Guest Editorial: Hess, Should Arbitration and European Procedural Law be Separated or Coordinated?

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Should arbitration and European procedural law be separated or coordinated? Some remarks on a recurrent debate of European lawmaking

The idea of separating arbitration entirely from European (procedural) law is an illusion, since recent case law demonstrates growing frictions and inconsistencies. The proposals of the Heidelberg Report which are severely criticised by parts of the "arbitration community" should be regarded as a (preferable) alternative to a comprehensive action of the European Union in the field of arbitration. The article describes the political background and contributes to the current discussion on the reform of the Regulation Brussels I with regard to arbitration.

I. Introduction

During the last 40 years, the relationship between arbitration and European law has often been difficult, marked by misunderstandings and sometimes by overt distrust. Two communities – the arbitration world on the one side, "European regulators" on the other side ((For the sake of clarity, the following paper describes the different positions in a rather acuminate way.)) – address

arbitration and litigation from distinctively different perspectives. One current example is the ongoing discussion about the Heidelberg Report ((*Hess/Pfeiffer/Schlosser*, The Regulation Brussels I (2008), no. 105 – 135.)) which proposes to replace the so-called arbitration exception of Article 1 (2)(d) of the Brussels I Regulation (JR) by two new articles which shall address positively the interfaces between arbitration and the Regulation and strengthen arbitration within the European Judicial Area. ((This discussion was triggered by the West Tankers decision, ECJ, 2.28.2009, case C-185/07, *Allianz SpA, Generali Assicurazioni Generali SpA./.West Tankers Inc.))*

The following article first delineates the background of the present discussion (II), than it briefly presents the proposals of the Heidelberg Report (III) and the Commission's Green Paper ((Green Paper on the Review of Council Regulation (EC) no 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of April, 21st,2009, COM (2009)175 final.)) as well as the reactions to the Green Paper – including the current lobbying efforts in Brussels (IV). ((All references to "submissions" in this paper refer to the submissions of Member States and other stakeholders to the EU Commission with regard to the Green Paper of April, 21st,2009, COM (2009)174fina, available at: http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0002_en.htm.)) The last part of the paper deals with possible solutions which could be acceptable for both sides and would be in the interests of all of the parties involved.

II. Mutual trust and distrust in litigation and in arbitration

The functions of arbitration in the European Judicial Area are regarded differently, depending on the respective perspectives. The perspective of arbitration is global. Based on the New York Convention of 1958, arbitration has been accepted almost worldwide as a valuable alternative to litigation. ((*Steinbrück*, Schiedsrecht, staatliches, in: Basedow/Zimmermann (ed), Handwörterbuch des Europäischen Privatrechts vol. II (2009), p. 1353 – 1355. For (impressive) figures on the increasing use of arbitration see *Born*, International Commercial Arbitration, vol I (2009), p. 68 – 71.)) At present, the trend towards

liberalisation of arbitration and towards empowerment of arbitral tribunals continues to gain acceptance – denoted by the keywords of *kompetenz-kompetenz* of the arbitral tribunal and of the delocalisation of arbitral awards. ((*McLaughlin*, Lis pendens in International Litigation, 336 RdC, 200, 346 et seq (2008).)) This concept is aimed at detaching arbitration as an autonomous system of dispute resolution entirely from national jurisdictions. According to the underlying "philosophy" ((*Gaillard*, Aspects philosophiques du droit de l'arbitrage international (2008). Different concepts on the foundation of international arbitration are explained by *Born*, International commercial arbitration, vol. I, p. 184 – 189.)) party autonomy and the choice of arbitration instead of litigation must be fully respected. This thinking is based on the assumption that parties which derogated the jurisdiction of state courts do not want to re-litigate their dispute there. ((However, a party contesting the validity of the arbitration clause may for good reason prefer to litigate this issue at a civil court, see *Schlosser*, SchiedsVZ 2009, 119, 121 et seq.)) Any intervention of state authorities in the realm of arbitration is considered to be an intrusion. ((For a wider perspective see *Radicati di Brozolo*, Interference of national courts with arbitration, in: Müller/Rigozzi (ed.), New Departments in International Commercial Arbitration 2009, p. 1, 3 et seq.)) Basically, this system is rooted in a deep distrust of state intervention in arbitration proceedings. One reason is the limited degree of uniformity created by the New York Convention which does not entirely eliminate differences between the national jurisdictions (especially in the context of arbitrability and public policy). ((International Bar Association Arbitration Committee, Working Group on the reform of the Regulation Brussels I, Submission to the European Commission of June 15, 2009 (ref no 733814/1) no 23.))

The perspective of European law is different. It mainly focuses on cross border litigation which is considered to be closely related to the proper functioning of the Internal Market. In 1958, only a few months after the ratification of the Rome Treaty by the six founding Member States, the EC Commission stressed the need of a Convention on jurisdiction and recognition of judgments. It argued that the swift and efficient cross border movement of persons, goods and services required a judicial framework for the cross border recovery of debts. ((Letter of the EC-Commission to the Member States of 10/22/1958, see *Hess*, Europäisches Zivilprozessrecht (2010), § 1 I, no. 2.)) In 1973, the Brussels Convention entered into force and became a successful and popular instrument.

((*Hess/Pfeiffer/Schlosser*, The Regulation Brussels I (2008), no. 59.)) Since 1999, the system has been considerably improved. Essentially, the European litigation system is based on mutual trust which relies on the expectation that the courts of all Member States will apply European law in the same way and respect fundamental rights of the parties to the same extent. ((The system is based on two safeguards: On the one hand, all Member States are bound by the ECHR and by the CFR; on the other hand the ECJ supervises and controls the coherent application of Union law by the courts of the Member States.)) In the near future, judgments coming from other Member States shall be recognised and enforced without any further review. ((*Hess*, Europäisches Zivilprozessrecht (2010), § 3 II, no 18 – 36. The abolition of exequatur is currently discussed in the context of the reforms of the Regulation Brussels I.))

Within the European Judicial Area, litigation and arbitration are considered as two equal alternatives of dispute resolution. ((Accordingly, Article 220 of the Rome Treaty and Article 293 of the Amsterdam Treaty (1999) explicitly provided for the elaboration of an EU-Convention on arbitration.)) However, the Community's explicit competence in arbitration has been never implemented, because for a long time the New York Convention of 1958 was considered as sufficient. Nevertheless, since the enactment of the Brussels Convention in 1973 the legal situation has changed considerably. In the present European law, arbitration plays a considerable role in supporting cross-border commercial transactions in the Internal Market. In this context, arbitral tribunals must apply (mandatory) EU law, i.e. in cartel law, like state courts. ((ECJ, 6.1.1999, case C-126/97, *Eco Swiss China Time Ltd./.Benetton International NV,* ECR 1999 I-3055, no 37 et seq.; see *Giannopoulos*, Einfluss des EuGH auf die Rechtsprechung der Mitgliedstaaten (2006), p. 149 et seq.; *Komninos*, EC Private Antitrust Enforcement (2007), p. 224 et seq.)) According to the case law of the ECJ, state courts must verify whether the arbitral award implements the applicable European Union law correctly. This control shall take place when arbitral awards are challenged in the Member State of origin or when arbitral awards are recognised in other EU Member States. ((See Article V (2)(b) New York Convention, *Illmer*, Schiedsverfahren, internationales, in: Basedow/Zimmermann (ed), Handwörterbuch des Europäischen Privatrechts vol. II (2009), p. 1358, 1360.))

Unsurprisingly, the different concepts underlying litigation and arbitration entail

diverging results in similar constellations. At present, several problems have arisen in this respect. The most compelling constellation concerned the recognition of arbitral awards. Recently, French courts recognised a Belgian award which had been annulled in Brussels because it was not in line with mandatory EU law. ((C.Cass., 6.4.2008, *Soc. SNP v. Soc. Cytec Industries BV,* Rev. arb. 2008, 473; for a similar constellation (not directly involving EU law) see [lbrxID883] C.Cass., 29.6.2007, *Société PT Putrabali v. Société Rena Holding et al.,* Rev. arb. 2007, 507 = Clunet 2007, 1236.)) The French courts had only verified that the award did not violate EU law in a flagrant way and, consequently, had permitted its recognition. ((See Tribunal de Grande Instance de Bruxelles, 3/8/2007, *Soc. SNP SAS v. Soc. Cytec Industries BV,* Rev. arb. 2007, 303; the judgment was set aside by the Court of Appeal, 6/22/2009, Rev. arb. 2009, 554.)) As a result, diverging judicial decisions on the application of mandatory European law occurred in the Internal Market. ((A second, recent example (equally not mentioned in the Heidelberg Report) is the *Ficantieri* case*: Legal Department du Ministère de la Justice de la Républiue d'Irak v. Sociétés Ficantieri Cantieri Navali Italiani, Finmeccanica et Armamenti e Aerispazio*, Paris Court of Appeal, 6/15/2006, Rev. arb. 2007, 90. In this case, the Genoa court of Appeal had held that the arbitration was invalid. Despite this judgment the award was recognised in France, because the French courts applied the French autonomous law on arbitration. They held that the French doctrine of negative kompetenz-kompetenz excluded the recognition of the Italian judgment.)) With regard to judgments, European procedural law clearly precludes such constellation: A judgments which has been set aside in the Member State of origin cannot be recognised and enforced in other Member States. ((Accordingly, from the perspective of European law, the basic concept of international arbitration (which permits simply to ignore judgments of the courts of other Member States) does not correspond to basic needs of a coordinated dispute resolution within the European Judicial Area (see Article 32 JR).)) From the perspective of European law the question arises which compelling reasons justify the different treatment of arbitral awards in the Internal Market.

Finally, in *West Tankers* the European Court of Justice was asked to rule on an anti-suit injunction issued by English courts in order to prevent Italian courts from proceeding with an action in disregard of an arbitration clause. ((ECJ, 2.28.2009, case C-185/07, *Allianz SpA, Generali Assicurazioni Generali SpA./.West Tankers Inc.; Schlosser*, SchiedsVZ 2009, 129 et seq; *Steinbrück/Illmer*,

SchiedsVZ 2009, 188 et seq.)) The Grand Chamber held that an anti suit injunction in support of an arbitration clause was irreconcilable with the principle of mutual trust and that the Italian courts were deemed to apply the Brussels I Regulation and Article II of the New York Convention appropriately. ((See ECJ, 2.28.2009, case C-185/07, *Allianz SpA, Generali Assicurazioni Generali SpA./.West Tankers Inc.*, no 33 where the ECJ (indirectly) expressed the view that the courts of the Member States must apply Article II (3) of the NYC in an appropriate manner.)) From the perspective of European procedural law, the outcome of West Tankers came as no real surprise. However, in the arbitration world it was considered an unwelcome intrusion into the autonomous system of dispute resolution. ((See the comment of *A. Briggs* on the Front Comor/West Tankers [2009] LMCLQ 161, 166.))

Against this background, the reconciliation of the different perceptions related to arbitration and litigation in Europe is a demanding task. However, it seems appropriate to highlight two basic assumptions which form the basis of this paper: First, the idea of separating arbitration entirely from European procedural law is an illusion. ((Contrary opinion: International Bar Association Arbitration Committee, Working Group on [the reform of the Regulation Brussels I], Submission to the European Commission (ref. no 733814/1 of July 2009), no 18 asserts "the absence of significant problems in the interface between arbitration and the Regulation". However, the Working Group itself carefully described recent case-law (*Putrabali, Cytec* and *Ficantieri*) which demonstrates considerable problems with regard to arbitration and EU law.)) Arbitration in Europe is strongly involved in the application of mandatory European law. Therefore, the courts of the Member States must apply the New York Convention (and their national laws on arbitration) in a way which conforms to EU law. As recent case law demonstrates the issue is becoming more and more compelling. ((*Herbert Smith*, Response to the Green Paper on the Review of the Brussels Regulation of June 30, 2009, p. 7-8; *House of Lords*, European Union Committee, Report on the Green Paper on the Brussels I Regulation of July 27, 2009, nos. 86 – 96.)) It is predictable that instances will occur in which the ECJ again will be concerned with matters related to arbitration. ((It should be noted that the recent case law of the French courts occurred within the short period of two years (2007-2008). Recently, the competence for concluding investment protection treaties of the Member States under Articles 69 and 307 EC-Treaty (which is closely related to arbitration) was reviewed by the ECJ, 11/19/2009, Case

C-118/07, *Commission v. Finland*.)) The existing (and the future) case law may trigger specific legislative activity of the European Union in this field. ((This option is expressly mentioned in the Green Paper on the Reform of the Regulation Brussels I, COM (2009) 174 final, p. 9 (with specific reference to Article VII of the NYC).)) Second, as the exclusion of arbitration from European law is not an expedient option, it seems preferable to address the interfaces with European procedural law in the new Regulation Brussels I explicitly and positively instead of awaiting the proposals for a comprehensive EU-instrument on arbitration in a close future. ((See *Bollée*, Annotation to ECJ, *Allianz SpA./.West Tankers*, Rev. arb. 2009, 413, 427.)) The proposals of the Heidelberg Report on the reform of the Regulation Brussels I must be seen in this context.

