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.

Conference on the Role of Ethics in International Law

Some of our readers will be interested in the following conference this Friday in Washington, D.C.

The Role of Ethics in International Law

Event Information
Friday, November 13, 2009 / 8:30 AM
Tillar House/Cosmos Club
Washington, D.C.

Each year, the International Legal Theory Interest Group of the American Society of International Law convenes a special conference to consider an important theoretical issue in international law. This year, the conference will focus on the Role of Ethics in International Law. Special attention will be paid both to the role of ethics in public and private international law, as well as to normative and theoretical perspectives. The panels will feature the following distinguished scholars.

The Role of Ethics in Public International Law
Moderator: Brian Lepard, University of Nebraska School of Law

Roger P. Alford, Pepperdine University School of Law, *Moral Reasoning in International Law*
Oona A. Hathaway, Yale Law School, *Why Do States Comply With International Law?*
Edward T. Swaine, George Washington University Law School, *Breaching*

The Role of Ethics in Private International Law
Moderator: Trey Childress, Pepperdine University School of Law
Lea Brilmayer, Yale Law School, *The Ethical Problem in Private International Law*
Perry Dane, Rutgers School of Law, *The Natural Law Challenge to Choice of Law*
Dean Symeon C. Symeonides, Willamette University College of Law, *The Quest for Multistate Justice*

Normative and Theoretical Perspectives
Moderator: Tim Sellers, Baltimore University School of Law
Samantha Besson, University of Fribourg/Duke University School of Law, *The Nature of Human Rights Theory*
H. Patrick Glenn, McGill University, *The Ethic of International Law*
Mary Ellen O'Connell, Notre Dame Law School, *Finding*Jus Cogens*: Preemptory Norms and Natural Law Process*

Lunch will be served as part of this free conference for ASIL members ($15.00 for non-ASIL members). For further information, see here.

Annual Conference of the American Association of Private International Law (ASADIP)

The American Association of Private International Law (Asociación americana de derecho internacional privado ASADIP) will hold its third annual conference "International Business Law in a time of change" on 12 and 13 November in Venezuela, Isla de Margarita). A special tribute will be given to Tatiana Maekelt,

who was one of the most outstanding conflicts scholars of Latin America.

Among the topics that will be addressed and which might interest members of this list are:

- Bernard Audit (Paris II Panthéon-Assas University) on "Problemas actuales del convenio arbitral: efecto negativo, extensión a otros contratos y a otros miembros del grupo societario"
- Georges Bermann (ColumbiaUniversityl) on "Recent Trends in Parallel Litigation"
- Herbert Kronke (Heidelberg University) on "Transnational Certainty and the Convention on Intermediated Securities –Reflections on Key Issues"
- David P. Stewart (Georgetown University) on "Companies and Human Rights: Litigation in the United States Under the "Alien Tort Statute"
- Juan M. Velázquez Gardeta (Basque Country University) on "Challenges of E-Commerce: North American Case Law and the Future of Latin America"
- Didier Opertti Badán (Catholic University of Uruguay) on "The Situation of Private International Law in a Context of Globalization"

For more information, please consult the website of the conference: http://www.negociosinternacionales.com.ve/

and here to ask for your membership to the associacion.

New Journal of International Dispute Settlement

Oxford University Press will publish a new *Journal of International Dispute Settlement* from 2010 onwards. The General Editors will be Geneva based scholars Gabrielle Kaufman-K0hler and Joost Pauwelyn, with Thomas Schultz being the Managing Editor.

Since the 1980s, a radical development has taken place in international dispute

settlement. The number of international courts, tribunals and other international dispute resolution mechanisms has increased dramatically. The number of international disputes resolved by such means has risen in even greater proportions. These disputes more and more frequently raise issues that combine private and public international law, effectively bringing back to light the deep-seated interactions that have always existed between these two traditional fields of academic study. The regulatory impact of certain branches of international dispute settlement – such as international arbitration – further create the need to take a step back and think about where we are going. The growth of the field of international dispute settlement in practice, the novelty and significance of the issues posed, and the originality of the academic angle from which such issues need to be addressed are the factors that triggered the launch of the Journal of International Dispute Settlement.

