goody, royal style?

What does all this tell us about the conflict of laws issue? Potentially, the choice of connecting factor entails significant distributional consequences in such a case. At present, outside the sway of Rome II, each forum makes its own policy choices in respect of conflict of law outcomes, and these probably balance each other out across the board in terms of winners and losers – at the price of transnational havoc on the way (through the risk of parallel proceedings and conflicting decisions, which Brussels I has encouraged with *Fiona Shevill*, although *Martinez* may be a significant improvement in this respect). If it were to be decided at some point that Rome II should cover privacy and personality issues, whatever consequences result from the choice of any given connecting factor would obviously be amplified through generalization; the risk of one-sidedness would then have to be dealt with. However, as illustrated by the continued failures of attempts to design an adequate regime in Rome II, any such scheme is highly complex. One might initially assume, say, that editors generally choose to set up in more permissive jurisdictions, whereas victims of alleged violations might more frequently issue from more protective cultures, which encourage higher expectations as to the protection of privacy or personality rights. Any clear-cut rule would therefore be likely to favor either the freedom of the press (country of origin principle, constantly lobbied by the medias from the outset), or conversely the right to privacy (place of harm or victim's habitual residence). However (and allowing for the switch from privacy to defamation), while the *Charlie Hebdo* case may conform to this pattern, the *Duchess of Cambridge* affair turns out to be (more or less) the reverse. To establish a better balance, therefore, exceptions

must be carved out, whichever principle is chosen as a starting point. The place of injury might be said to be paramount, unless there are good reasons to derogate from it under, say, a foreseeability exception in the interest of the defendant newspaper. Alternatively, the country of origin principle may carry the day (as in the E-commerce directive and *Edate Advertising*), but then the public policy of the (more protective) forum may interfere to trump all. In terms of the semiotics of legal argument, this endless to-and-fro illustrates the phenomenon of "nesting" (Kennedy *op cit*, p357). Each argument carries with it its own oppositional twin. Chase a contrary principle out of the door in a hard case and inevitably, at some point in the course of implementation of its opposite, it will reappear through the window.

Of course, even if one settles for the inevitable impact of public policy as a matter of private international law, this is not the end of the story. Because the public policy exception itself will have to mirror the balance of fundamental rights to which the Member States are ultimately held (under the ECHR or, if Rome II is extended to cover such issues, under the Charter). Consider the case of unauthorized pictures of Caroline of Hannover, which had given rise to judicial division within Germany over the respective weight to be given to freedom of press and privacy of the royal couple. In 2004, the ECtHR observed (Grand Chamber, case of VON HANNOVER v. GERMANY (no. 2), Applications nos. 40660/08 and 60641/08):

> *§124. … the national courts carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life. In doing so, they attached fundamental importance to the question whether the photos, considered in the light of the accompanying articles, had contributed to a debate of general interest. They also examined the circumstances in which the photos had been taken…§126. In those circumstances, and having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the latter have not failed to comply with their positive obligations under Article 8 of the Convention. Accordingly, there has not been a violation of that provision.*

Outside the German domestic context, whatever the legal basis supporting the competing interests here, it would be difficult to imagine a very different

outcome. My point, therefore, is merely that given the conflict of values involved, the choice of conflict rule – national or European, general principle or special rule, bright-line or flexible, with foreseeability clause or public policy – is for a significant part, indifferent in the end. The forum will be bound ultimately to a proportionality test, whatever the starting point. And in the end, no doubt, the way in which it implements such a test will depend on its own view of the equities in a specific case. Human rights law indubitably places constraints on adjudication, but it is of course largely context-sensitive and does not mandate one right answer. The economy of any choice of law rule, along with its exceptions, special refinements or escape clauses, is likely to reflect similar constraints – no more, no less.

It may be that the unfortunate saga of the Duchess of Cambridge's topless pictures will begin and end on a purely jurisdictional note, with the interim measures already obtained. These gave the claimants partial satisfaction, at least on French soil and for the existing digital versions of the pictures. At the time of writing, we do not know if further legal action is to be taken with a view to monetary compensation (nor where), and whether the issue of applicable law will arise. We know that the French provisional measures have not entirely prevented copies from circulating on the Internet, nor the medias in other countries (including of course some which would not be bound by Rome II in any event) from publishing or intending to publish them. This raises the additional and much discussed issue (or "can of worms" to borrow Andrew Dickinson's term) of the adequate treatment of cross-border cyber-torts (whether or not linked to the invasion of personality rights). As apparent already in the Duchess of Cambridge case, cyber-privacy conflicts will usually comprise a significant jurisdictional dimension, frequently debated in terms of the lack of effectiveness of traditional measures (such as seizure of the unauthorized pictures), which are usually territorial in scope (not cross-border), and merely geographical (no effect in virtual space). The first deficiency might be overcome through injunctive relief, but the second requires specifically regulatory technology (as opposed to merely legal or normative: see for example, on the regulatory tools available, Roger Brownsword's excellent *Rights, Regulation and the Technological Revolution*, Oxford, OUP, 2008). However, given the inevitable conflicts of values in all cases and the variable balance of equities as between any given instances, it is not necessarily desirable that any such measure should actually achieve universal water-tightness. Look at the *Trafigura* case, after all (a saga involving the