III. The proposals of the Heidelberg Report

1. The objectives of the Heidelberg Report

When the Report was prepared, its authors were fully aware of the pending reference of the House of Lords to the ECJ in *West Tankers* and expected the outcome of the case. Therefore, the main objective of the proposals is to avoid a West Tankers' situation and to preserve the prevalence of arbitration agreements in a constellation where a party initiates litigation in a (foreign) civil court although it is bound by an arbitration clause. ((*Schlosser*, SchiedsVZ 2009, 129, 130 et seq.; *Hess*, in: Global Arbitration Review 4/2009, p. 12, 16 – Round Table on the EU Green Paper (Brussels 6/29/2009).)) The proposals aim to reduce the uncoordinated competition of parallel proceedings in different Member States and to prevent torpedo actions. Court proceedings shall be concentrated in the Member State where the arbitration takes place. Accordingly, the proposals provide for an exclusive head of jurisdiction for court proceedings supporting arbitration in the civil courts of the Member States and the corresponding obligation of the courts in all other Member States to transfer parallel litigation to the courts of the Member State where the arbitration takes place.

In response to some of the criticisms, it seems to be appropriate to clarify a major point which the proposals neither intend nor contain: First, they do not intend to increase satellite or parallel litigation in cases where the arbitration clause is

undisputed. ((This criticism – unfortunately based on a misreading of the proposal – was expressed by the International Bar Association Arbitration Committee, Working Group on the reform of the Regulation Brussels I, Submission to the European Commission of June 15, 2009 (ref no 733814/1) no 26. According to this reading, parties of an arbitration agreement "would be forced to sue in a court instead of initiating arbitration proceedings". This misunderstanding was clarified during a round table in Brussels, 6/29/2009, but it is still present in many submissions, see Global Arbitration Review 4/2009, p. 20.)) Since the Regulation only addresses the coordination of conflicting litigation between state courts, it does not address the relationship between state courts and arbitration – this issue is left to the New York Convention and the procedural laws of EU-Member States. ((*McLaughlin*, 336 RdC, 203, 374 et seq (2008) criticizes the Heidelberg Report, because it does not ensure that the courts of the Member State where the arbitration takes place directly send the parties to arbitration. However, this solution would implement the French doctrine of the negative kompetenz-kompetenz at the European level although it has not been accepted by most of the EU Member States. In addition, the proposal of *McLaughlin* would directly include arbitration in the framework of the Regulation and enlarge its scope considerably. The Heidelberg Report clearly distinguishes between court proceedings and arbitration proceedings.)) Accordingly, when the arbitration agreement is undisputed, parties may immediately initiate arbitration proceedings without any recourse to State courts. ((The opposite assertion by *E. Gaillard*, Letter to (former) EU-Commissioner *Barrot* of June 29, 2010, is not correct: "It means that applying to courts at the seat of arbitration will become a prerequisite to arbitration proceedings conducted within the European Union". This assertion is obviously based on a misreading of the proposal which only addresses parallel proceedings (on the validity of the arbitration clause) in different EU-Member States.)) Even if the clause is disputed, Member States shall be free to provide a system of negative competence-competence where the arbitral tribunal decides on the validity of the clause or Member States ((*Radicato di Brozolo*, IPRax 2/2010, criticises the proposal as "courting disaster, as the … proceeding may end up … before a national court." However, according to Article V (1) (a) NYC, the validity of the arbitration clause will finally be verified by a "national court". However, the advantage of the proposed Article 22 no. 6 JR is that this decision will come up at a very early stage of the proceedings. Accordingly, the parties will save money if the clause is deemed to be invalid or they will get increased legal certainty, as they will be certain that the award will

not be annulled because the arbitration clause is deemed void.)) may provide a system where the competent state court may decide on the validity of clause.

2. The main proposals of the Heidelberg Report

The starting point of the Heidelberg Report was the *West Tankers* decision of the ECJ. ((ECJ, 2.28.2009, case C-185/07, *Allianz SpA, Generali Assicurazioni Generali SpA./.West Tankers Inc* ECR 2009 I-)) As a result of this judgment, a party bound by an arbitration cause may institute parallel litigation in a civil court in order to circumvent the arbitration clause. According to the case law of the ECJ civil courts in the Member State where the arbitration takes place are not allowed to grant anti-suit injunctions against parallel civil litigation. Accordingly, torpedo actions aimed at delaying or even destructing arbitral proceedings may be easily initiated by an obstructing party. ((*Briggs*, [2009] LMCLQ, 161, 165 – 166.))

For this reason, the Heidelberg Report proposed to replace the anti-suit injunction by a similar device (declaratory relief) aimed at securing the priority of arbitral proceedings. To achieve this objective, the report proposed the incorporation of two new articles in the Judgments Regulation which should read as follows:

New Article 22 no.6: *"The following courts shall have exclusive jurisdiction, (…) (6) in ancillary proceedings concerned with the support of arbitration the courts of the Member State in which the arbitration takes place."*

New Article 27A: *"A court of a Member State shall stay the proceedings once the defendant contests the jurisdiction of the court with respect to existence and scope of an arbitration agreement if a court of the Member State that is designated as place of arbitration in the arbitration agreement is seized for declaratory relief in respect of the existence, the validity, and/or scope of that arbitration agreement".*

These provisions shall concentrate the proceedings on the validity of the arbitration agreement in the courts of the Member State where the arbitration takes place. ((As the parties usually agree on the seat of arbitration, the proposal fully respects the principle of party autonomy.)) In this respect, the proposal is not entirely new. In several Member States, the courts may assist arbitration proceedings at a very early stage and give judgment on the validity of the

arbitration clause. ((It corresponds to the legal situation in many Member States, as England (sections 32 and 72 of the Arbitration Act), Germany (section 1032 (2) ZPO) and Italy (article 819b (3) CCP), *Steinbrück/Illmer*, SchiedsVZ 2009, 188, 191.))

If applied to the facts in *West Tankers*, the proposed articles would oblige the Italian courts to stay the proceedings and transfer the case to the English courts. According to Sec. 32 and 72 of the Arbitration Act, the High Court is competent to decide on the validity of the arbitration agreement. However, the arbitral tribunal will decide on the validity of the clause after its constitution (kompetenz-kompetenz). The tribunal may render an interim award on its jurisdiction which can be challenged (immediately) in the State court. The judgment of the competent court of the Member State on the validity (or annulment) of the award will be recognised in all EU-Member States pursuant to Article 32 JR. Thus, a uniform regime for the recognition of decisions on the validity of arbitral agreements supports the coherent application of Article II NYC in all EU Member States. In addition, the recognition of an arbitral award under Article V (1) (a) NYC will equally be improved considerably. ((If arbitral proceedings take place in Paris, French courts will help the parties to constitute the arbitral tribunal. The arbitral tribunal will decide on the validity of the clause (*negative competence-competence*). Thereafter, the French courts endorse the (partial) award on the validity of the clause. This decision will be recognised in all EU-Member States pursuant to Article 32 JR. Thus, a uniform regime for the recognition of decisions on the validity of arbitral agreements supports the coherent application of Article II NYC in all EU Member States.))

In respect of the proposed Articles 22 no 6 and 27 A JR, three points shall be clarified: First, the notion of ancillary measures to arbitral proceedings is strictly limited to supportive measures of civil courts. This relates to measures such as the decision on the validity of the arbitration clause, the nomination of an arbitrator or the expansion of time limits. ((Supportive measures aimed at the preservation and the taking of evidence shall not be included; in this respect the author endorses the criticism of *Steinbrück* and *Illmer*, SchiedsVZ 2009, 188, 192.)) It does not include provisional measures in terms of Article 31 JR related to the substance of the disputes at issue in the arbitral proceedings. ((In this respect, the concerns expressed in the submission of the International Bar Association Arbitration Committee, Working Group on [the reform of the

Regulation Brussels I] to the EU Commission, (ref. no 733814/1 of July 2009), no 20 d) are not endorsed by the Heidelberg Report, see *Hess/Pfeiffer/Schlosser*, The Regulation Brussels I (2008), no. 740.)) Accordingly, the case law of the ECJ in *van Uden* (([lbrxID185] ECJ, 11.17.1998, Case C-391/95*, Van Uden ./. Deco Line*, ECR 198 I-7091.)) will be retained; provisional measures will still be available in all EU Member States. Second, the proposed article will overturn the case law of the ECJ in the *Marc Rich* case, (([lbrxID185] ECJ, 7.25.1991, case 190/89, *Marc Rich./.Società Italiana Impianti,* ECR 1991, 3855, no 28.)) since the Regulation will address supporting measures of civil courts for arbitral proceedings. Third and most importantly, the proposal will establish an exclusive competence for proceedings challenging the validity of the arbitration agreement. These proceedings shall be concentrated in the Member State in which the arbitration takes place. ((The exclusive head of jurisdiction is reinforced by the proposed Article 27A which obliges the courts of other Member States to transfer parallel or satellite proceedings to the Member State where the arbitration takes place.))

Finally, it should be stated that the proposed articles fully respect party autonomy, since the parties usually designate the place of arbitration (even if parties wish to delocalise arbitration proceedings). According to the proposal, the designation of the place of arbitration does not only determine the lex arbitri, but also fixes the jurisdiction of the state courts for a (potential) setting aside of the award and for supportive measures. However, for parties engaged in arbitration the proposed framework also entails a certain burden: They must carefully draft arbitration clauses with regard to the lex arbitri and the location of the proceedings. In case the place of arbitration has not been sufficiently determined, the report proposes to introduce a new recital containing a definition of the place of arbitration to support Article 22 (6) JR. The new recital shall constitute a fall-back provision. ((The proposed recital reads as follows: “the place of arbitration shall depend on the agreement of the parties or be determined by the arbitral tribunal. Otherwise, the court of the capital of the designated Member State shall be competent, lacking such a designation the court shall be competent that would have general jurisdiction over the dispute under the Regulation if there was no arbitration agreement.” The second sentence of the proposal is criticised as too wide and too imprecise. As an alternative, it seems to be possible to delete the second sentence. However, if the arbitral tribunal does not reach an agreement on the place of arbitration, the proposed regime under the Regulation Brussels I will not apply.))

3. Should the arbitration exception of the JR be deleted?

The most controversial proposal of the Heidelberg Report is the deletion of the "arbitration exception" in Article 1 (2) (d) JR. This deletion would entail a close connection between the New York Convention and the Judgment Regulation: the prevalence of the New York Convention would be ensured by Article 71 JR, guaranteeing the New York Convention's priority as a so-called 'special convention'. ((Surprisingly, the submission of the IBA Working Party to the EU Commission does not mention Article 71 JR and its impact of maintaining the priority of the NYC. In this respect, the critique forwarded seems to be incomplete.)) Yet, arbitral proceedings could still not be qualified as proceedings pending in a "court" of a Member State and arbitral awards could still not be referred to as "judgments". However, court proceedings supporting arbitration in civil and commercial matters would be covered by the scope of the Judgment Regulation. In addition, a judgment on the validity of the arbitration agreement (given by the court competent under Article 22 paragraph 6 JR) will be recognised in all other Member States under Article 32 JR, thereby excluding the risk of diverging judgments on the validity of the arbitration agreement in the European Judicial Area. The coordinated operation of the JR and the NYC in this respect will improve the position of parties to arbitration considerably. ((If a party seeks the recognition of an arbitral award under Article V NYC, he or she can rely on the judgment of the court in the Member State of the arbitration proceedings which confirmed the validity of the arbitration clause: As this judgment will be recognised under Article 32 et seq. JR, the validity of the arbitration agreement cannot be challenged in other EU-Member States under Article V (1) (a) NYC.))

