Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2012)

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

- ***Eva-Maria Kieninger***: "Das auf die Forderungsabtretung anzuwendende Recht im Licht der BIICL-Studie" – the English abstract reads as follows:

In the Rome I Reg., the question of the law applicable to priority conflicts arising from the assignment or subrogation of claims has deliberately been left open (see Art. 27 (2) Rome I Reg.). As a first step towards a future solution, the EU-Commission has requested the British Institute of International and Comparative Law (BIICL) to prepare an empirical and legal study and to elaborate options for a legislative solution. The article presents the study and partly criticises its proposals. The introduction of a restricted choice of law seems overly complex and may lead to unforeseeable results, so that the rather limited addition of flexibility seems to be outweighed by its drawbacks. The alternatively suggested applicability of the law governing the claim goes not far enough in its exemptions of bulk assignments whereas the last proposal, putting forward the law of the assignor's domicile is accompanied by exemptions which are not elaborated with the necessary precision and possibly too broad. The article welcomes, however, the BIICL's proposal to extend any future rule on priority conflicts in Art. 14 Rome I Reg. to all proprietary relationships including that between assignor and assignee.

- ***Peter Mankowski***: "Zessionsgrundstatut v. Recht des Zedentensitzes – Ergänzende Überlegungen zur Anknüpfung der Drittwirkung von Zessionen" – the English abstract reads as follows:

The proprietary aspects erga omnes of the assignment of debts have not been dealt with by Art. 14 Rome I Regulation. They are a topic of constant debate which appears to have come to some stalemate in recent times, though. But there still are some aspects and issues which deserve closer inspection than

they have attracted yet, in particular the interfaces with the European Insolvency Regulation and the UN Assignment Convention.

- ***Kilian Bälz***: "Zinsverbote und Zinsbeschränkungen im internationalen Privatrecht" – the English abstract reads as follows:

This article challenges the widely held opinion that provisions prohibiting and restricting interest are mandatory provisions in the sense of Art. 9 Rome I Regulation. According to this opinion, provisions prohibiting and restricting interest at the debtor's seat may apply also in the case another law has been determined as the proper law of the contract.Prohibitions on taking interest which are based on the Islamic legal tradition, however, demonstrate that it is not appropriate to treat respective restrictions generally as mandatory. Normally, there are far reaching exemptions, so that one cannot speak of a prohibition of interest of general application in Muslim jurisdictions. Against this backdrop it is more than questionable whether the respective provisions are mandatory in the sense of Art. 9 (1) of the Rome I Regulation.

Further, interest rate caps normally are determined in view of a specific currency. From this it follows that under Art. 9 (3) Rome I Regulation interest rate caps can only be recognised in cases where there is a congruence of applicable law and currency. Finally, interest rate caps cannot be recognised where local banks are exempted from the respective restrictions. In the latter case, the interest rate cap merely serves the purpose of protecting the local credit market. As a result, provisions prohibiting or restricting interest can only be recognised as "mandatory provisions" in very exceptional circumstances.

- ***Stefan Arnold***: "Entscheidungseinklang und Harmonisierung im internationalen Unterhaltsrecht" – the English abstract reads as follows:

Within a world which becomes smaller and smaller, Private International Law also gains importance with respect to the area of maintenance obligations. Harmonization measures – like the new European rules on the law applicable to maintenance obligations – promise legal certainty here. The new regime established by the Hague Protocol from November 23rd 2007 is not sufficiently coordinated with the European Regulation No. 4/2009 on Maintenance Obligations, however. This paper introduces into the main aspects of the new

rules on the law applicable to maintenance obligations and suggests a way to establish better coherence between the Conflict of Laws rules and the procedural possibilities established by the Regulation No. 4/2009.