JIDS defines its mission according to these developments. It is primarily designed to encourage interest in issues of enduring importance and to highlight significant trends in the field of international dispute settlement. Heavyweight and reflective articles will find preference over news-driven works. In addition to strictly legal approaches, the journal's purview encompasses studies inspired by legal sociology, legal philosophy, the history of law, law and political science, and law and economics. It covers all forms of international dispute settlement and focuses particularly on developments in private and public international law that carry commercial, economic and financial implications. The main subjects that will be dealt with are international commercial and investment arbitration, WTO dispute resolution, diplomatic dispute settlement, the settlement of international political disputes over economic matters in the UN, as well as international negotiation and mediation. Particular attention will be paid to questions that involve a combination of private and public international law.

JIDS will address procedural issues that arise in international dispute resolution procedures, such as provisional measures; the consensual character of jurisdiction; evidence; amicus curiae interventions; res judicata, lis pendens and double fora; the procedural influence of human rights; experts and witnesses; interpretation, revision and challenge of awards and decisions; recognition and enforcement, etc. Comparative approaches, which are attentive to the different ways that these issues are dealt with in different types of dispute resolution

procedures, are of particular interest.

The journal will also include substantive aspects pertaining to those fields of the law that are shaped by international courts and tribunals, be they of an interstate, private or mixed character. Hence, substantive issues in international economic law and international investment law will be considered, so long as the link to international dispute settlement is clearly established. This will include questions of substantive law properly speaking, but also more general aspects of the substantive evolution of international law, covering issues such as the proliferation of international dispute settlement mechanisms and the ensuing fragmentation of international law.

JIDS is intended not only for academics with an interest in international dispute settlement, international arbitration, private or public international law. It is also intended for practitioners who are looking for a single source that captures the fundamental trends with the field, allowing them to anticipate new issues and new ways to resolve them. Graduate and post-graduate students, government officials, in-house lawyers dealing with international disputes, and people working for international courts and tribunals and for international arbitration institutions should also find interest in this journal.

The contents of the first two issues of the Journal can be found here.

Dr Krombach's Final (?) Contribution to the European Judicial Area

Last week-end, Dr. Dieter Krombach was found in the street, tied up, in front of a court in Mulhouse, France, in the middle of the night.

What was he doing there, you may wonder?

Well, André Bamberski has now revealed that he had the 74 year old German doctor kidnapped in Germany and brought to France. The French police had been alerted that Dr. Krombach could be found in Mulhouse by an anonymous phone call from someone speaking French with a strong Russian accent.

Of course, many readers will know what Bamberski has against Krombach from the famous *Krombach* cases of the European Court of Justice and the European Court of Human Rights. Krombach allegedly raped and killed Bamberski's 14 year old daughter in 1982. He was sentenced by a French court in abstentia in 1995 to 15 years of prison. But he never served them, as German authorities did not prosecute him, nor extradited him. So Bamberski, it might be argued, was thinking that he would soon die without serving his sentence. One logical theory is that he did not really trust the German legal system, so he decided to take the necessary steps to ensure that justice would done. It has been suggested that he thus involved a couple of Russian associates he had met in Munich earlier this month.

If that is true (and we offer no formal opinion either way here), he may or may not have been aware that what he was doing was illegal. Possibly, he had not heard about *West Tankers* and mutual trust. At the same time, one doubts that Dr Krombach was a stronger believer in mutual trust, since the European Court of Human Rigths recognized that he had not been afforded a fair trial by French criminal courts.

In any case, Bambersky has now been arrested in France and charged on Tuesday with kidnapping, among other criminal offences.