silencing of journalists relating to a case involving the international dumping of toxic waste: see, on the extraordinary judicial journey of the *Probo Koala*, *Revue critique DIP 2010.495*). Was it not lucky that the super-injunction which purported to gag *The Guardian* newspaper to the extent allowed by the most sophisticated judicial technology, did not succeed in preventing an unauthorized twit (but that's also a sore point in French politics at the moment!)?

Lüttringhaus on Uniform Terminology in European Private International Law

Jan D. Lüttringhaus, Senior Research Fellow at the Max Planck Institute for Comparative and International Private Law in Hamburg, has posted an article on SSRN that deals with the uniform interpretation of the Rome I, Rome II and Brussels I Regulations ("Übergreifende Begrifflichkeiten im europäischen Zivilverfahrens- und Kollisionsrecht – Grund und Grenzen der rechtsaktsübergreifenden Auslegung dargestellt am Beispiel vertraglicher und außervertraglicher Schuldverhältnisse". The article is forthcoming in RabelsZ and can be downloaded here. The English abstract reads as follows:

> *Autonomous and interdependent interpretation is a valuable tool for completing and systematising the growing body of European private international law. Yet, the general presumption in favour of uniform interpretation of similar notions in the various European Regulations as set out in Recital (7) of both Rome I and Rome II is overly simplistic. Total uniformity cannot be achieved because provisions governing conflict of laws and jurisdiction often differ in both function and substance.*
>
> *Against this background, this paper analyses the rationale as well as the limits of autonomous and inter-instrumental interpretation. It demonstrates that uniform concepts may be developed in areas where the underlying motives*

behind European provisions on conflict of laws and jurisdiction coincide, e.g. in the context of consumer and employment contracts or direct claims under Rome II and Brussels I. These parallels pave the way for an autonomous understanding of the various notions used in the respective Regulations. However, interdependent interpretation finds its limits in teleological considerations as well as in the persisting functional differences between European instruments on conflict of laws and jurisdiction.

Implied Choice of Law in International Contracts

Manuel Penadés Fons has just published a new book on the implied choice of law in international contracts, entitled *Elección tácita de ley en los contratos internacionales* (Thomson Reuters Aranzadi).

Abstract provided by the author:

> The autonomy of the parties to choose the law applicable to their international commercial contracts does not always manifest through an express clause in the agreement. This silence leads occasionally to litigation over the possibility that the parties exercised such freedom, even though it was not explicitly reflected in the contract. Despite the harmonised solution provided to this issue by the European legislation, practice shows that the answer given by the courts of different Member States is substantially divergent. This reality makes the question highly controversial and unpredictable in the context of international commercial litigation. The book at hand studies the theoretical underpinnings of the institution and explores the criteria used by European caselaw under the Rome Convention and the Rome I Regulation, offering valuable professional guidance to deal with the question of implied choice of law before national and arbitral tribunals.

Summary (click here for whole table of contents)

I.- Introduction: Party autonomy under the Rome I Regulation

II.- Conceptual delimitation: Implied choice of law

III.- Practical delimitation: Implications of the study

IV.- The History and *Status Quo* of Implied Choice of Law in the European Union

V.- The Search for the Real Intention of the Parties

VI.- Conclusions

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Second Issue of 2012's Journal of Private International Law

The second issue of the Journal of Private International Law has recently been released. The table of contents reads as follows:

- *Hill, Jonathan*, **The Significance of Foreign Judgments Relating to an Arbitral Award in the Context of an Application to Enforce the Award in England,** pp. 159-193
- *Elbalti, Beligh,* **The Jurisdiction of Foreign Courts and the Enforcement of their Judgments in Tunisia: A Need for Reconsideration**, pp. 195-224
- *Kuipers, Jan-Jaap,* **Schemes of Arrangement and Voluntary Collective Redress: A Gap in the Brussels I Regulation**, pp. 225-249
- *Nagy, Csongor István,* **The Word is a Dangerous Weapon: Jurisdiction, Applicable Law and Personality Rights in EU Law –**