- ***Kurt Siehr***: "Kindesentführung und EuEheVO – Vorfragen und gewöhnlicher Aufenthalt im Europäischen Kollisionsrecht" – the English abstract reads as follows:

The annotated cases deal with alleged child abductions covered by the Hague Abduction Convention of 1980 and the Brussels II Regulation of 2003. The case McB. of the European Court of Justice (ECJ) had to decide whether an Irish unmarried father of three children had custody rights with respect to his children in order to qualify him to prevent a removal of the children from their home in Ireland and, if removed to England, ask for return to Ireland under the Hague Abduction Convention of 1980 and the Brussels II Regulation of 2003. The ECJ decided very quickly in the PPU-proceedings (procédure préjudicielle d'urgence) and found that at the time of removal the father had no right of custody under Irish law and therefore could not blame the mother of having illegally removed the children to England. This is correct. In the PPU-proceedings the ECJ could not go into details and evaluate Irish law under the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights.

In the cases of the ECJ in Mercredi v. Chaffe and of the Austrian Supreme Court of 16 November 2010 the term "habitual residence" was correctly defined and could be applied by the lower national courts. In Mercredi v. Chaffe the English Court of Appeal finally raised doubts whether there was a wrongful removal of the child from England to the French overseas department La Réunion at all.

- ***Francis Limbach***: "Nichtberechtigung des Dritten zum Empfang einer der Insolvenzmasse zustehenden Leistung: Zuständigkeit, Qualifikation und Berücksichtigung relevanter Vorfragen" – the English abstract reads as follows:

Upon opening German insolvency proceedings, the insolvency debtor loses the right to dispose of his assets. Thus, holding a claim against another person, the

insolvency debtor is legally unable to instruct the latter to pay a third party the sum owed. In such an event, the insolvency administrator may demand recovery of the amount received by the third party on the grounds of Paragraph 816(2) of the German Civil Code. The Higher Regional Court of Hamm had to deal with such a case: It involved an insolvency debtor who had presumably instructed a party with a debt to her to perform not to herself but to her mother who eventually received the payment. The insolvency administrator then filed a claim against the mother to recover the respective sum. As the amount paid might have originated in a contract governed by Portuguese law, the Court had to consider whether the filed action appeared as an "annex procedure" related to an insolvency case, implying an international jurisdiction on the grounds of Article 3(1) of the European Insolvency Regulation. Furthermore, in order to identify the applicable law in this matter, the Court had to determine whether the respective legal relationship was to be qualified as of insolvency or as of general private law. At last, it had to consider relevant preliminary questions regarding the source of the claim filed.

- ***Tobias Helms***: "Vereinbarung von Gütertrennung durch Wahl des Güterstandes anlässlich einer Eheschließung auf Mauritius" – the English abstract reads as follows:

In this case the German-based parties (the husband being a German citizen and the wife a Mauritian national) appeared before the Federal Supreme Court (Bundesgerichtshof) to contest whether they had validly agreed on the matrimonial property regime of Gütertrennung (separation of goods) when they concluded their marriage in Mauritius. Mauritian law does not provide for a default statutory matrimonial property regime. The engaged couple is instead given a choice between separation of goods and community of goods. The courts of lower instance considered the fact that the couple had chosen separation of goods while concluding their marriage in Mauritius to be irrelevant as the matrimonial property regime in this case is governed by German law according to Art. 15 Sect. 1 EGBGB in connection with Art. 14 Sect. 1 No. 2 EGBGB. However, the Federal Supreme Court correctly disagreed with this assessment and held that the parties had validly agreed to adopt the German Gütertrennung. It was held that the deciding factor was that the spouses had given mutual declarations of their intent to regulate their property regime. This procedure was held to be equivalent to the conclusion of a

marriage contract under German law (§ 1408 BGB).

- ***Rolf Wagner***: "Vollstreckbarerklärungsverfahren nach der EuGVVO und Erfüllungseinwand – Dogmatik vor Pragmatismus?" – the English abstract reads as follows:

Article 45 of Council Regulation (EC) No 44/2001 (Brussels I-Regulation) deals with the limits within which the national courts of the State of enforcement may refuse or revoke a declaration of enforceability. The European Court of Justice (ECJ) had to decide whether this provision precludes the court with which an appeal is lodged under Article 43 or Article 44 of that regulation from refusing or revoking the declaration of enforceability on the ground that there had been compliance with the judgement in respect of which the declaration of enforceability was obtained. The article discusses the decision of the ECJ and raises the question whether the German law has to be changed.