Professor Hess informed me that the Bavarian ministry of justice has issued earlier today a press declaration insisting that States have the monopoly of violence, that private individuals may substitute neither judges nor enforcement authorities, and that this abduction was wholly unacceptable.

Krombach was first brought to a hospital in Mulhouse, then transferred to Paris so that he could be heard by a French judge on Wednesday night. Bamberski's lawyer is calling for a new criminal trial in France.

Latest Issue of “Rabels Zeitschrift”

The latest issue of the **Rabels Zeitschrift** (Vol. 73, No. 4, October 2009) is a special issue on the occasion of the 60th birthday of *Professor Jürgen Basedow* and contains the following articles:

- ***Dietmar Baetge:*** Contingency Fees – An Economic Analysis of the Federal Constitutional Court’s Decision Authorising Attorney Contingency Fees – the English abstract reads as follows:

In Germany, until recently, contingency fees were prohibited. In December 2006, the legal ban on contingency fees was declared unconstitutional by the Federal Constitutional Court (Bundesverfassungsgericht). Implementing the Court’s ruling, the German legislator, in 2008, legalised contingency fees on a limited basis. This paper attempts to analyse the Constitutional Court’s decision from an economic vantage point. The main constitutional reasons given to justify the legal ban on contingency fees are translated into economic terms and further elaborated. Points of discussion include the problem of moral hazard between the lawyer and the judge on the one hand and the lawyer and his client on the other. A third question dealt with in the paper is the extent to which contingency fees may influence the efficient allocation of resources. The paper concludes that access to the instrument of contingency fees should not be limited to poor clients but also extended to affluent persons.

- ***Moritz Bälz***: Japan’s Accession to the CISG – the English abstract reads as follows:

On 1 July 2008 Japan, as the 71st state, acceded to the United Nations Convention on the International Sale of Goods (CISG). As of 1 August 2009, the most important convention in the field of uniform private law will thus enter into force in Japan, leaving Great Britain as the sole major trading nation not yet party to the convention. The article examines the complex reasons why Japan did not accede earlier as well as why this step was finally now undertaken. It, furthermore, offers an assessment of the importance of the

CISG for Japan prior to the accession and the impact to be expected from the convention on the reform of the Japanese Civil Code which is currently under way. Finally, it is argued that Japan's accession nourishes the hope that the CISG will spread further in Asia, thus not only extending its reach to one of the world's most dynamic regions, but also opening up opportunities for a future harmonisation of Asian contract law.

- ***Friedrich Wenzel Bulst***: The Application of Art. 82 EC to Abusive Exclusionary Conduct – the English abstract reads as follows:

The article addresses recent developments in the application of the prohibition of abuse of dominance in EC competition law. The European Commission has published a communication providing guidance on its enforcement priorities in applying Art. 82 EC to abusive exclusionary conduct of dominant undertakings. Under this more effects-based approach which focuses on ensuring consistency in the application of Arts. 81 and 82 EC as well as the Merger Regulation, priority will be given to cases where the conduct in question is liable to have harmful effects on consumers. After a brief introduction (section I), the author outlines the main elements of the communication and illustrates how the Commission's approach to providing guidance in this area has evolved since the publication of its 2005 discussion paper on exclusionary abuses (section II). The author then addresses the scope of the communication against the background of the case law on the Commission's discretion (not) to pursue cases (section III). The central concept of the communication is that of »foreclosure leading to consumer harm«. Against this background the author discusses, in the context of refusal to supply abuses both in and outside an IP context, the operationalisation of the criterion of harm to consumers (section IV) before concluding (section V).