The proposed deletion of the arbitration exception has been widely criticized by the arbitration world. To some extent, this critique seems to be understandable since the proposal will visibly reduce the "psychological gap" between European civil litigation and global arbitration under the New York Convention. However, in practice, the implications of the proposal will be rather limited, because the prevalence of the NYC shall be fully guaranteed by Article 71 JR. ((*Hess/Pfeiffer/Schlosser*, The Regulation Brussels I (2008), no. 130.)) Pursuant to this provision, the Regulation Brussels I fully guarantees the prevalence of special conventions. ((This principle was confirmed recently in the opinion of GA *Kokott* in the case C-533/08, *TNT Express Nederland B.V. v. Axa Versicherungs AG*, para.

31 et seq.)) Further, the arbitral proceedings as such are not addressed by the Judgments Regulation. Only the supportive functions shall be included in the framework of the Regulation. As a result, the present state of affairs will largely remain unchanged.

However, two arguments have been raised in the current discussion, which deserve closer attention. The first argument relates to Article II NYC. According to the Heidelberg Report, a (declaratory) judgment on the validity of an arbitration agreement could be recognised in other Member States under Article 32 JR. Some critics of the proposal argued that this result would violate Article II NYC which obliges each contracting party to apply this provision independently. ((IBA Arbitration Committee Working Group Submission, no. 22.)) Yet, this critique does not correspond to public international law. As the New York Convention provides for a uniform law, there is a general assumption that the courts of its contracting parties will apply its provisions equally. ((The very reason for implementing uniform laws is to set up a uniform regime which is interpreted and applied by the courts in a uniform way. Accordingly, a genuine obligation of applying uniform laws independently from the case law of other Contracting parties clearly contradicts the objectives of uniform laws, see generally *Gruber*, Methoden des internationalen Einheitsrechts (2004), p. 336 et seq.)) Seen from this perspective, there is no reason to oblige the courts of contracting party in a regional framework to verify the validity of the agreement individually, as long as the courts in the regional framework are deemed to apply the New York Convention correctly. ((Same opinion *Illmer/Steinbrück*, SchiedsVZ 2009, 188, 193.))

A second argument has been raised recently by the government of the U.K. ((Submission of the UK government to the European Commission, nos. 35 – 37.)) which expressed concerns that the proposed articles would entail conferring the external competence on arbitration on the Community. ((Obviously, this concern was triggered by the ECJ's opinion on the external competences of the European Union with regard to the Lugano Convention, ECJ 2/7/2006, ECR 2006 I-1145, see *Hess*, Europäisches Zivilprozessrecht (2010), § 2 III, nos 68 et seq.)) As a consequence, the UK government proposed to enlarge the arbitration exception of Article 1 (2) (d) of the Regulation and to clarify that it applies to all aspects of the arbitration process. As a result, arbitration (according to the NYC and national laws) would generally prevail over European procedural law. ((Such a provision

would severely obstruct the coherent application of the Brussels I Regulation since it would exclude the application of the Regulation in all (incidental) matters related to arbitration. It is doubtful that such a concept corresponds to the fundamental principle of the supremacy of the Union law.))

With all respect, this proposal does not correspond to the present state of arbitration in the Internal Market. As has been demonstrated above, ((Supra at footnote 19 et seq.)) arbitral awards implement (mandatory) European law and, according to the case law of the ECJ, they cannot be detached from European law. Further, the concern of the U.K. Government does not seem to be justified. As the proposed changes to the Regulation only address the concurrence of supporting measures of State courts with regard to arbitration, the whole arbitration process is not included. In addition, the prevalence of the New York Convention shall be fully observed. However, to avoid any unnecessary "transfer" of competences to the Union, it may be advisable to maintain the arbitration exception but to clarify that the Regulation applies to declaratory relief under Articles 22 (6) and 27 (A) as well as to supportive measures under Articles 22 (6) and 31. A reformulated Article 1(2) (d) could read as follows:

"Arbitration, save supportive measures and declaratory relief proceedings as provided for under Articles 22(6), Article 27A and Article 31."

This reformulation of Article 1 (2) (d) JR would certainly equally (and hopefully) reassure the arbitration community. However, the basic proposal to realign arbitration and litigation will remain untouched.

IV. The EU Commission's Green Paper on the Reform of the Brussels I Regulation

1. The Green Paper

The Green Paper addresses the relationship to arbitration in an open-ended manner. Its 7th section starts by describing the present state of arbitration as a "matter of great importance to international commerce." ((Green Paper on the Review of Council Regulation (EC) no 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of April,

21st,2009, COM (2009)175 final, p. 9.)) It also clearly emphasises the prevalence of the New York Convention which shall remain untouched by the legislative efforts. However, the Paper seeks to obtain the opinion of Member States and stakeholders in the field about the interfaces between arbitration and the Regulation. Among other things, the Commission asks about appropriate actions at the Community level with regard to the strengthening of arbitration agreements, the ensuring of a better coordination between court and arbitration proceedings and the improvement of the effectiveness of arbitral awards.

As the Green Paper contains a questionnaire, it would be premature to conclude that the EU Commission intends to include arbitration into the scope of the Regulation. In addition, it should be noted that the EU Commission did not endorse the proposals of the Heidelberg Report comprehensively, but presented several alternative legislative options. However, the existence of the 7th question in the Green Paper clearly manifests that the Commission is considering proposing legal action in this field.

2. The reactions to the Green Paper

By June 30, 2009, the Commission received many reactions, 21 from the EU Member States and 1 from Switzerland (a third state); in addition many reactions from the bar, the industry, consumers' protection associations, universities and individual citizens have been submitted. ((The submissions are available here.)) Many stakeholders in arbitration, especially law firms, arbitration associations and arbitration institutions also submitted their (diverging) views. As far as arbitration is concerned, the opinions differ: 5 Member States expressed (cautiously) support for the proposal to address the interfaces between arbitration and litigation, ((Belgium, Sweden, Slovenia and Spain (and – cautiously: Germany).)) while 3 Member States expressed concerns. ((Austria, France and the United Kingdom. Switzerland (as a third state, but a contracting party of the Lugano Convention) expressed satisfaction with the judgment of the ECJ in *West Tankers* and denied any need for changes.)) Especially the French arbitration scene strongly disagreed with the proposal of addressing the interfaces between arbitration and litigation in the Regulation. ((See the submissions presented by AIA; Allen and Overy LLP (presenting an own proposal); Barreaux de France; Centre belge d'arbitrage et de mediation; Chamber of national and international Arbitration of Milan; Chambre de commerce et d'industrie de Paris; Comité

français de l'arbitrage; Comite national Français de la Chambre de Commerce Internationale; Deutscher Industrie- und Handelskammertag ; International Bar Association Arbitration Committee ; Mr. E. *Gaillard* ; Paris, The Home of International Arbitration (A. *Mourre*); Lovells LLP. It must be reiterated, however, that some of these critics obviously misunderstood the proposed solution of the Heidelberg Report; see supra footnotes 33 – 35.)) However, other stakeholders in arbitration supported the idea. ((See inter alia the submissions presented by Bundesrechtsanwaltskammer; City of London Law Society; Civil Justice Council (cautiously); Clifford Chance LLP ("may be beneficial"); Commercial Bar Association; Council of Bars and Law Societies of Europe; Deutscher Anwaltsverein; German Institution of Arbitration; Herbert Smith LLP; Mr. A. *Dickinson*; Siemens AG; Spanish Arbitration Club.)) All in all, it must be noted that a clear tendency for or against the proposals cannot be ascertained.

The Green Paper is currently discussed in the European Parliament, accompanied by an intense lobbying of the "arbitration scene". In December 2009, the Reporter of the Parliament, *Tadeusz Zwiefka*, issued a first statement on the matter which evinced great reluctance toward a fundamental reform of the Regulation. ((See here.)) According to this pre-paper, the Reporter intends to adopt the position of the UK government which strives for a comprehensive re-nationalisation of arbitration. ((See supra text at footnote 59.)) However, as has been demonstrated above, such a solution is not in accordance with the role and the function of arbitration in the Internal Market. ((See supra text at footnotes 19 et seq.)) Further, since the interfaces between arbitration and European procedural law have become a recurrent issue in the case law of the ECJ and the Member States, the issue will reappear on the agenda of the European legislator in the near future. Against this background, it is recommended to address the interfaces by the Brussels Regulation now – in a positive, yet prudent way. ((A regional, supporting regime is not inconsistent with the New York Convention as the Geneva Convention of 1961 clearly demonstrates.))

VI. Concluding Remark

Will it be possible to reconcile the diverging perspectives of the arbitration world and European procedural law? From today's perspective, a clear answer to this question may appear premature. However, as has been shown in this contribution, much of the criticism forwarded against the proposals of the

Heidelberg Report is still based on misunderstandings. Moreover, a solution which promotes that arbitration shall take blind precedence over the Brussels Regulation would entail a re-nationalisation and fragmentation of European procedural law. This, however, contravenes the requirements of a coordinated dispute resolution in the Internal Market.

On the other hand, the proposal of the Heidelberg Report to delete the arbitration exception entirely maybe goes too far. Therefore, it may be advisable not to delete the arbitration exception, but rather to reduce and to clarify its scope. ((See supra text at footnote 59.)) However, the inclusion of the new Articles 22 no 6 and 27A in the Judgments Regulation is still strongly recommended. The critics expressed against this proposal seem not to be convincing. Nevertheless, the proposed regime should only apply if the parties choose an EU Member State as the place of arbitration. Third state relations should be excluded – in this respect Member States should be free to adapt their national arbitration laws to the international framework.

One final objection against the inclusion of arbitration in the framework of Brussels I remains: Many critics expressed the concern that parties would not select Europe as a place of arbitration since the autonomy of arbitration would not be respected. However, this concern does not seem to be realistic. The aim of the proposed Articles 22 no 6 and 27 A JR is to avoid obstructive tactics against arbitration, especially torpedo-actions. In this respect, the position of arbitration in Europe will be improved considerably. Further, the decision on the validity of an arbitration clause will be recognised in all Member States. Thus, legal certainty for the parties with regard to arbitration will be improved considerably. Against this background, it seems very unlikely that the proposed “regional regime” will unleash an exodus of arbitration from Europe to other places in the world.

Maher v Groupama Grand Est: Law Applicable to Direct Action Against Insurer

This post was written by Mrs Jenny Papettas, a PhD Candidate and Postgraduate Teaching Assistant at the University of Birmingham.

The Court of Appeal delivered its judgment in the case of *Maher v. Groupama Grand Est*. on 12 November 2009, upholding both the decision and reasoning of Blair J. in the Queen's Bench Division. The case, concerning issues of applicable law in a direct action against an insurer, is noteworthy because it is illustrative of the type of case that will fall to be decided under Article 18 Rome II and serves as a reminder that individual Member State reasoning on these issues is obsolete under that Regulation.

The Claimants, an English couple, Mr. and Mrs. Maher, were involved in a collision in France with a van being driven negligently by French resident M Marc Krass. M Krass was sadly killed in the collision. The claim was brought directly against M Krass' third party liability insurer. Liability and the application of French law to the substantive issues in the case were not at issue. The outstanding issues to be determined by the court were; (1) Whether damages should be assessed in accordance with French law or English law, (2) Whether pre-judgment interest on damages should be determined in accordance with French law or English law.