- ***Katharina Hilbig-Lugani***: "Forderungsübergang als materielle Einwendung im Exequatur- und Vollstreckungsgegenantragsverfahren" – the English abstract reads as follows:

The German Federal Supreme Court's decision concerns a complaint against a declaration of enforceability pronounced for a Swiss judgement under the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations and the German execution provisions, contained until 18 June 2011 in the AVAG, now in the new AUG. The case raised the well-discussed questions of whether the court deciding on enforceability could take into account defenses of the debtor based on a modification of the judgement, on partial performance of the maintenance and on reasons to modify the judgement. But it particularly raised the new question of the effect of the legal transfer of the debt enshrined in the judgment to the public authority who has provided the maintenance creditor with subsidiary social security benefits. Convincingly, the Federal Supreme Court decided that this as well qualified as a defense to be taken into account in the exequatur decision (under Section 12 AVAG). As before, the court seems to limit its statements to those defenses which are undisputed or which are based on circumstances having acquired the force of res iudicata. Pursuant to the author, the legal appreciation of the claim's transfer should be the same as the one

provided by the Federal Supreme Court under the new German execution provisions in the AUG and under the maintenance regulation 4/2009.

- ***Andreas Piekenbrock***: "Ansprüche gegen den ausländischen Schuldner in der deutschen Partikularinsolvenz"
- ***Eva-Maria Kieninger***: "Abtretung im Steuerparadies" – the English abstract reads as follows:

The Austrian Supreme Court has held that the account debtor of a claim in damages cannot rely on provisions subjecting the effectiveness of an assignment to the (prior) consent of the account debtor, if those provisions do not form part of the law governing the assigned claim (art 12 (2) Rome Convention). The case note discusses the possible impact of the decision on the presently debated reform of art 14 Rome I Reg. It suggests that the term "assignability" in art 14 (2) Rome I Reg. should be replaced by a more precise definition of those rules which limit or exclude the assignability of claims in the interest of the debtor.

- ***Helen E. Hartnell:*** U.S. Court of Appeals Rules on Effect of One Country's Article 96 Reservation on Oral Contract Governed by the CISG (in English)

The U.S. Court of Appeals for the Third Circuit has decided an important case on Article 96 CISG, which permits a State "whose legislation requires contracts of sale to be concluded in or evidenced by writing" to make a declaration of inapplicability in regard to any CISG provision that disavows a writing requirement for international sales contracts. Only 11 Contracting States have such declarations in effect. In Forestal Guarani S.A. v. Daros International, Inc. (2010), the court addressed the question of how to apply Article 96 to a case involving one party with its place of business in Argentina, which made an Article 96 declaration, and one based in the U.S., which made no such declaration. The court embraced what it called the "majority approach" and held that the Article 96 declaration did not absolutely bar an action to enforce the oral contract. Rather, the court held that Article 96 CISG gives rise to a gap that permits resort to the forum's private international law rules per Article 7(2), and remanded to the lower court with instructions on how to proceed. If

Argentine law governs, then the lower court should examine Argentine domestic law to ascertain the enforceability of the oral contract. However, if U.S. law governs, then the lower court should apply the U.S. domestic law to the issue of enforceability, in lieu of CISG provisions disavowing a writing requirement. The article criticizes the result for its turn to domestic law in the latter situation, and questions the viability of Article 96 declarations by States that do not totally prohibit oral contracts.

- ***Hans Jürgen Sonnenberger***: "Deutscher Rat für Internationales Privatrecht – Spezialkommission „Drittwirkung der Forderungsabtretung"
- ***Hans Jürgen Sonnenberger***: "German Council for Private International Law – Special Committee: "Third-party effects of assignment of claims"

Issue 2012.2 Nederlands Internationaal Privaatrecht

The second issue of 2012 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* includes the following articles on Recognition of (Dutch) Mass Settlement in Germany, the CLIP Principles, the European Patent Court and case note on Brussels I and the Unknown Address (Lindner):

Axel Halfmeier, Recognition of a WCAM settlement in Germany, p. 176-184. The abstract reads:

The Dutch 'Wet Collectieve Afwikkeling Massaschade'(WCAM) [Collective Settlements Act] has emerged as a noteworthy model in the context of the European discussion on collective redress procedures. It provides an opportunity to settle mass claims in what appears to be an efficient procedure. As the WCAM has been used in important transnational cases, this article looks at questions of

jurisdiction and the recognition of these court-approved settlements under the Brussels Regulation. It is argued that because of substantial participation by the courts, such declarations are to be treated as 'judgments' in the sense of the Brussels Regulation and thus are objects of recognition in all EU Member States. Written from the perspective of the German legal system, the article also takes the position that the opt-out system inherent in the WCAM procedure does not violate the German ordre public, but is compatible with fair trial principles under the German Constitution as well as under the European Human Rights Convention. The WCAM therefore appears as an attractive model for the future reform of collective proceedings on the European level.

Mireille van Eechoud & Annette Kur, Internationaal privaatrecht in intellectuele eigendomszaken – de 'CLIP' Principles, p. 185-192. The English abstract reads:

The European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP) presented its Principles in November 2011 to an international group of legal scholars, judges, and lawyers from commercial practice, governments and international organisations. This article sets out the objectives and principal characteristics of the CLIP Principles. The Principles are informed by instruments of European private international law, but nonetheless differ in some important respects from the rules of the Brussels I Regulation on jurisdiction and the Rome I and II Regulations on the law applicable to contractual and non-contractual obligations. This is especially so in situations where adherence to a strict territorial approach creates significant problems with the efficient adjudication of disputes over intellectual property rights or undermines legal certainty. The most notable differences are discussed below.

M.C.A. Kant, A specialised Patent Court for Europe? An analysis of Opinion 1/09 of the Court of Justice of the European Union from 8 March 2011 concerning the establishment of a European and Community Patents Court and a proposal for an alternative solution, p. 193-201. The abstract reads:

Attempts have been made for decades to establish both a Community patent and a centralised European court which would have exclusive jurisdiction in this matter. However, none of these attempts has ever been fully successful. In its Opinion 1/09 from 8 March 2011, the Court of Justice of the European Union (hereinafter CJEU) held, inter alia*, that the establishment of a unified patent litigation system as planned in the draft agreement on the European and Community Patents Court*

would be in breach of the rules of the EU Treaty and the FEU Treaty. However, it is argued in this paper that also in view of Opinion 1/09 the creation of a unified court has not become per se *unattainable. After clarifying in whose interest effective patent protection in Europe should primarily be formed, different constellations of judicial systems shall be discussed. The author will deliver his own proposal for a two-step approach in structure and time, comprising, in a first step, the creation of a specialized chamber of the CJEU for patent litigation, and in a second step the creation of a central EU Court for all EU intellectual property litigation. The paper will finish with an analysis of how the requirements for a unified patent litigation system (indirectly) set up by the CJEU in its Opinion 1/09 could be taken into consideration, and with some further deliberations on effective patent protection and enforcement.*

Jochem Vlek, De EEX-Vo en onbekende woonplaats van de verweerder. Hof van Justitie EU 17 november 2011, zaak C-327/10 (*Lindner*) (Case note), p. 202-206. The English abstract reads:

The author reviews the decision of the ECJ in the case of Hypotecni banka/Udo Mike Lindner *in which the ECJ ruled on the application of the jurisdictional rules of the Brussels I Regulation in the case of a consumer/defendant with an unknown domicile. Several issues are highlighted: first, the existence of an international element in the case of a defendant with unknown domicile whose nationality differs from the state of the court seized; secondly, the application of Article 4(1) Brussels I Regulation if the domicile of the defendant is unknown and (since the ECJ does not apply Article 4(1) in this regard) the interpretation of Article 16(2) Brussels I Regulation; thirdly, the requirement that the rights of the defence are observed, as also laid down in Article 47 of the Charter of Fundamental Rights of the EU. Additionally, the article briefly mentions the subsequent case of* G/Cornelius de Visser*, in which a German Court resorted to public notice under national law of the document instituting the proceedings in the case of a defendant with an unknown address.*