- ***Anatol Dutta:*** The Death of the Shareholder in the Conflict of Laws – the English abstract reads as follows:

The death of the shareholder raises the question how the law applicable to the company and the law governing the succession in the deceased shareholder's estate have to be delimitated. This borderline becomes more and more relevant against the background of recent jurisprudence of the European Court of Justice (ECJ) in Centros, Überseering and Inspire Art concerning the freedom of

movement of companies in the Community. On the one hand, as a consequence of this jurisprudence the laws governing the company and the succession often differ. On the other hand, the ECJ's jurisprudence might further blur the boundaries between the laws governing companies and successions. The article tries to draw the border between the relevant choice-of-law rules. It comes to the conclusion that the consequences of the shareholder's death for the company and his share are subject to the conflict rules for companies (supra III.). More problematic, though, is the characterisation of the succession in the share of the deceased shareholder. Some legal systems contain special succession regimes for shares in certain private companies and partnerships. The article argues (supra IV.) that the succession in shares has to be dually-characterised and subjected to both, the law governing the company and the succession. Yet clashes between the applicable company and succession laws are to be solved by giving precedence to the applicable company law. The precedence of company law should be clarified by the legislator – by the German legislator when codifying the conflict rules for companies and by the European legislator when codifying the conflict rules for successions upon death (supra V.).

- ***Franco Ferrari***: From Rome to Rome via Brussels: Remarks on the Law Applicable to Contractual Obligations Absent a Choice by the Parties (Art. 4 of the Rome I Regulation)
- ***Christian Heinze***: Industrial Action in the Conflict of Laws – the English abstract reads as follows:

The introduction of a special conflicts rule for industrial action in Art. 9 Rome II Regulation can be considered as a felicitous innovation of European Private International Law. The application of the law of the country where the industrial action is to be taken or has been taken is founded on the public (social) policy concerns of the country where the action takes place and will therefore, in general, obviate the need for any enforcement of this country's strike laws by means of the ordre public or as internationally mandatory provisions (at least as far as intra-European cases are concerned). The major drawback of Art. 9 does not derive from the rule itself but rather from its restriction to »non-contractual liability«. Article 9 Rome II Regulation may therefore designate a substantive law applicable to the non-contractual liability

for the industrial action which is different from the law applicable to the individual employment contract (Art. 8 Rome I Regulation) or a collective labour agreement. This may be unfortunate because the industrial action will usually have consequences for at least the individual employment contract (e.g. a suspension of contractual obligations) which might be governed by a different law (Art. 8 Rome I Regulation) than the industrial action itself (Art. 9 Rome II Regulation). Possible conflicts between these laws can be resolved by extending the scope of Art. 9 Rome II Regulation to the legality of the industrial action in general, thus subjecting any preliminary or incidental questions of legality of industrial actions to Art. 9 Rome II Regulation while applying the lex contractus to the contractual consequences of the action.

- ***Eva-Maria Kieninger***: The Full Harmonisation of Standard Contract Terms – a Utopia? – the English abstract reads as follows:

The article discusses the proposal for a consumer rights directive of October 2008, in which the European Commission suggests to move from minimum to full harmonisation of specific areas of consumer contract law. The article specifically examines whether full harmonisation of the law relating to the judicial control of unfair contract terms, even if politically desirable, will be feasible in the context of non-harmonised national contract law. Examples are presented for cases which were decided differently by national courts on the basis of divergent rules of general contract law. The article discusses whether the Draft Common Frame of Reference (DCFR) can be used by the European Court of Justice (ECJ) and the national courts as a common yardstick to measure the unfairness of a contractual term. Two problems present themselves: one is the question of legitimacy because, until now, the DCFR is no more than a scientific endeavour which in part rests on the autonomous decisions of its drafters and does not merely present a comparative restatement of Member States' laws; second, the DCFR makes excessive use of the term »reasonableness« so that, in many instances, its ability to give guidance in the assessment of the unfairness of a specific contract term is considerably reduced. The question of legitimacy could be solved by an optional instrument which could be chosen by the parties as the applicable law.