The Assessment of Damages

Under English law the assessment of damages in tort claims falls to be decided as a procedural issue *(Harding v. Wealands* [2007] 2 AC 1). The issue in *Maher* was whether in a direct action against the tortfeasor's insurer the issue was to be characterised as tortious, with damages being dealt with as a procedural issue under the *lex fori* or as a claim founded in contract, where assessment of damages is dealt with as a substantive issue by the applicable (French) law as stipulated in both the Rome Convention (implemented in English law by Contracts (Applicable Law) Act 1990, s.2 and Sch.1, Art.10(1)(c)) and the Rome I Regulation. Despite

the Defendant's arguments that the claim only arose because it was contractually obliged to indemnify the insured and that therefore the claim was contractual in nature, the Court, citing *Macmillan Inc v. Bishopgate Investment Trust plc (No. 3) [1996]1 WLR 387,* held that it was not the claim that fell to be characterised but each individual issue. Further citing Law Com Report No. 193 (Private international Law: Choice of Law in Tort and Delict (1990)) where it was stated that direct actions against liability insurers are better seen as an extension of a tortious action (para 3.51) the Court held that since liability was admitted and the insurer therefore had to meet the tortfeasor's liability the claim was tortious with the consequence that assessment of damages was procedural and a matter for the *lex fori*.

Pre-judgment Interest

With regard to pre-judgment interest the Court found that the issue was split. The existence of a right to such interest was held to be a substantive issue whilst the calculation of any interest, being partially discretionary in nature under s 35A Supreme Court Act 1981, was procedural. However, although the quantification of interest would as a result be determined with reference to English law, s35A is flexible enough to allow the Court to apply French rates if it is necessary to achieve justice in the circumstances.

Anticipating Rome II

Article 15 of Rome II provides a lengthy list of issues which will be determined by the applicable law, largely disposing of any possibility of subjecting different issues to different laws. This extends to the assessment of damages thereby expanding the scope of Rome II into areas previously classified as procedural under the traditional English substance /procedure dichotomy. Indeed, it was acknowledged during *Maher* that the application of Rome II would have produced a different result in this regard.

However an intriguing question remains as to whether Article 18, which provides for direct actions against insurers, will be interpreted so that the injured party's choice of either the applicable law or the law of the insurance contract will govern the whole claim or simply the question of whether a direct action can be permitted. Furthermore it will be interesting to see how the issue of

characterisation plays out. For example, will the insurer be able to rely on the contractual limits of the policy where the applicable law to a direct action is determined by the law applicable under the Regulation. The only certainty is that such questions will have to be answered with reference to the autonomous definitions which are yet to develop and the methods currently employed by Member State courts will be obsolete for dealing with issues which fall within the remit of Rome II.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (1/2010)

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

It contains the following **articles/case notes (including the reviewed decisions)**:

- ***Heinz-Peter Mansel/Karsten Thorn/Rolf Wagner***: "Europäisches Kollisionsrecht 2009: Hoffnungen durch den Vertrag von Lissabon" – the English abstract reads as follows:

> *This article provides an overview on the developments in Brussels concerning the judicial cooperation in civil and commercial matters from November 2008 until November 2009. It summarizes the current projects in the EC legislation and presents some new instruments. Furthermore, it refers to the national German laws as a consequence of the new European instruments. This article also shows the areas of law where the EU has made use of its external competence. With regard to the ECJ, important decisions and some pending cases are presented. In addition, the article deals with important changes as to judicial cooperation resulting from the Treaty of Lisbon. It is widely criticised that the Hague Conference on Private International Law and the European*

Community should improve their cooperation. An important basis for the enhancement of this cooperation is the exchange of information among all parties involved. Therefore, the present article turns to the current projects of the Hague Conference as well.

- ***Ulrich Magnus***: "Die Rom I-Verordnung" – the English abstract reads as follows:

December 17, 2009 is a marked day for international contract law in Europe. From that day on, the court of the EU Member States (except Denmark) have to apply the conflicts rules of the Rome I Regulation to all transborder contracts concluded on or after that day. Fortunately, the Rome I Regulation builds very much on the fundaments of its predecessor, the Rome Convention of 1980, and amends that Convention only moderately. Though progress is limited, the amendments should not be underestimated. First, the communitarisation of international contract law will secure a stricter uniform interpretation of the Rome I Regulation through the European Court of Justice. Secondly, the changes strengthen legal certainty and reduce to some extent the courts' discretion, however without sacrificing the necessary flexibility. This is the case in particular with the requirements for an implicit chance of law, which now must be clearly demonstrated; with the escape clauses, which come into play when a manifestly closer connection points to another law or with the definition of overriding mandatory provisions, which apply irrespective of the law otherwise applicable (Art. 9 par. 1). Legal certainty is also strengthened by a number of clarifying provisions, among them that the franchisee's and distributor's law governs their contracts, that set-off follows the law of the claim against which set-off is asserted or that the redress claim of one joint debtor against another is governed by the law that applies to the claiming debtor's obligation forwards the creditor. Thirdly, the protection of the weaker party through conflicts rules has been considerably extended and aligned to the Brussels I Regulation. Yet, some weaknesses have survived. These are the continuity of the confusing coexistence of the Rome I conflicts rules and further special conflicts rules in a number of EU Directives on consumer protection, the hardly convincing system of differing conflicts rules on insurance contracts and still open questions us to the rules applicable to assignments and their scope. It is to be welcomed that the Rome I Regulation itself (Art. 27) has already set these problems on the agenda for further amendment.

- ***Peter Kindler***: "Vom Staatsangehörigkeits- zum Domizilprinzip: das künftige internationale Erbrecht der Europäischen Union" – the English abstract reads as follows:

On October 14, 2009 the Commission of the European Communities has adopted a "Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments in Matters of Succession and the Creation of a European Certificate of Succession" (COM [2009] 154 final 2009/0157 [COD] (SEC [2009] 410), (SEC [2009] 411). Its aim is to remove obstacles to the free movement of persons in the Union resulting from the diversity of both the rules under substantive law and the rules of international jurisdiction or of applicable law, the multitude of authorities to which international successions matters can be referred and the fragmentation of successions which can result from these divergent rules. According to the Proposal the competence lies with the Member state where the deceased had their last habitual residence, and this includes ruling on all elements of the succession, irrespective of whether adversarial or non-adversarial proceedings are involved (Article 4). The author welcomes this solution considering that the last habitual residence of the deceased will frequently coincide with the location of the deceased's property. As to the applicable law, the Proposal again uses the last habitual residence of the deceased as the principal connection factor (Article 16), but at the same time allows the testators to opt for their national law as that applying to their successions (Article 17). In this respect, the author is critical on the universal nature of the proposed Regulation (Article 25) and, inter alia, advocates the admission of referral in case the last habitual residence of the deceased is located outside the European Union. Furthermore, the author is in favour of a wider range of choice-of-law-options for the testator as foreseen in the Hague Convention 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons.

- ***Wolfgang Hau***: "Doppelte Staatsangehörigkeit im europäischen Eheverfahrensrecht" – the English abstract reads as follows:

The question how multiple nationality is to be treated under the European rules on matrimonial matters was rather misleadingly answered by Alegría Borrás in her Official Report on the Brussels II Convention and it is still open in respect of

the Regulation No 2201/2003. In the Hadadi case, the European Court of Justice has now pointed out that every nationality of a Member State held by both spouses is to be taken into account regardless of its effectivity. The Hadadi case directly concerns only the rather particular context of Article 64 (4) of the Regulation. In this case note it is argued that the considerations of the ECJ are convincing and also applicable to more common settings of the multiple-nationality problem within the Brussels II regime. On the occasion of the ongoing reform of the Regulation, it should however be carefully considered whether nationality of the spouses is an appropriate and indispensable basis of jurisdiction anyway.

- ***Jörg Dilger:*** "EuEheVO: Identische Doppelstaater und forum patriae (Art. 3 Abs. 1 lit. b)" – the English abstract reads as follows:

The essay reviews another judgment of the European Court of Justice relating to the Regulation (EC) No. 2201/2003 (Brussels IIA). Having to deal with spouses sharing the common nationality of two member states (Hungary and France), the ECJ – following the convincing AG's opinion – held that where the court of a member state addressed had to verify, pursuant to Article 64 (4), whether the court of a member state of origin of a judgment would have had jurisdiction under Article 3 (1) (b), the court had to take into account the fact that the spouses also held the nationality of the member state of origin and that therefore the courts of the latter could also have had jurisdiction under that provision. Since the spouses might seize a court of the member state of their choice, the evolving conflict of jurisdictions had to be solved by means of the lis alibi pendens rule (Article 19 (1)). Given the special procedural situation, the author starts by analyzing the transitional rule in Article 64 (4) which empowers the courts of one member state to examine the jurisdiction of another member state's courts. He then examines the ECJ's reasoning and comes to the conclusion that de lege lata the ECJ's decision is correct. He finally shows that the ECJ's solution is not limited to transitional cases falling within the scope of Article 64, but applies to all the cases in which the court seized – which, not having jurisdiction pursuant Articles 3 to 5, considers having resort to jurisdiction according to its national law ("residual jurisdiction") – has to examine whether the courts of another member state have jurisdiction under the regulation (Article 17). Moreover, the solution

elaborated by the ECJ also applies to spouses who share the common nationality of a member state and the common domicile pursuant to Article 3 (1) b, (2).

- ***Felipe Temming***: "Europäisches Arbeitsprozessrecht: Zum gewöhnlichen Arbeitsort bei grenzüberschreitend tätigen Außendienstmitarbeitern" – the English abstract reads as follows:

The Austrian High Court of Vienna has published a judgment on the topic of jurisdiction where an employee is relocated from Austria to Germany but the relocation never took effect. The employee was relocated pursuant to sections 99 and 95(3) Betriebsverfassungsgesetz, which raised the question of a change of jurisdiction according to Art. 19 No. 2 lit. a Regulation 44/2001/EC. The proceedings before the regional court of Innsbruck were brought by a sales representative against his Berlin-based employer in an action for payment. The employee was domiciled near Innsbruck from where he serviced customers in the area of Innsbruck and South-Germany and was transferred to Berlin however the employee became ill and the transfer never took effect. The case note first addresses issues regarding the personal scope of the Betriebsverfassungsgesetz in cross-border and external situations (part II.). It argues that the membership in an undertaking is the preferable criterion in order to establish the necessary link and only a consistent approach will lead to coherent and fair results. The case note then briefly revisits the long-standing jurisprudence of the European Court of Justice on matters of the habitual – usual – work place according to Art. 5 No. 1 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which was incorporated into Art. 19 of Regulation 44/2001/EC (part III.). The case note furthermore refers to section 48(1a) Arbeitsgerichtsgesetz which came into effect on 1 April 2008 and gives German labour courts jurisdiction at the habitual work place in matters solely internal to Germany. Art. 19 No. 2 lit. a of Regulation 44/2001/EC founds its counterpart in this new German law. The enactment of section 48(1a) Arbeitsgerichtsgesetz is consistent with Germany's Federal Labour Court which has set out in several cases the doctrine of the uniform place of performance of work as the criterion for jurisdiction in labour law cases and in so doing has followed the path laid down by the ECJ in the early Ivenel case. The legislation enacts the decisions which have been held by the Federal Labour Court and had not been supported

by leading German scholars. The case note ends with concluding remarks (part IV.)

- ***Marianne Andrae/Steffen Schreiber***: "Zum Ausschluss der Restzuständigkeit nach Art. 7 EuEheVO über Art. 6 EuEheVO" – the English abstract reads as follows:

The article deals with a decision of the Austrian Supreme Court of Justice concerning the exclusion of residual jurisdiction according to art. 7 Brussels IIa Regulation in case there is no jurisdiction under art. 3–5 Brussels IIa Regulation but the defendant spouse is a national of a Member State. The authors agree with the decision. Only if no member state has jurisdiction on the lawsuit and if the rules of jurisdiction in art. 3–5 are not exclusive for any action against the defendant spouse, does art. 7 allow to determine the jurisdiction according to the law of the relative Member State. According to art. 6, the rules of jurisdiction in art. 3–5 are exclusive if the defendant spouse has his/her habitual residence in a Member State or if he/she is a national of a Member State. However, it is not necessary for the exclusion of residual jurisdiction under art. 6 that any member state actually has jurisdiction under art. 3–5. Even though the abatement of art. 6 and the introduction of new rules of residual jurisdiction may be desirable, this effect must not be achieved by simply interpreting the current art. 6 this way.