Verschraegen on Private International Law in Austria

Bea Verschraegen, Internationales Privatrecht - ein systematischer Überblick, Manz, Wien 2012

Bea Verschraegen, Professor for Comparative Law at the University of Vienna, has recently published a textbook on Private International Law in Austria. It provides an up-to date presentation of the applicable rules and regulations and, thereby, fills a long-lasting gap in the Austrian literature on Private International Law. The official announcement reads as follows:

> *A new systematic presentation of Private International Law for study and practice has just been published by Bea Verschraegen (Professor for PIL and Comparative Law at the University of Vienna). The entire body of significant PIL for Austria is examined, including relevant European and international law. With it, Bea Verschraegen also handles recent innovations in conflict of laws, for instance the Rome III Regulation, the European Maintenance Obligations regulations and the 2007 Hague Maintenance Convention.*
>
> *Bea Verschraegen's work contributes in particular to European integration and the corresponding changes to the fundamentals of conflicts of law. The book is intended as a reference guide from questions related to Private International Law to European and Austrian law. Therefore, the more detailed section is positioned at the beginning of the book for ease of reference, followed by the more general section thereafter.*
>
> *The book comprises the following chapters:*
>
> *I. Detailed Section:*

- *Law of Persons*
- *Family law*
- *Law of Succession*
- *Law of Contractual Obligations*
- *Law of Non-Contractual Obligations*
- *Property law*
- *Company law*
- *Competition law (Trade law and anti-trust law)*
- *Intellectual Property law*

II. General Section

A full table of contents and a preview is available on the publisher's website.

June at the Academy of European Law (ERA)

June is going to be quite charged at the Academy of European Law (ERA). The program starts with the seminar on **Rome I and Rome II** (31 May-1 June, see here. Update: there are still some places left; fees include two nights at a hotel).

Then, a five-day course will provide training on cross-border civil litigation (18-22 June 2012). Key topics of this **summer course** are:

- Challenges for cross-border litigation
- Specific procedures that help to obtain a judgment abroad faster and more easily
- Law applicable to contracts and torts

There will be conferences as well as workshops, led by Angelika Fuchs, Ivana Kunda, Jens Haubold, Jan von Hein, Xandra Kramer, John Ahern, Raquel Ferreira Correia and Brian Hutchinson.

Another five days (25-29 June) will be devoted to European labour law, PIL included (for those interested also on social security law, the Annual conference on the topic will be held also at the ERA on June, 4-5. The conference will address the new EU social security coordination rules in force since May 2010; problems in terms of implementation at national and local level for the new regulations; and the challenge of Administrative cooperation between social security institutions.)

Key issues of the labour law summer course are

- Free movement of workers
- Applicable law to employment contracts
- Posting of workers
- Transfer of undertakings
- Information and consultation rights
- Equality and non-discrimination
- Part-time, fixed-term and temporary agency work
- Working time

And the list of speakers: Ronald M. Beltzer; Nicola Braganza, Guy Castegnaro, Stefan Clauwaert, Szymon Kubiak, Jean-Philippe Lhernould, Nicolas Moizard, Filip Van Overmeiren, Nuria Elena Ramos Martin, Corinne Sachs-Durand, and Claudia Schmidt.

The summer program goes on at the very beginning of July with a five-days summer course on European intellectual property law (2-6 July). Key topics, this time

- Legal and institutional framework
- Trade marks and designs
- Geographical indications
- Copyright and related rights
- Protection of databases
- Patents
- Intellectual/industrial property and the internal market (competition law and free movement of goods)
- Jurisdiction and dispute resolution
- Enforcement

Expected speakers are Philippe de Jong, Stefan Enchelmaier, Elisabeth Fink, Irina

Kireeva, Anne MacGregor, David Por, Marius Schneider, Martin Senftleben, Paul L.C. Torremans and Guido Westkamp.

Participants in summer courses are given the opportunity to visit the European Court of Justice in Luxembourg (though the number of places is limited by the Court for practical reasons to 35).