Missed and New Opportunities, pp. 251-296

- *Papettas, Jenny,* **Direct Actions Against Insurers of Intra-community Cross-Border Traffic Accidents: Rome II and the Motor Insurance Directives**, pp. 297-321
- *Fitchen, Jonathan***, "Recognition", Acceptance and Enforcement of Authentic Instruments in the Succession Regulation**, pp. 323-358
- *Borg-Barthet, Justin,* **The Principled Imperative to Recognise Same-Sex Unions in the EU**, pp. 359-388
- *Smith, Peter De Verneuil; Lasserson, Ben; Rymkiewicz, Ross,* **Reflections on Owusu: The Radical Decision in Ferrexpo**, pp. 389-405
- *Hartley, Trevor,* **Private International Law by AE Anton, Third Edition by PR Beaumont and PE McEleavy** ,pp. 407-410

Third issue of 2012's Journal du Droit International

The third issue of French *Journal du droit international* (*Clunet*) for 2012 was just released. It contains two articles addressing issues of private international law and several casenotes. A full table of content is (or will soon be) accessible here.

The first article is the second part of the survey of the French law on arbitration *(« Liberté, Égalité, Efficacité » : La devise du nouveau droit français de l'arbitrage – Commentaire article par article*) offered by Thomas Clay (Versailles Saint Quentin University). The first part was published in the previous issue of the *Journal*. The English abstract reads:

> *It was the long-awaited reform. The arbitration regulation has just been amended and modernized, more than thirty years after the previous regime came into force. This has been achieved by different means : by rewriting certain unclear or outdated sections, by implementing case law-developed*

solutions already being applied in arbitral proceedings and, finally, by promoting new (sometimes avantgardist) solutions. All the above has resulted in the enactement of a real new Arbitration act.

Therefore, an article-by-article review seems to be a suitable form for an accurate and comprehensive study. This study consists of a comparison between the replaced articles and the new ones, a an analysis of the first commentaries on the reform and an interpretation of the case law following the enactment of the new regulation.

The proposed analysis also evidences the main principles governing the new French law of arbitration. Surprisingly they are in fact rooted in the foundations, not only of private law, but also on the principles of our Republic since they apply (almost perfectly), our Republican maxim, except that brotherhood is substituted by efficiency (the later being more representative).

In conclusion, it is without any doubt a successful text and the long wait was worth it. However it is useful to explain the circumstances of its endless development, which has experienced many disruptions. The article below starts by describing such circumstances.

In the second article, David Sindres, who lectures at Paris I Pantheon Sorbonne University, wonders whether the public policy exception triggered by the proximity of the dispute with the forum is in decline (*Vers la disparition de l'ordre public de proximité ?*).

Is international public policy based upon proximity disappearing from the French legal landscape ? One may have this feeling in the wake of two recent evolutions of positive law. The first one stems from the adoption of the « Rome III » regulation on the law applicable to divorce and legal separation, whose article 10 condemns, without any requirement of proximity, laws which do not grant one of the spouses equal access to divorce or legal separation on grounds of their sex. The second one results from a decision rendered by the French Cour de cassation on October 26, 2011, which opposed international public policy to Ivorian Law insofar as it deprived a child from the right to establish his filiation with his alleged father : once again, the exclusion of foreign law based upon international public policy was not justified by the links between the situation and the French legal order. These two solutions take the opposite

view of previous decisions by the Cour de cassation, which had subordinated the intervention of international public policy to the links between the situation and the French legal order in cases purporting to unilateral repudiations and the establishment of filiation.

This decline of international public policy based upon proximity echoes the criticism that this mechanism has drawn from several authors. At the stage of the creation of the situation within the forum, it presents the risk of weakening international public policy. As for the refusal to recognize situations which were created abroad, based upon their links with the French legal order, it proves discriminatory. Under these circumstances a better solution would be to return to the classical distinction between full and attenuated international public policy, which achieves a satisfactory compromise between two objectives of private international law : the protection of the fundamental values of the forum and the respect granted to vested rights.

La Ley-Unión Europea, July 2012

A new article from Prof. Patricia Orejudo Prieto de los Mozos (Complutense University, Madrid) entitled "La nueva regulación de la ley aplicable a la separación judicial y al divorcio: aplicación del Reglamento Roma III en España" is to be found in the Spanish magazine *La Ley-Unión Europea* of July 31, 2012. The summary reflects the critical view of the author:

> The Rome III Regulation, the first instrument of enhanced cooperation adopted in the EU, seeks to provide "a clear and comprehensive legal framework on applicable law to divorce and legal separation. " However, it does not increase legal predictability, nor does it prevent (on the contrary, it could encourage) the so called "race to the courts." Furthermore, when applied in Spain it will add regulatory fragmentation and complexity to an already intricate situation, making it more difficult to manage for the Spanish legal operators. If we sum this to the democratic deficit inherent to the adoption process and with the fact that the Regulation serves best the

conservative values of other Member States, the Spanish decision to participate is hard to understand.

A comment on the recent ECJ ruling *Oracle v. UsedSoft,* from Prof. Miguel Michinel (University of Vigo), has also been published in the same issue of the magazine.