- ***Katharina Jank-Domdey/Anna-Dorothea Polzer: "***Ausländische Eheverträge auf dem Prüfstand der Common Law Gerichte" – the English abstract reads as follows:

Courts in a number of important common law jurisdictions until recently gave little or no weight to prenuptial contracts entered into in civil law jurisdictions such as France or Germany. These contracts typically contain provisions as to the spouses' marital property regime or their maintenance after divorce. Recent decisions, however, show a clear trend towards the enforceability of such agreements. The paper discusses the judgments of the Court of Appeals of New York in Van Kipnis v. Van Kipnis (11 NY3d 573) involving a French separation of property agreement and of the Court of Appeal of England and Wales in Radmacher v. Granatino ([2009] EWCA Civ 649), involving a German contract providing for the separation of property and the exclusion of spousal

maintenance in case of divorce, and looks at their precedents. While none of the courts concludes that the foreign law under which the contracts were made must be applied they in fact enforce the spouses' agreements as to the financial consequences of their divorce. According to the English court, however, giving due weight to a foreign prenuptial agreement is subject to the principle of fairness and must safeguard the interests of the couple's children.

- ***Sven Klaiber*** on the new Algerian international civil procedural law as well as arbitration law: "Neues internationales Zivilprozess- und Schiedsrecht in Algerien"
- ***Erik Jayme*** on the third Heidelberg conference on art law: "Kunst im Markt – Kunst im Streit Internationale Bezüge und weltweiter Kampf um Urheberrechte – III. Heidelberger Kunstrechtstag"

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2009)

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

It contains the following **articles/case notes (including the reviewed decisions)**:

- ***Klaus Bitterich:*** "Vergaberechtswidrig geschlossene Verträge und internationales Vertragsrecht" – the English abstract reads as follows:

This article is concerned with the law applicable to international (works or supplies) contracts concluded by a German public authority on the basis of an unlawful award procedure or decision. In many, but not all cases there will be an express or implied choice of law agreement in favor of German law by way of

reference to the German Standard Building Contract Terms "VOB/B" or, in case of a supplies contract, the "VOL/B" respectively. In the absence of choice, a contract concluded as a result of a tender procedure governed by public procurement legislation is, as the author intends to show, according to the escape clause of article 4 para. 3 of the new Rome I-Regulation No. 593/2008 governed by the law of the country where the tender procedure took place, because such a contract is more closely connected to this place than to the place where the party who is to effect the characteristic performance has his habitual residence. Thus, where German authorities are involved German law will apply to the question whether a breach of a public procurement rule is capable of affecting the validity of the contract. The relevant German provisions of substantive law state that such breach may only be invoked by means of a specific review process according to §§ 102 et seq. of the "Gesetz gegen Wettbewerbsbeschränkungen" (GWB) and, as this remedy is no longer available after the contract has been concluded, as a principle hold errors in the procurement procedure which where not subject to such review irrelevant. The only exception is § 101b GWB (replacing the former § 13 of the "Vergabeverordnung" – public procurement regulation –) declaring void contracts concluded without prior information of tenderers whose offers will not be accepted and, on the other hand, contracts concluded without a regular tender procedure. Whether this provision is an overriding mandatory provision within the meaning of article 9 para. 1 of the Rome I-Regulation and thus applicable irrespective of the law otherwise applicable to the contract is the second subject of the article at hand. The author argues that this is not the case due to its inability to effectively enforce the public procurement regime even on a national level after the contract has been concluded. It must be noted, though, that the Oberlandesgericht (OLG) Düsseldorf has taken the opposite view.

- ***Felix Dörfelt***: "Gerichtsstand sowie Anerkennung und Vollstreckung nach dem Bunkeröl-Übereinkommen" – the English abstract reads as follows:

The International Convention on Civil Liability for Bunker Oil Pollution Damage designates international jurisdiction to the country where the damage occurred. The author discusses the various available local fori under the Brussels I-Regulation and the German ZPO, emphasizing on the forum actoris under Art. 9

para. 1 lit. b in connection with Art. 11 para. 2 Brussels I-Regulation. The gap in German local jurisdiction for damages in the exclusive economic zone can be bridged by an analogy to § 40 AtomG. Concerning the recognition and enforcement of Judgments under the convention the author criticises the possibility of "recognition-tourism" due to the global effect of recognition under Art. 10 para. 1 Bunker Oil Convention. The convention allows subsequent enforcement of judgements recognized without the possibility of a public policy exception due to the specialties of the German law on recognition and enforcement. This problem can be overcome by an extensive interpretation of "formalities" in Art. 10 para. 2 Bunker Oil Convention allowing for courts to invoke the public order exception.

- ***Peter Mankowski***: "Die Darlegungs- und Beweislast für die Tatbestände des Internationalen Verbraucherprozess- und Verbrauchervertragsrechts" – the English abstract reads as follows:

The burden of proof and the onus for the underlying facts in the concrete application of both conflict rules and rules on jurisdiction is one of the dark areas. The present article examines it in the field of international consumer law. The fundamental maxim is that the party who alleges that a certain rule is applicable bears the burden of stating and proving that the facts required are fulfilled. Hence, generally it is for the consumer to show that the facts required to bring the protective regime of international consumer law in operation, are present since ordinarily the consumer will allege its applicability. He who invokes an exception is liable to present the facts supporting such contention. If a choice of law or choice of court agreement is at stake the party invoking it must show that such agreement has been concluded in accordance with the chosen law.

- ***Carsten Müller***: "Die Anwendung des Art. 34 Nr. 4 EuGVVO auf Entscheidungen aus ein- und demselben Mitgliedstaat" – the English abstract reads as follows:

The Council Regulation (EC) No 44/2001 provides in Article 34 (3) and (4) that a judgment, under certain conditions, shall not be recognised if this judgment is irreconcilable with a judgment given in the Member State in which recognition is sought (Article 34 (3)) or with an earlier judgment given in another Member

State or in a third State (Article 34 (4)). The following article deals with the question whether "another Member State" in the sense of Article 34 (4) is also the Member State from which the judgment to which the earlier judgment might be opposed originates. The author comes to the conclusion that Article 34 (4) also applies to two judgments originating from the same Member State other than the Member State in which recognition is sought.

- ***Moritz Brinkmann***: "Der Vertragsgerichtsstand bei Klagen aus Lizenzverträgen unter der EuGVVO" – the English abstract reads as follows:

In Falco Privatstiftung and Rabitsch the ECJ has excluded license agreements from the application of Article 5 (1) (b) Brussels I Regulation. The author argues that the Court's narrow understanding of the term "contract for the provision of services" is persuasive particularly in light of Article 4 (1) (b) Rome I Regulation. Regarding Article 5 (1) (a) Brussels I Regulation, the ECJ has held, that the principles which the Court previously developed in Tessili and De Bloos with respect to Article 5 (1) of the Brussels Convention are still pertinent with respect to the construction of Article 5 (1) (a) of the Brussels I Regulation. This position is not surprising as the legislative history of Article 5 (1) gives clear indications that for contracts falling under (a) the legislator wanted to retain the Tessili and De Bloos approach. In the author's view, however, the case gives evidence for the proposition that the solution in Article 5 (1) of the Brussels I Regulation is an unsatisfying compromise as it requires for contracts other than contracts for the sale of goods or for the provision of services a determination of the applicable law. Hence, the ascertainment of jurisdiction is burdened with the potentially difficult determination of the lex causae. The author postulates that the European legislator should de lege ferenda extend the approach taken in Article 5 (1) (b) to other kinds of contracts where the place of performance of the characteristic obligation can be autonomously ascertained. With respect to license agreements this could be the jurisdiction for which the right to use the intellectual property right is granted.

- ***Markus Fehrenbach***: "Die Zuständigkeit für insolvenzrechtliche Annexverfahren" – the English abstract reads as follows:

Even though the EC Regulation No 1346/2000 on Insolvency Proceedings contains provisions about recognition and enforcement of judgments deriving directly from insolvency proceedings and which are closely linked with them it lacks explicit rules about international jurisdiction for these types of actions. On 12 February 2009 the ECJ ruled on the international jurisdiction on an action to set aside which was brought by the liquidator of a German main insolvency proceeding. The ECJ declared the international jurisdiction to open a main proceeding covered these actions as well. While the ECJ established an international jurisdiction for German courts, German law does not contain explicit rules about local jurisdiction. In its judgment of 19 May 2009 the German Federal Court of Justice decided that local jurisdiction is determined by the seat of the Court of Insolvency. The author analyses both judgments and agrees with the ECJ insofar as international jurisdiction for actions deriving directly from insolvency proceedings and which are closely linked with them, belong to the courts of the member state where the main proceeding was opened. He disagrees insofar as a German action to set aside is regarded as such an action. Once the international jurisdiction of the German courts is established there has to be a local jurisdiction, too. In contrast to the judgment of the German Federal Court of Justice, the local jurisdiction follows by analogy with article 102 sec. 1 para. 3 of the German Act Introducing the Insolvency Code.

- ***Diego P. Fernández Arroyo/Jan Peter Schmidt***: "Das Spiegelbildprinzip und der internationale Gerichtsstand des Erfüllungsortes" – the English abstract reads as follows:

The article comments on a decision by the Oberlandesgericht Düsseldorf on the recognition and enforcement of an Argentine judgment. The Argentine claimant had obtained an award for payment of a broker's commission against a company domiciled in Germany. Recognition and enforcement of the judgment was denied because, according to the German rules of international jurisdiction, the Argentinean court had not been competent to decide the matter. The case perfectly illustrates Argentine courts' tendency to claim a much wider scope of jurisdiction than their German counterparts in litigation arising out of contractual relations. The authors draw the conclusion that while the decision by the Oberlandesgericht Düsseldorf not to grant recognition and

enforcement is fully in accordance with German law, it also highlights the defects of the so called "mirror principle", i. e. the mechanism of reviewing the jurisdiction of foreign courts strictly according to the German rules. In times of ever increasing international legal traffic, more flexible and liberal approaches, which can be found in other legal systems, are clearly preferable.

- ***Rolf A. Schütze***: "No hay materia más confusa …" – In this article, the author discusses a decision of the German Federal Court of Justice dealing with the question which standard has to be applied with regard to the (in)consistency of national arbitral awards with public policy (BGH, 30.10.2008 – III ZB 17/08).
- ***Dirk Looschelders***: "Anwendbarkeit des § 1371 Abs. 1 BGB nach Korrektur einer ausländischen Erbquote wegen Unvereinbarkeit mit dem ordre public" – the English abstract reads as follows:

Under the German statutory marital property regime a person who outlives his or her spouse and becomes legal heir is generally granted an additional quarter of the inheritance pursuant to § 1371 para. 1 BGB. Scholars disagree whether this provision also applies in cases where the legal succession to the deceased is governed by foreign law. The present case involved an unusual situation: the applicable Iranian law of succession discriminates against the surviving wife and therefore violates the German ordre public. The Higher Regional Court of Düsseldorf refused the application of § 1371 para. 1 BGB, since the wife's inheritance pursuant to the Iranian law of succession had already been increased to avoid the ordre public violation. This argument, however, does not convince: There needs to be a clear distinction between the correction of the Iranian law of succession to conform to the German ordre public and the question of whether the provisions of § 1371 para. 1 BGB apply.

- ***Andreas Spickhoff***: "Die Zufügung von „Trauerschmerz" als Borddelikt" – The article analyses a decision of the Austrian Supreme Court of Justice (OGH, 09.09.2008 – 10 Ob 81/08x). The decision concerns – at a PIL-level – the question of the applicable law with regard to a claim for grief compensation in a case of a deadly accident aboard a yacht. At the level of substantive law, the case illustrates the differences between German and Austrian law: While under German law, the compensation of relatives

of accident victims requires an impairment of health exceeding the "normal" reaction caused by the death of a close relative, Austrian courts award grief compensation also in cases where the relatives themselves have not suffered an impairment of health – as long as there exists a strong emotional bond which is presumed in case of close relatives living in a joint household.