Report of European Parliament on Future Choice of Law Rule for Privacy and Personality Rights

On May 2nd, 2012, the Committee on Legal Affairs of the European Parliament has issued its final Report on with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) (the previous draft is available here). The Report includes a Motion for a European Parliament Resolution which advocates the following addition to the Regulation:

Recital 32a

This Regulation does not prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media. In particular, the application of a provision of the law designated by this Regulation which would have the effect of significantly restricting the scope of those constitutional rules may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (ordre public) of the forum.

Article 5a

Privacy and rights relating to personality

1. The law applicable to a non-contractual obligation arising out of a violation of

privacy or rights relating to the personality, including defamation, shall be the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur.

2. However, the law applicable shall be the law of the country in which the defendant is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by paragraph 1.

3. Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors.

4. The law applicable to the right of reply or equivalent measures and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast and regarding the violation of privacy or of rights relating to the personality resulting from the handling of personal data shall be the law of the country in which the publisher, broadcaster or handler has its habitual residence.

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

Conference on European Contract

Law: A Law-and-Economics Perspective

On April 27 and 28 the University of Chichago's Law School will host a Conferecen on European Contract Law (University of Chicago Law School, 1111 E. 60th Street, Chicago, Il 60615 – Room V).

The annoucement on the conferece's homepage reads as follows:

> *The movement to harmonize European contract law generated various proposals for uniform statutes and optional instruments, culminating by the recent Draft Common European Sales Law. This ambitious reform envisions a uniform Sales Law for Europe with strong consumer protections, enacted by every member nation. Transactors will be able to choose this law to govern their transaction in place of existing contract law.*
>
> *The Chicago conference brings together a group of leading scholars from Europe and from the University of Chicago, exploring the law and economics perspectives of the proposed harmonization. Is such an optional statute a desirable regulatory tool? What economic goals might it serve? Are the protections enacted in it suitable? What can be learned from the American experience with uniform commercial laws?*
>
> *The conference will be hosted by the Institute for Law and Economics at the University of Chicago Law School and will take place on Friday and Saturday, April 27-28, 2012, in Chicago. It is open to the public and attendance is free. Please contact Marjorie Holme (mholme@uchicago.edu) for more details.*
>
> *The conference will be published in the Common Market Law Review (2013).*

The conference schedule reads as follows:

Friday, April 27

9:00 – 9:15 **Opening Remark**

9.15 – 12:30 **Panel I: The Law and Economics of an Optional Instrument**s

- **Public Supply of Optional Standardized Consumer Contracts: A Rationale for the Common European Sales Law?,** *Thomas Ackermann,* Ludwig?Maximilians University, Munich
- **Optional Law for Firms and Consumers: An Economic Analysis of Opting into the Common European Sales Law**, *Fernando Gomez*, Pompeu Fabra University, Barcelona
- **Contract Law as Optional Law: On the Potential and Limits of Choice,** *Jan Smits,* Maastricht University
- **What Can Be Wrong with an Option? The Proposal for an Optional Common European Sales Law,** *Horst Eidenmüller*, Ludwig?Maximilians University, Munich
- **Identifying Legal Costs of the Operation of the Common European Sales Law: Legal Framework, Scope of the Uniform Law and National Judicial Evaluations,** *Simon Whittaker*, Oxford University

12:30 – 1:45 **Lunch**

1:45 – 5:15 **Panel II: A Law and Economics Critique of the CESL**

- **Regulatory Techniques in Consumer Protection: A Critique of the Common European Sales Law**, *Oren Bar?Gill*, New York University, and *Omri Ben?Shahar*, University of Chicago
- **Mistake under the Common European Sales Law**, *Ariel Porat*, University of Chicago and Tel Aviv University
- **Buyers' Remedies under the CESL: Rejection, Rescission, and the Seller's Right to Cure**, *Gerhard Wagner*, University of Bonn
- **Custom and the CESL,** *Lisa Bernstein*, University of Chicago
- **Another Look at the Eurobarometer Contract Law Survey Data,** *William Hubbard*, University of Chicago