- ***Jan Kleinheisterkamp***: Internationally Mandatory Rules and Arbitration

– A Practical Attempt – the English abstract reads as follows:

This article treats the impact that internationally mandatory rules of the forum state may have on the effectiveness of arbitration agreements if the claims are based on such internationally mandatory rules but the parties had submitted their contract to a foreign law. The specific problems of conflicts of economic regulation are illustrated and discussed on the basis of Belgian and German court decisions on disputes relating to commercial distribution and agency agreements. European courts have adopted a restrictive practice of denying the efficacy of such tandems of choice-of-law and arbitration clauses if there is a strong probability that their internationally mandatory rules will not be applied in foreign procedures. This article shows that neither this approach nor the much more pro-arbitration biased solutions proposed by critics are convincing. It elaborates a third solution which allows national courts both to reconcile their legislator's intention to enforce a given public policy with the parties' original intention to arbitrate and to optimize the effectiveness of public interests as well as that of arbitration.

- ***Axel Metzger***: Warranties against Third Party Claims under Arts. 41, 42 CISG – the English abstract reads as follows:

The United Nations Convention on Contracts for the International Sale of Goods (CISG) provides two regimes for warranties against third party claims. The general rule of Art. 41 establishes a strict liability rule for all third party claims not covered by Art. 42. Article 42 limits the seller's liability for infringement claims based on intellectual property. A seller under the CISG warrants only against third party intellectual property claims he »knew or could not have been unaware« at the time of the conclusion of the contract. In addition, his liability is territorially restricted to claims based on third party intellectual property rights in the countries contemplated by the parties at the conclusion of the contract. This article provides an overview of seller's warranties under Arts. 41 and 42. It examines, more specifically, whether the limited scope of seller's warranties for third party intellectual property claims is efficient and whether it is expedient from a comparative law perspective. Under a traditional economic analysis of law approach, the party who can avoid third party claims most cheaply should bear the risk of infringement claims. This will often be the seller, especially if he has produced the goods or has specific knowledge of the

industry. But it may also occur that the buyer is in the superior position to investigate intellectual property rights, e.g. if the buyer is a specialized player in the industry and the seller is a mere vendor without specific knowledge in the field. Article 42 allows an efficient allocation of the risk by the court. The party charged with the risk, be it seller or buyer, should not only warrant against third party rights he knew but also for those he could have been aware of after investigation in the patent and trademark offices of the relevant countries or through other resources. Such a duty to investigate may also exist with regard to unregistered rights like copyrights. A strict interpretation of the seller's (or buyer's) duty is in accordance with international standards. Seller's warranties are strict liabilities rules in many countries with an exception in case of bad faith on the part of the buyer.

- ***Ralf Michaels***: Rethinking the UNIDROIT Principles: From a law to be chosen by the parties towards a general part of transnational contract law – the English abstract reads as follows:

1. The most talked-about purpose of the UNIDROIT Principles of International and Commercial Contracts (PICC) is their applicability as the law chosen by the parties. However, focusing on this purpose in isolation is erroneous. The PICC are not a good candidate for a chosen law – they are conceived not as a result of the exercise of freedom of contract, but instead as a framework to enable such exercise. Their real potential is to serve as objective law – as the general part of transnational contract law. 2. This is obvious in practice. Actually, choice of the PICC is widely possible. National courts accept their incorporation into the contract; arbitrators frequently accept their choice as applicable law. However, in practice, the PICC are rarely chosen. The most important reason is that they are incomplete. They contain no rules on specific contracts. Further, they refer to national law for mandatory rules and for standards of illegality and immorality. This makes their choice unattractive. 3. The nature of the PICC is much closer to that of the U.S. Restatement of the law. The U.S. Restatement becomes applicable not through party choice but rather as an articulation of background law. Actually, this describes the way in which the PICC are typically used in practice. 4. This use as background law cannot be justified with an asserted legal nature of the PICC (their »law function«). Rather, the use is justified insofar as they fulfill two other functions: the »restatement function«