- ***Santiago Álvarez González***: "The Spanish Tribunal Supremo Grants Damages for Breach of a Choice-of-Court Agreement"- the introduction reads as follows:

On January 12th 2009, the Spanish Tribunal Supremo (TS henceforth) granted compensation for damages caused by the breach of a choice-of-court agreement favoring Spanish jurisdiction. This is the first, or at least one of the first judgments in Europe (leaving aside the UK), which has dealt with the issue at the highest level of the courts of justice. The TS revoked the two prior rulings (those of the courts of first instance and appeal), in which the claim of the plaintiff had been rejected alleging that, due to the essentially procedural nature of the choice-of-court agreement, its violation could not lead to compensation. For both courts of justice, the natural consequence of the breach of a choice-of-court agreement was the rejection of the claim and (depending on the case) an order for costs. It is not the first time that the Spanish TS decides about a claim for damages due to the breach of a choice-of-court – but it is, indeed, the first time it shows its awareness of the specific problems present in this type of lawsuit. Good proof is that, in an unusual move, the judgment reproduces in extenso the legal arguments advanced by the parties both in first instance and in appeal. It also reproduces the arguments of the first and second instance courts of justice in detail. Nevertheless, the resolution is simple, convincing, and does not take into account (and in my opinion this is correct) the great number of useless details the parties added to their otherwise quite clear pretensions. In this commentary, I will pay attention just to the contents of the judgment in the light of the elements and issues that are usually relevant in this kind of process, attending to the singularity of the current case – where the non-contractual court is placed on the US, this is, out of the scope of action of Brussels I; it must be noted that Spain has no agreement on enforcement of judgments in civil and commercial matters with the US. After going through the general idea of the case, I will study the rulings of both first and second

instance, as well as some non-discussed issues. I will analyze the solution of the TS, and I will finish by giving my own view on the decision and its relevance for the future. The legal discussion was heterogeneous and messy; most of the topics, except that of the procedural or substantive nature of non-fulfillment and its consequences, were not given the importance they indeed have and, at some points, they were not articulated at the right procedural moment through the proper, procedural mechanisms envisaged by the lex fori. This paper tries to reorganize and synthesize this heterogeneity, even at the price of losing some nuances.

- **Viktória Harsági/Miklós Kengyel***:* "Anwendungsprobleme des Europäischen Zivilverfahrensrechts in Mittel- und Osteuropa" – the English abstract reads as follows:

The study is the summary of an international conference organized at the Andrássy Gyula German Speaking University. It deals with the effect of the community law on the legal systems of eight new Central and Eastern European Member States, (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovenia) on the field of civil procedure. Apart from this, former member states like Austria and potential member states like Croatia and Turkey are also analyzed. The article examines the specific problems of applying the law in cross-border litigation, such as questions of jurisdiction, recognition, enforcement, service of documents and taking of evidence.

- ***Hilmar Krüger*** presents selected PIL decisions of the Jordanian Court of Cassation: "Jordanische Rechtsprechung zum Kollisionsrecht"
- ***Carl Friedrich Nordmeier***: "Timor-Leste (Osttimor): Neues Internationales Zivilprozessrecht" – the English abstract reads as follows:

The Democratic Republic of Timor-Leste (East Timor) enacted a new Civil Procedure Code (Código de Processo Civil) by decree-law n. 1/2006 of 21st of December, 2006. This article reports on the new rules of international jurisdiction and enforcement of foreign judgments in Timor-Leste. The wording of the new provisions is very similar to the corresponding rules of the Portuguese Civil Procedure Code.

Netherlands Proposal on Private International Law ("Book 10")

A Dutch Proposal on Private International Law, to be included as Book 10 of the Civil Code of the Netherlands, has been put before Parliament (Tweede Kamer, 2009-2010, 32137, Vastellings- en Invoeringswet Boek 10 Burgerlijk Wetboek; with *Memory van Toelichting*/Explanatory Memorandum). This long-awaited proposal is a Consolidating Act of 165 provisions, merging 16 existing Conflict of Laws Acts (such as those on Names, Marriage, Divorce and Corporations), with some minor amendments. New are the 17 general provisions, containing rules on, amongst others, the application of choice of law rules, public policy, special mandatory rules, party autonomy, and capacity, though these largely reflect the current rules formulated in case-law or laid down in the special acts. Where applicable, reference to the relevant Conventions and EU Regulations is made. As for Rome I and Rome II, the Proposal provides that these Regulations also apply where the case falls outside the (material) scope of these Regulations.

Once the Proposal is adopted, this Book 10 of the Civil Code will replace the existing special PIL acts. Since it is part of the Civil Code, it only includes choice of law rules. International jurisdiction, recognition and enforcement and other international procedural issues, as far as not governed by international and EU instruments, will still be regulated by the Code of Civil Procedure.

See for earlier developments on Dutch Private International Law, Kramer, IPRax 2007/1 (overview 2002-2006) and Kramer, IPRax 2002/6 (overview 1998-2002).

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2009)

Recently, the September/October issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was released.

It contains the following **articles/case notes (including the reviewed decisions)**:

- ***Christoph Althammer***: "Verfahren mit Auslandsbezug nach dem neuen FamFG" – the English abstract reads as follows:

The new "Law on procedure in matters of familiy courts and non-litigious matters" (FamFG) contains a chapter that deals with international proceedings. The author welcomes this innovation for German law in non-litigious matters as there is an increase of cross-border disputes in this subject matter. He especially welcomes that the rules on international procedure are no longer fragmented but are part of one comprehensively codified regulation. The author then highlights these rules on international procedures. Subsection 97 establishes the supremacy of international law. The following subsections (98 to 106) regulate the international jurisdiction of German courts in international procedures. Finally, subsections 107 to 110 detail principles for the recognition and enforcement of a foreign judgement.

- ***Florian Eichel:*** "Die Revisibilität ausländischen Rechts nach der Neufassung von § 545 Abs. 1 ZPO" – the English abstract reads as follows:

So far, s. 545 (1) German Code of Civil Procedure (Zivilprozessordnung – ZPO) prevented foreign law from being the subject of Appeal to the German Federal Court of Justice (Bundesgerichtshof – BGH); s. 545 (1) ZPO stipulated that exclusively Federal Law and State Law of supra-regional importance can be subject of an appeal to the BGH. The BGH could review foreign law only indirectly, namely by examining whether the lower courts had determined the foreign law properly – as provided for in s. 293 ZPO. The new wording of

s. 545 (1) allows the BGH to examine foreign law: now every violation of the law can be subject of an appeal. However, this change in law was motivated by completely different reasons. Parliament did not even mention the foreign law dimension in its legislative documents although this would be a response to the old German legal scholars' call for enabling the BGH to review the application of foreign law. The essay methodically interprets the amendment and comes to the conclusion that the new s. 545 (1) ZPO indeed does allow the appeal to the BGH on aspects of foreign law.

- ***Stephan Harbarth/Carl Friedrich Nordmeier:*** "GmbH-Geschäftsführerverträge im Internationalen Privatrecht – Bestimmung des anwendbaren Rechts bei objektiver Anknüpfung nach EGBGB und Rom I-VO" – the English abstract reads as follows:

According to German substantive law, a contract for management services (Anstellungsvertrag) concluded between a German private limited company (Gesellschaft mit beschränkter Haftung) and its director (Geschäftsführer) is only partially subject to labour law. The ambiguous character of the contract is reflected on the level of private international law. The present contribution deals with the determination of the law applicable to such service contracts in the absence of a choice of law, i.e. under art. 28 EGBGB and art. 4 Rome I-Regulation. As the director normally does not establish a principal place of business, the closest connection principle of art. 28 sec. 1 EGBGB applies. Art. 4 sec. 1 lit. b Rome I-Regulation contains an explicit conflict of law rule regarding contracts for the provision of services. If the director's habitual residence is not situated in the country of the central administration of the company, the exemption clause, art. 4 sec. 3 Rome I-Regulation, may apply. Compared to the determination of the applicable law to individual employment contracts, art. 30 EGBGB and art. 8 Rome I-Regulation, there is no difference regarding the applicable law in the absence of a choice of law provision.

- ***Michael Slonina***: "Aufrechnung nur bei internationaler Zuständigkeit oder Liquidität?" – the English abstract reads as follows:

In 1995 the European Court of Justice stated that Article 6 No. 3 is not applicable to pure defences like set-off. Nevertheless, some German courts and authors still keep on postulating an unwritten prerequisite of jurisdiction for

set-off under German law which shall be fulfilled if the court would have jurisdiction for the defendant's claim under the Brussels Regulation or national law of international jurisdiction. The following article shows that there is neither room nor need for such a prerequisite of jurisdiction. To protect the claimant against delay in deciding on his claim because of "illiquidity" of the defendant's claim, German courts can only render a conditional judgment (Vorbehaltsurteil, §§ 145, 302 ZPO) on the claimants claim, and decide on the defendants claims and the set-off afterwards. As there is no prerequisite of liquidity under German substantial law, German courts can not simply decide on the claimant's claim (dismissing the defendants set-off because of lack of liquidity) and they can also not refer the defendant to other courts, competent for claims according to Art. 2 et seqq. Brussels Regulation.

- ***Sebastian Krebber***: "Einheitlicher Gerichtsstand für die Klage eines Arbeitnehmers gegen mehrere Arbeitgeber bei Beschäftigung in einem grenzüberschreitenden Konzern" – the English abstract reads as follows:

Case C-462/06 deals with the applicability of Art. 6 (1) Regulation (EC) No 44/2001 in disputes about individual employment contracts. The plaintiff in the main proceeding was first employed by Laboratoires Beecham Sévigné (now Laboratoires Glaxosmithkline), seated in France, and subsequently by another company of the group, Beecham Research UK (now Glaxosmithkline), registered in the United Kingdom. After his dismissal in 2001, the plaintiff brought an action in France against both employers. Art. 6 (1) would give French Courts jurisdiction also over the company registered in the United Kingdom. In Regulation (EC) No 44/2001 however, jurisdiction over individual employment contracts is regulated in a specific section (Art. 18–21), and this section does not refer to Art. 6 (1). GA Poiares Maduro nonetheless held Art. 6 (1) applicable in disputes concerning individual employment contracts. The European Court of Justice, relying upon a literal and strict interpretation of the Regulation as well as the necessity of legal certainty, took the opposite stand. The case note argues that, in the course of an employment within a group of companies, it is common for an employee to have employment relationships with more than one company belonging to the group. At the end of such an employment, the employee may have accumulated rights against more than one of his former employers, and it can be difficult to assess which one of the

former employers is liable. Thus, Art. 6 (1) should be applicable in disputes concerning individual employment contracts.

- ***Urs Peter Gruber*** on the ECJ's judgment in case C-195/08 PPU (Inga Rinau): "Effektive Antworten des EuGH auf Fragen zur Kindesentführung" – the English abstract reads as follows:

According to the Brussels IIa Regulation, the court of the Member State in which the child was habitually resident immediately before the unlawful removal or retention of a child (Member State of origin) may take a decision entailing the return of the child. Such a decision can also be issued if a court of another Member State has previously refused to order the return of the child on the basis of Art. 13 of the 1980 Hague Convention. Furthermore in this case, the decision of the Member State of origin is directly recognized and enforceable in the other Member States if the court of origin delivers the certificate mentioned in Art. 42 of the Brussels IIa Regulation. In a preliminary ruling, the ECJ has clarified that such a certificate may also be issued if the initial decision of non-return based on Art. 13 of the 1980 Hague Convention has not become res judicata or has been suspended, reversed or replaced by a decision of return. The ECJ has also made clear that the decision of return by the courts of the Member State of origin can by no means be opposed in the other Member States. The decision of the ECJ is in line with the underlying goal of the Brussels IIa Regulation. It leads to a prompt return of the child to his or her Member State of origin.

- ***Peter Schlosser***: "EuGVVO und einstweiliger Rechtsschutz betreffend schiedsbefangene Ansprüche".
  The author comments on a decision of the Federal Court of Justice (5 February 2009 – IX ZB 89/06) dealing with the exclusion of arbitration provided in Art. 1 (2) No. 4 Brussels Convention (now Art. 1 (2) lit. d Brussels I Regulation). The case concerns the declaration of enforceability of a Dutch decision on a claim which had been subject to arbitration proceedings before. The lower court had argued that the Brussels Convention was not applicable according to its Art. 1 (2) No.4 since the decision of the Dutch national court included the arbitral award. The Federal Court of Justice, however, held – taking into consideration that

the arbitration exclusion rule is in principle to be interpreted broadly and includes therefore also proceedings supporting arbitration – that the Brussels Convention is applicable in the present case since the provisional measures in question are aiming at the protection of the claim itself – not, however, at the implementation of arbitration proceedings. Thus, the exclusion rule does not apply with regard to provisional measures of national courts granting interim protection for a claim on civil matters even though this claim has been subject to an arbitral award before.