Saturday, April 28

9:00 – 12:00 **Panel III: Harmonization and Regulatory Competition**

- **Harmonization, Heterogeneity, and Regulation: Why the Common European Sales Law Should Be Scrapped**, *Richard Epstein*, New York University, Hoover Institute, and University of Chicago
- **The Desirability of an Optional European Contract Law ? and the Impact of a Particular Code Design on this Question,** *Stefan*

Grundmann, Humboldt University, Berlin
- **Harmonization, Preferences, and Convergence**, *Saul Levmore*, University of Chicago
- **The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition,** *Eric Posner*, University of Chicago
- **Response,** *Chantal Mak*, University of Amsterdam

12:00 – 1:00 **Lunch**

1:00 – 2:30 **Panel IV: Precontractual Liability**

- **Precontractual Disclosure Duties under the Common European Sales Law**, *Douglas Baird*, University of Chicago
- **CESL and Precontractual Liability from a Status to a Transaction?Based Approach**, *Fabrizio Cafaggi*, European University Institute, Florence

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First Issue of 2012's Journal du Droit International

The first issue of French *Journal du droit international* (*Clunet*) for 2012 was just released. It contains five articles and several casenotes.
Four articles explore private international law issues.

In the first one, María Mercedes Albornoz and Jacques Foyer (both from Paris II University) compare the Interamerican Convention on the law applicable to international contracts with the Rome I Regulation (*Une relecture de la Convention interaméricaine sur la loi applicable aux contrats internationaux à la lumière du règlement « Rome I »*). The English abstract reads:

> *The substantive and formal changes undergone by the Rome Convention as a result of its transformation into a European Community Regulation have altered the terms of comparison between the Rome and Mexico systems on the law*

applicable to international contracts. An analytical re-reading of the Inter-American Convention in the light of the Rome I Regulation shows that even if the Rome system may continue contributing to the interpretation of the Mexico system, Rome I's introduction of new interpretive elements is limited.

In the second article, Gian Paolo Romano (University of Geneva) wonders whether private international law fits within Emmanuel Kant's theory of justice (*Le droit international privé à l'épreuve de la théorie kantienne de la justice*).

Kant's legal writings are becoming increasingly popular and so is the idea that Law purports to ensure consistency of the domains of external freedom of the rational agents – in Kant's view : both individuals and States – so as to prevent or resolve conflicts, which are simultaneous and mutually incompatible claims asserted by two agents over the same domain of freedom. If it is commonly held that private international law is also centered around coordination, the Kantian account on how Law comes into existence, both at the national and international levels, suggests that what cross-border relations between private persons require is actually a twofold consistency, i.e. that of domains of external freedom of States, which freedom consists here in securing, through their national laws and adjudications, mutually consistent domains of external freedom of private persons which are parties to those relations. Positivism and natural law, liberty and necessity, universalism and particularism, multilateralism and unilateralism : those dualisms with which conflict of laws thinking and methodology has been grappling for some time also feature within the Kantian tradition and the way the latter manages to come to terms with them may assist the former in readjusting its paradigm. Which readjustment arguably mandates reconciling the contention that conflict of laws ultimately involves a conflict between States with the idea that conflicts between private persons are the only ones truly at stake here.

In the third article, Xavier Boucobza and Yves-Marie Serinet (both Paris Sud University) explore the consequences of a recent ruling of the Paris court of appeal on the application of human rights in international commercial arbitration (*Les principes du procès équitable dans l'arbitrage international*).

The affirmation of fundamental right to a fair hearing before the international arbitrator emerges clearly from the ruling handed down by the Paris Court of

Appeals on November 17, 2011. The ruling states, in part, that arbitration decisions are not exempt from the principle according to which the right to a fair trial implies that a person may not be deprived of the concrete possibility of having a judge rule on his claims and, furthermore, that the principle of contradictory implies that all parties are in an equal position before the arbitrator. In light of of these principles, the decision taken in application of the rules of arbitration of the ICC to regard counter-claims as withdrawn because of the failure of the defendant to advance fees, constitutes an excessive measure because of the impecuniousness of the claimant.