(PICC as description of a common core of legal rules) and the »model function« (PICC as model for a superior law). 5. From a choice-of-law perspective, such use cannot be justified under traditional European choice of law, which designates legal orders, not incomplete codifications, as applicable. 6. By contrast, application could be justified under U.S. choice of law. Under the governmental interest analysis, the PICC could be applicable to situations in which no state is interested in the application of its own law. Their international character qualifies the PICC for the Restatement (2d) Conflict of laws. Finally, for the better-law theory, according to which the substantive quality of a law is a criterion for choice of law, the PICC are a candidate insofar as they perform a model function. 7. In result, the PICC are comparable to general common law or the ius commune, within which regulatory rules of national, supranational and international origin act like islands. 8. Altogether, this results in a complex picture of transnational contract law, which combines national, international and non-national rules. The PICC can be no more, but no less, than a general part of this contract law.

- ***Hannes Rösler***: Protection of the Weaker Party in European Contract Law – Standardised and Individual Inferiority in Multi-Level Private Law – the English abstract reads as follows:

It is a permanent challenge to accomplish freedom of contract effectively and not just to provide its formal guarantee. Indeed, 19th century private law already included elements guaranteeing the protection of this »material« freedom of contract. However, consensus has been reached about the necessity for a private law system which also provides for real chances of self-determination. An example can be found in EC consumer law. Admittedly, this law is restrained – for reasons of legal certainty – by its personal and situational typicality and bound to formal prerequisites. However, the new rules against discrimination are dominated by approaches which strongly focus on the protection of the individual. It is supplemented by national provisions, which especially counter individual weaknesses. The autonomy of national law can be explained by the different traditions with regard to »social« contract law in the Member States. The differences are especially apparent regarding public policy, good faith or breach of duty before or at the time of contracting (culpa in contrahendo). They form another argument against the undifferentiated saltation from partial to total harmonisation of contract law.

- ***Giesela Rühl***: The Presumption of Non-Conformity in Consumer Sales Law – The Jurisprudence of the Federal Court of Justice in comparative perspective – the English abstract reads as follows:

The Law on the Modernisation of the Law of Obligations has introduced a large number of provisions into the German Civil Code. One of these provisions has kept German courts particularly busy during the last years: § 476. The provision implements Art. 5 III of the Consumer Sales Directive and provides that any lack of conformity which becomes apparent within six months of delivery of the goods is presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity. The presumption has proved to be difficult to apply in practice: the German Federal Court of Justice (Bundesgerichtshof; hereinafter BGH) alone as issued eight – highly controversial – decisions. And numerous articles, case notes and commentaries have analysed and criticised each and every one of them. It is therefore surprising to see that both the BGH and the German literature refrain from exploiting one very obvious source of information that might help to deal with § 476: comparative law. Even though Art. 5 III of the Consumer Sales Directive has been implemented in all Member States except for Lithuania nobody has endeavoured to analyse its application in other countries to this date. The above article tries to fill this gap and looks at § 476 from a comparative perspective. It finds that courts across Europe apply the provision in the same way as the BGH regarding the exclusion and the rebuttal of the presumption. However, regarding the scope of the presumption, the BGH stands alone with its strict interpretation. In fact, no other court in Europe refuses to apply the presumption in cases in which a defect that occurs after delivery might be the result of a basic defect present at the time of delivery. The article, therefore, concludes that the BGH should rethink its position regarding the scope of the presumption and refer the next case to the European Court of Justice.

- ***Jens M. Scherpe:*** Children Born out of Wedlock, their Fathers, and the European Convention on Human Rights – the English abstract reads as follows:

Unlike in many European countries, only a father married to the mother will automatically have parental custody (elterliche Sorge) in Germany. A father not

married to the mother is effectively barred from obtaining parental custody unless the mother agrees, and there is not even the possibility – unlike e.g. in England – for the courts to interfere with the mother's decision, cf. §§ 1626a, 1672 BGB. The legal rules are based on the – somewhat questionable – assumption that the mother's motives for refusal of parental custody are based on the welfare of the child. The German statutory provisions have been challenged unsuccessfully in the German Constitutional Court (Bundesverfassungsgericht; BVerfG). However, the BVerfG voiced some doubt as to the premises upon which these rules rested and has demanded that further development be monitored closely. The vast majority of German academic authors also doubts the constitutionality of § 1626a BGB and are in favour of reforming the law. The matter is now the subject of a case pending at the European Court of Human Rights (ECtHR), Zaunegger v. Germany, in which the applicant claims, inter alia, that his right of respect for family life under Art. 8 ECHR is being violated. In previous cases, McMichael v. United Kingdom and Balbontin v. United Kingdom, challenges of Scots and English law on parental responsibility for fathers not married to the mother have failed. This article critically analyses the legal rules in England and Germany and, based on the differences between them and the relevant case law of the ECtHR, suggests that the Court will find that the German rules are indeed in breach of the European Convention. The article concludes with suggestions for reform.

- ***Wolfgang Wurmnest***: Unilateral Restrictions of Parallel Trade by Dominant Pharmaceutical Companies – Protection of Innovation or Anti-competitive Market Foreclosure? – the English abstract reads as follows:

The elimination of cross-border barriers to trade as means of encouraging competition in the single market lies at the heart of EC-competition policy. Limitations of parallel trade were therefore treated as restrictions of competition. With regard to the pharmaceutical sector the merit of such a competition policy has been called into question. It is said that the unique features of the market for pharmaceuticals, namely the existence of price regulation at the national level for prescription medicines, makes parallel trade socially undesirable as it does not foster real price competition and undermines investment in R&D to the detriment of the consumer. Hence, unilaterally imposed restrictions of parallel trade by dominant producers, such as supply quota systems, should not be regarded as a violation of Art. 82 EC. This article

discusses the legal and economic arguments in favour of a policy shift in light of the recent case Lélos v. GlaxoSmithKline. In this case the European Court of Justice (ECJ) has held that a pharmaceutical company in a dominant position cannot be allowed to cease honouring the ordinary orders of an existing customer for the sole reason that the customer engages in parallel trade, but that Art. 82 EC does not prohibit a dominant undertaking from refusing to fill orders that are out of the ordinary in terms of quantity in order to protect its commercial interests. It is argued that the ECJ was right in denying pharmaceutical companies a general right to limit the flow of pharmaceutical products by unilateral measures as the pro-competitive effects of parallel trade are greater than often assumed.

- ***Nadjma Yassari:*** The Reform of the Spousal Share under Iranian Succession Law – An example of the transformability of Islamic law – the English abstract reads as follows:

It is generally held that Islamic law is a static system of rules, unable to accommodate change. This is especially thought true of family and succession laws that are firmly rooted in a religious foundation. Nonetheless, one can observe in the last decades how active the Iranian legislator has been in reforming its family laws, with the result that a number of traditional provisions have undergone remarkable changes. Most recently, the Iranian Parliament ventured into the field of succession law by amending the inheritance portion received by the surviving wife, which so far had been limited to movables. Under the new regulations, she takes her portion also from immovable property. The previous limitations placed on the inheritance portion of the widow have no base in the Koran, the primary source of Islamic shi'i law, and were deduced from another primary source of law, notably the traditions of the twelve Imams. This article examines the religious foundations of the inheritance rule on the spousal share, its codification in the Iranian Civil Code and the proposed amendments by the Iranian Parliament. It shows how the Iranian Parliament by emphasising another interpretation of the sources has been successful in changing a rule that has prevailed in Iranian law for over 80 years. Without doubt, this reform is a significant step towards the harmonisation of the widow's inheritance share and the elimination of the harsh economic consequences of the rule as it stood. Beyond this effect however it can also be taken as an illustration of the way legal development can be set

within an Islamic framework. Moreover, it shows that it is ultimately the intrinsic structure of the sources of Islamic law and the methods by which law is deduced from them that makes reform possible.