- ***Kurt Siehr*** on a decision of the Swiss Federal Tribunal (18 April 2007 – 4C.386/2006) dealing with PIL aspects of money laundering: "Geldwäsche im IPR – Ein Anknüpfungssystem für Vermögensdelikte nach der Rom II-VO"

- ***Brigitta Jud/Gabriel Kogler***: "Verjährungsunterbrechung durch Klage vor einem unzuständigen Gericht im Ausland" – the English abstract reads as follows:

It is in dispute whether an action that has been dismissed because of international non-competence causes interruption of the running of the period of limitation under § 1497 ABGB. So far this question was explicitly negated by the Austrian Supreme Court. In the decision at hand the court argues that the first dismissed action causes interruption of the running of the period of limitation if the first foreign court has not been "obviously non-competent" and the second action was taken immediately.

- ***Friedrich Niggemann*** on recent decisions of the French Cour de cassation on the French law on subcontracting of 31 December 1975 (Loi n. 75-1334 du 31 décembre 1975 – Loi relative à la sous-traitance version consolidée au 27 juillet 2005) in view of the Rome I Regulation: "Eingriffsnormen auf dem Vormarsch"

- ***Nadjma Yassari***: "Das Internationale Vertragsrecht des Irans" – the English abstract reads as follows:

Contrary to most regulations in Arab countries, Iranian international contract law does not recognise the principle of party autonomy in contractual obligations as a rule, but as an exception to the general rule of the applicability

of the lex loci contractus (Art. 968 Iranian Civil Code of 1935). Additionally, the parties of a contract concluded in Iran may only choose the applicable law if they are both foreigners. Whenever one of the parties is Iranian, the applicable law cannot be determined by choice, unless the contract is concluded outside Iran. However, in a globalised world with modern communication technologies, the determination of the place of the conclusion of the contract has become more and more difficult and the Iranian rule causes uncertainty as to the applicable law. Although these problems are seen in the Iranian doctrine and jurisprudence, the rule has not yet been challenged seriously. A way out of the impasse could be the Iranian Act on International Arbitration of Sept. 19, 1997. Art. 27 Sec. I of the Arbitration Act allows the parties to freely choose the applicable law of contractual obligations, without any restriction. However, the question whether and how Art. 968 CC restricts the scope of application of Art. 27 Arbitration Act has not been clarified and it remains to be seen how cases will be handled by Iranian courts in the future.

Futher, this issue contains the following information:

- ***Erik Jayme*** on the conference of the German Society of International Law which has taken place in Munich from 15 – 18 April: "Moderne Konfliktsformen: Humanitäres Völkerrecht und privatrechtliche Folgen – Tagung der Deutschen Gesellschaft für Völkerrecht in München"
- ***Marc-Philippe Weller*** on a conference on the Rome I Regulation taken place in Verona: "The Rome I-Regulation – Internationale Tagung in Verona"

Article on Passengers' Rights

Jens Karsten (Brussels/Oslo) has written a paper on recent developments in the field of European passenger law with references to PIL issues. "Im Fahrwasser der Athener Verordnung zu Seereisenden: Neuere Entwicklungen des europäischen Passagierrechts" has been published in the German law journal

"Verbraucher und Recht" (VuR) vol. 6/2009, pp. 213 et seq.

The article mainly deals with Regulation (EC) No. 392/2009 on the liability of carriers of passengers by sea in the event of accidents. The Athens Regulation incorporates most of the Athens Convention 2002 (www.imo.org) into the acquis communautaire but postpones the implementation of its Articles 17 and 17bis on jurisdiction and enforcement (deviating from 'Brussels I') until such time as the EC has acceded to the Convention.

Beyond the discussion of the Athens Regulation, the paper also presents new references for preliminary rulings and recent decisions of the ECJ linking travel law and PIL. The author refers inter alia to the "Rehder" case (which in the meantime – as we have reported – has been decided). It also introduces the Austrian reference on Art. 15(3) 'Brussels I' in the "Pammer" case (now also Case C-144/09, Alpenhof v. Heller).

Most significant for the development of EU-PIL, the paper raises the question of the interaction of the European Commission proposal of 8 October 2008 for a Directive on Consumer Rights (COM(2008) 614 final) with the 'Rome I'-Regulation (first discussed in this forum by Giorgio Buono on 9 October 2008: "EC Commission Presents a Proposal for a Directive on Consumer Rights"). The proposal aims at merging four existing directives on consumer rights: Directive 85/577/EEC on contracts negotiated away from business premises; Directive 93/13/EEC on unfair terms in consumer contracts; Directive 97/7/EC on distance contracts; and Directive 1999/44/EC on consumer sales and guarantees. Three of these directives provide for conflict-of-law clauses concerning the scope of EC consumer law (scope clauses). Those clauses, where applicable, have the effect of making, for instance, unfair term control as foreseen in EC law under Directive 93/13/EEC on Unfair Terms in Consumer Contracts possible even when the law of a third country is chosen. Somewhat hidden in its provisions, the proposal would abolish the scope clauses of its predecessor directives. The author assesses the impact of this change in EC-PIL de lege ferenda, taking in particular into account Article 5 and Article 3(4) of 'Rome I', both new provisions compared to the Rome Convention. The choice of law of a third, non-EU-country for seat-only sales would consequently be possible also in those areas of EC consumer law whose application is so far guaranteed by the scope clauses. This significant change is welcomed; however, uncertainty remains whether this consequence has been properly considered in the proposal. The author encourages therefore a

discussion on the territorial scope of EC consumer law with regard to passengers' rights.

Publication: "La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)"

The papers presented at the conference on the Rome I Regulation hosted in November 2008 by the University of Venice "Ca' Foscari" (see here for the webcast) have been published by the Italian publishing house Giappichelli under the editorship of *Nerina Boschiero*: **"La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)"**.

Here's the table of contents:

Presentazione (*N. Boschiero*).

Introduction. Considérations de méthode (*P. Lagarde*).

Parte I: Problemi generali.

- Funzione ed oggetto dell'autonomia della volontà nell'era della globalizzazione del contratto (*F. Marrella*);
- I limiti al principio d'autonomia posti dalle norme generali del regolamento Roma I. Considerazioni sulla "conflict involution" europea in materia contrattuale (*N. Boschiero*);
- La legge applicabile in mancanza di scelta dei contraenti (*U. Villani*);
- Le norme di applicazione necessaria nel regolamento "Roma I" (*A. Bonomi*);
- A United Kingdom Perspective on the Rome I Regulation (*J. Fawcett*).

Parte II: Temi specifici.

- La definizione dell'ambito di applicazione del regolamento Roma I: criteri generali e responsabilità precontrattuale (*P. Bertoli*);
- I contratti di assicurazione tra mercato interno e diritto internazionale privato (*P. Piroddi*);
- Contratti con i consumatori e regolamento Roma I (*F. Seatzu*);
- La legge applicabile ai contratti individuali di lavoro nel Regolamento "Roma I" (*F. Seatzu*);
- Il contratto internazionale di trasporto di persone (*G. Contaldi*);
- Le relazioni intercorrenti tra il regolamento Roma I e le convenzioni internazionali (in vigore e non) (*A. Bonfanti*);
- La legge applicabile alla negoziazione di strumenti finanziari nel regolamento Roma I (*F.C. Villata*);
- La legge regolatrice delle conseguenze restitutorie e risarcitorie della nullità del contratto nei regolamenti Roma I e Roma II (*Z. Crespi Reghizzi*);
- I contratti relativi alla proprietà intellettuale alla luce della nuova disciplina comunitaria di conflitto. Analisi critica e comparatistica (*N. Boschiero*).

Osservazioni conclusive (*T. Treves*).

Title: **"La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)"**, edited by *Nerina Boschiero*, Giappichelli (Torino), 2009, XVI – 548 pages.

ISBN: 978-88-348-9562-7. Price: EUR 50. Available at Giappichelli.

Brussels I Review – Loose Ends

The final question in the Commission's Green Paper (which, incidentally, deserves praise for its concise and focussed presentation of the issues), covers other suggestions for reform of the Regulation's rules not falling under any of the previous headings. It is divided into three headings: Scope, Jurisdiction and Recognition and enforcement, as follows:

8.1. Scope

As far as scope is concerned, maintenance matters should be added to the list of exclusions, following the adoption of Regulation (EC) No 4/2009 on maintenance. With respect to the operation of Article 71 on the relation between the Regulation and conventions on particular matters, it has been proposed to reduce its scope as far as possible.

8.2. Jurisdiction

In the light of the importance of domicile as the main connecting factor to define jurisdiction, it should be considered whether an autonomous concept could be developed.

Further, it should be considered to what extent it may be appropriate to create a non-exclusive jurisdiction based on the situs of moveable assets as far as rights in rem or possession with respect to such assets are concerned. With respect to employment contracts, it should be reflected to what extent it might be appropriate to allow for a consolidation of actions pursuant to Article 6(1). As to exclusive jurisdiction, it should be reflected whether choice of court in agreements concerning the rent of office space should be allowed; concerning rent of holiday homes, some flexibility might be appropriate in order to avoid litigation in a forum which is remote for all parties. It should also be considered whether it might be appropriate to extend the scope of exclusive jurisdiction in company law (Article 22(2)) to additional matters related to the internal organisation and decision-making in a company. Also, it should be considered whether a uniform definition of the "seat" could not be envisaged.With respect to the operation of Article 65, it should be reflected to what extent a uniform rule on third party proceedings might be envisaged, possibly limited to claims against foreign third parties. Alternatively, the divergence in national procedural law might be maintained, but Article 65 could be redrafted so as to allow national law to evolve towards a uniform solution. In addition, an obligation on the part of the court hearing the claim against a third party in third party notice proceedings to verify the admissibility of the notice might reduce the uncertainty as to the effect of the court's decision abroad.

In maritime matters, it should be reflected to what extent a consolidation of proceedings aimed at setting up a liability fund and individual liability

proceedings on the basis of the Regulation might be appropriate. With respect to the binding force of a jurisdiction agreement in a bill of lading for the third party holder of the bill of lading, stakeholders have suggested that a carrier under a bill of lading should be bound by and at the same token allowed to invoke a jurisdiction clause against the regular third-party holder, unless the bill is not sufficiently clear in determining jurisdiction.

With respect to consumer credit, it should be reflected whether it might be appropriate to align the wording of Articles 15(1)(a) and (b) of the Regulation to the definition of consumer credit of Directive 2008/48/EC .

With respect to the ongoing work in the Commission on collective redress , it should be reflected whether specific jurisdiction rules are necessary for collective actions.

8.3. Recognition and enforcement

As far as recognition and enforcement is concerned, it should be reflected to what extent it might be appropriate to address the question of the free circulation of authentic instruments. In family matters (Regulations (EC) No 2201/2003 and (EC) No 4/2009), the settlement of a dispute in an authentic instrument is automatically recognised in the other Member States. The question arises to what extent a "recognition" might be appropriate in all or some civil or commercial matters, taking into account the specific legal effects of authentic instruments.

Further, the free circulation of judgments ordering payments by way of penalties might be improved by ensuring that the amount fixing the penalty is set, either by the court of origin or by an authority in the Member State of enforcement. It should also be considered to what extent the Regulation should not only permit the recovery of penalties by the creditor, but also those which are collected by the court or fiscal authorities.

Finally, access to justice in the enforcement stage could be improved by establishing a uniform standard form, available in all official Community languages, which contains an extract of the judgment . Such a form would obviate the need for translation of the entire judgment and ensure that all relevant information (e.g. on interest) is available to the enforcement authorities. Costs in the enforcement may be reduced by removing the

requirement to designate an address for service of process or to appoint a representative ad litem . In light of the current harmonisation at Community law, in particular Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters , such a requirement does indeed seem obsolete today.