The solution that emerges has positive implications from the point of view of the politics of arbitration. The guarantee of the right to arbitration, until now invoked in order to facilitate arbitration, has evolved into an actual duty, which is the corollary of the promotion of this form of settling claims. Ultimately, arbitration law can never be totally independent of and exempt from universally recognized fundamental principles.

Finally, Sandrine Maljean-Dubois (Centre National de la Recherche Scientifique) discusses the impact of international environmental norms on businesses (*La portée des normes du droit international de l'environnement à l'égard des entreprises*).

International environmental law must reach enterprises to be effective. It nevertheless grabs hold of them only imperfectly. While enterprises are among the final addressees of international rules, its apprehension by international law is generally indirect, requiring the mediation of domestic law. It is commonplace to say that in an international society made from States enterprises are secondary actors, « non-prescribers ». Though they are thirds to interstate relations, enterprises are actively involved. And though they do not have an international or internationalized status, enterprises can all the same enjoy rights or be subjected to obligations stemming from the interstate society by means of international law. In practice, international law makes them enjoy more rights than it lays down obligations. In spite of this, regulatory constraints on enterprises are increasing. Their forms and terms are varied. Traditional, interstate sources of international law are but one of the many layers of the « normative millefeuille » gripping enterprises. Newer – rather global or transnational – sources also regulate their activities. Paradoxically, binding law

(customary and conventional law) only binds weakly, since it binds mediately. On the contrary, incentive law actually manages to grab hold of and to compel enterprises, complementing more traditional rules and instruments and under pressure of citizens-consumers-unions-shareholders-investors.

German Compendium on English Commercial and Business Law

As part of a series of compendia on foreign commercial and business law in German language, a fully revised edition on English commercial and business law has just been released. The book is edited and authored (with two additional co-authors) by Volker Triebel, a German Rechtsanwalt and English barrister, Martin Illmer from the Max Planck Institute for Comparative and International Private Law in Hamburg and Wolf-Georg Ringe, Stefan Vogenauer as well as Katja Ziegler, all from the University of Oxford.

The book attempts to provide a comprehensive overview of English commercial and business law while at the same time explaining and analyzing the differences between German and English business law as well as the increasing interfaces between English and European law. For readers of this blog the chapters on international civil procedure, private international law, international insolvency law and international arbitration, all written by Martin Illmer, may be of particular interest. They present the autonomous common law rules in these fields as well as the interfaces of the European regimes (such as Brussels I, Rome I, Rome II and the Insolvency Regulation) with English law which are often are only rarely covered. Other areas explored by the treatise are the legal sources of English commercial law, contract law (with sale of goods in particular), company law, labour law, insolvency law and competition law.

More information is available on the publisher’s website.

Brand and Fish on Choice of Law Rules in Contract and Tort Cases in the PIL Japanese Act

Ronald Brand (University of Pittsburgh – School of Law) and Tabitha Fish (Saxon, Gilmore, Carraway & Gibbons, P.A.) have posted An American Perspective on the New Japanese Act on General Rules for Application of Laws on SSRN.

> *Any changes in rules of applicable law in one state are necessarily of interest to those concerned with the outcome of potential cross-border disputes. This makes the new Japanese Act on Application of Laws of interest beyond the borders of Japan. In this article, we focus on the new rules governing applicable law in contract and tort cases. The primary point of comparison is U.S. law, but there is also reference to the other major recent civil law developments brought about by the European Union's Rome I and II Regulations. Specific attention is given to how each of the sets of rules deals with the concept of party autonomy, taking into account the recent retreat in the United States from proposed changes to the party autonomy rule in Article 1 of the Uniform Commercial Code.*

The paper was published in the *Japanese Yearbook of International Law* in 2009.

Festschrift for Bernd von Hoffmann has been released

On the occasion of *Bernd von Hoffmann's* 70th birthday *Herbert Kronke* and

Karsten Thorn have edited a Festschrift entitled **"Grenzen überwinden – Prinzipien bewahren"** (Overcoming Borders – Preserving Principles). It has been published by *Ernst und Werner Gieseking* and contains contributions relating to Private International Law, International Civil Procedure, Comparative Law and International Commercial Arbitration.

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