The Commission asks whether the operation of the Regulation could be improved in the ways suggested above. While different respondents will, no doubt, pick out different elements of these proposals as being significant and deserving of attention, the following conclusions could be drawn:

1. Domicile of individuals (Art. 59)

In terms of the objective of the Regulation in promoting clear and uniform solutions to problems concerning the jurisdiction of Member State courts, it makes no sense for the key concept of "domicile" to be defined, in the case of individuals, by reference to national law, particularly as an autonomous definition has been provided for bodies corporate and unincorporated (Art. 60). A uniform approach should be adopted for individuals as well. This could refer to the concept of "habitual residence", consistently with the Rome I and Rome II Regulations, with the possible alternative of "main place of residence". These two factors would, broadly speaking, correlate to the second and third factors for bodies corporate etc. ("central administration" , "principal place of business"). Nationality, however, should not be adopted as a factor corresponding to the first factor for bodies corporate etc. ("statutory seat"), as the prospect of being brought before the courts of a country of origin, with which a person may no longer have a close connection, may act as a deterrent to the free movement of persons within the EC.

2. "Seat" of companies (Art. 22(2))

It would, in principle, appear equally desirable to develop a uniform approach to determining the "seat" of a company etc. for the purposes of Art. 22(2). If such a provision is to be adopted, the "statutory seat" (cf. Art. 60(1)(a), 60(2)) should be favoured over the "real seat" as being more certain and consistent with EC law principles of freedom of establishment. Continuing differences between the Member States as to the private international law rules to be applied to questions of corporate status and internal management – despite the intervention of the ECJ

on more than one occasion – may, however, make agreement on this point difficult, if not impossible at this stage in the development of private international law in the Community.

3. Rules of special jurisdiction

An additional rule of special jurisdiction for cases concerning title, possession or control of *tangible* moveable assets (favouring the courts of the place where the asset is physically located at the time that the court becomes seised) would potentially be valuable, particularly in cases involving ships and aircraft. There may, however, be a risk that the rule could be abused by moving assets so as to create, or remove, jurisdiction of a particular Member State's courts. In particular, a party in possession or control of assets may move them to a particular jurisdiction with laws favourable to him and immediately issue proceedings for positive or negative declaratory relief, thereby blocking proceedings in other Member States to claim the asset. Such tactics may hinder, for example, efforts to recover artworks or cultural artefacts. As a consequence there would appear a strong argument for limiting any new rule to claims that include a claim to recover possession or control of tangible moveable assets. The rule should not, in any event, be extended to intangible assets, for which any "location" or situs is artificial and does not demonstrate the necessary close connection.

The special provision in Art. 65 for Germany, Austria and Hungary, excluding the application of Arts. 6(2) and 11 for third party proceedings and substituting certain national rules of jurisdiction, should be deleted, as being incompatible with an EC Regulation intended to have uniform effect.

4. Rules for employment cases

As the Commission suggests, the *Glaxosmithkline* decision should be partially reversed by allowing an employee who sues two or more employers (whether joint or several) in the same proceedings to bring those proceedings before the courts of the domicile of one of them, provided that the claims are so closely connected that it is expedient to hear them together to avoid the risk of irreconcileable judgments resulting from separate proceedings.

5. Collective redress

The possible development of specific jurisdiction rules for collective redress cases should be considered (outside the present review of the Brussels I Regulation) as part of an overall package of measures designed to improve protection for consumers and, possibly, other categories of claimants in particular situations (e.g. in anti-trust cases).

6. Recognition and enforcement

The recognition of authentic instruments and court settlements should be addressed, alongside their enforcement, in Chapter IV of the Regulation, as the Commission suggests.

More generally, and importantly, consideration should be given to elaborating in the Regulation what is required of Member States by the obligation in Art. 33 to "recognise" a judgment. In its judgment in *Hoffmann v. Krieg*, the ECJ suggested (citing a passage in the Jenard Report) that "[r]ecognition must therefore 'have the result of conferring on judgments the authority and effectiveness accorded to them in the state in which they were given'" (paras. 10-11). More recently in *Apostolides v. Orams*, albeit in the context of proceedings relating to the enforcement of a judgment, the ECJ appeared to qualify that proposition by applying a "correspondence of effects" test (para. 66):

> *Accordingly, the enforceability of the judgment in the Member State of origin is a precondition for its enforcement in the State in which enforcement is sought (see Case C-267/97 Coursier [1999] ECR I-2543, paragraph 23). In that connection, although recognition must have the effect, in principle, of conferring on judgments the authority and effectiveness accorded to them in the Member State in which they were given (see Hoffmann, paragraphs 10 and 11), there is however no reason for granting to a judgment, when it is enforced, rights which it does not have in the Member State of origin (see the Jenard Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1979 C 59, p. 0048) or effects that a similar judgment given directly in the Member State in which enforcement is sought would not have.*

Despite these dicta, it remains unclear whether "recognition" under the Regulation consists only of "formal recognition" of the judgment as an instrument generating or discharging obligations, or having other constitutive effects, or

whether it extends (for example) to the effect of a judgment in precluding the re-litigation of claims or issues. A recent study led by Jacob van de Velden and Justine Stefanelli of the British Institute of International and Comparative Law has confirmed that Member States currently take widely diverging views on these questions. Accordingly, further development of the Regulation's understanding of the concept of recognition deserves closer attention as part of the present review of the Regulation.

Finally, as to enforcement (see also the earlier post on the proposed abolition of "*exequatur*"), the Commission's proposed improvements to the enforcement regime (i.e. creation of a standard form containing all relevant information as to the nature and terms of the judgment) and removal of the requirement (Art. 40(2)) to have an address for service within the jurisdiction) appear sensible.

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This is the last of my posts on the current Brussels I review, the initial consultation period for which closes on 30 June 2009. Even after that date, I would encourage conflictoflaws.net users who take an interest in the Regulation and its application in the Member States to comment here on the issues raised by the Commission's Green Paper.

> *8.1. Scope*
> *As far as scope is concerned, maintenance matters should be added to the list of exclusions, following the adoption of Regulation (EC) No 4/2009 on maintenance. With respect to the operation of Article 71 on the relation between the Regulation and conventions on particular matters, it has been proposed to reduce its scope as far as possible.*
> *8.2. Jurisdiction*
> *In the light of the importance of domicile as the main connecting factor to define jurisdiction, it should be considered whether an autonomous concept could be developed.*
> *Further, it should be considered to what extent it may be appropriate to create a non-exclusive jurisdiction based on the situs of moveable assets as far as rights in rem or possession with respect to such assets are concerned. With respect to employment contracts, it should be reflected to what extent it might be appropriate to allow for a consolidation of actions pursuant to Article 6(1). As to exclusive jurisdiction, it should be reflected whether choice of court in agreements concerning the rent of office space should be allowed; concerning rent of holiday homes, some flexibility might be appropriate in order to avoid*

litigation in a forum which is remote for all parties. It should also be considered whether it might be appropriate to extend the scope of exclusive jurisdiction in company law (Article 22(2)) to additional matters related to the internal organisation and decision-making in a company. Also, it should be considered whether a uniform definition of the "seat" could not be envisaged.With respect to the operation of Article 65, it should be reflected to what extent a uniform rule on third party proceedings might be envisaged, possibly limited to claims against foreign third parties. Alternatively, the divergence in national procedural law might be maintained, but Article 65 could be redrafted so as to allow national law to evolve towards a uniform solution. In addition, an obligation on the part of the court hearing the claim against a third party in third party notice proceedings to verify the admissibility of the notice might reduce the uncertainty as to the effect of the court's decision abroad.

In maritime matters, it should be reflected to what extent a consolidation of proceedings aimed at setting up a liability fund and individual liability proceedings on the basis of the Regulation might be appropriate. With respect to the binding force of a jurisdiction agreement in a bill of lading for the third party holder of the bill of lading, stakeholders have suggested that a carrier under a bill of lading should be bound by and at the same token allowed to invoke a jurisdiction clause against the regular third-party holder, unless the bill is not sufficiently clear in determining jurisdiction.

With respect to consumer credit, it should be reflected whether it might be appropriate to align the wording of Articles 15(1)(a) and (b) of the Regulation to the definition of consumer credit of Directive 2008/48/EC .

With respect to the ongoing work in the Commission on collective redress , it should be reflected whether specific jurisdiction rules are necessary for collective actions.

8.3. Recognition and enforcement

As far as recognition and enforcement is concerned, it should be reflected to what extent it might be appropriate to address the question of the free circulation of authentic instruments. In family matters (Regulations (EC) No 2201/2003 and (EC) No 4/2009), the settlement of a dispute in an authentic instrument is automatically recognised in the other Member States. The question arises to what extent a "recognition" might be appropriate in all or some civil or commercial matters, taking into account the specific legal effects of authentic instruments.

Further, the free circulation of judgments ordering payments by way of penalties might be improved by ensuring that the amount fixing the penalty is set, either by the court of origin or by an authority in the Member State of enforcement. It should also be considered to what extent the Regulation should not only permit the recovery of penalties by the creditor, but also those which

are collected by the court or fiscal authorities.
Finally, access to justice in the enforcement stage could be improved by establishing a uniform standard form, available in all official Community languages, which contains an extract of the judgment . Such a form would obviate the need for translation of the entire judgment and ensure that all relevant information (e.g. on interest) is available to the enforcement authorities. Costs in the enforcement may be reduced by removing the requirement to designate an address for service of process or to appoint a representative ad litem . In light of the current harmonisation at Community law, in particular Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters , such a requirement does indeed seem obsolete today.
Question 8:

Do you believe that the operation of the Regulation could be improved in the ways suggested above32

Yearbook of Private International Law, vol. X (2008)

I am grateful to Gian Paolo Romano, Production Editor of the Yearbook of Private International Law, for providing this presentation of the new volume of the YPIL.

Volume X (2008) of the Yearbook of Private International Law, edited by *Prof. Andrea Bonomi* and *Prof. Paul Volken*, and published by Sellier European Law Publishers in association with the Swiss Institute of Comparative Law (ISDC) of Lausanne, was put on the market last week.

Volume X, which celebrates the tenth anniversary of the Yearbook, is made up of 35 contributions on the most various subjects authored by scholars and practioners of almost all continents. Its 743 pages make him one of the most considerable collections of PIL essays in English language of recent years. The volume may be ordered via the publisher's website, where the table of contents and an extract are available for download.

The **Doctrine** section includes three contributions concerning the European judicial area: a first on the revised Lugano Convention on jurisdiction and the recognition and enforcement of judgments of 30 October 2007, a second on the European jurisdiction rules applicable to commercial agents and a third on the recent decision of the European Court of Justice in *Grunkin-Paul*, a seminal case that opens new perspectives for the application of the recognition principle as opposed to classical conflict rules in the field of international family law. Other original contributions concern damages for breach of choice-of-forum agreements, accidental discrimination in conflict of laws and the recent Spanish regulation of arbitration agreements.

Two **Special sections** of this volume are devoted, respectively, to the EC Regulation on the law applicable to contractual obligations (Rome I) and to the new Hague Convention and Protocol on maintenance obligations.

- In addition to several contributions of general nature, the **special section on Rome I** includes detailed analyses of the impact that the Regulation will have on the connection of specific categories of contracts (contracts relating to intellectual and industrial property rights, distribution and franchise contracts, financial market and insurance contracts), as well as some remarks from a Japanese perspective.
- The **special section on maintenance obligations** includes insider commentaries on the two instruments adopted by the Hague Conference on 23 November 2007: the Convention on the International Recovery of Child Support and other Forms of Family Maintenance and the Protocol, which includes rules on the law applicable to maintenance obligations and aims to replace the 1973 Hague Applicable Law Convention.

The **National Reports** section includes the second part of a detailed study on private international law before African courts, a critical analysis of the new Spanish adoption system and of the conflict of laws issues raised by the Panamanian business company, two articles on arbitration (in Israel and Romania), and several contributions concerning recent developments in Eastern European countries (Macedonia, Estonia, Lithuania and Belarus). Africa is also at the centre of the report on UNCITRAL activities for international trade law reform in that continent.

The section on **Court Decisions** includes – together with commentaries on the *Weiss und Partner* and the *Sundelind López* decisions of the ECJ – detailed analyses of a recent interesting ruling of the French *Cour de cassation* on overriding mandatory provisions and of two Croatian judgments on copyright infringements.

The **Forum Section** is devoted to the recognition of trusts and their use in estate planning, the juridicity of the *lex mercatoria* and the use of nationality as a connecting factor for the capacity to negotiate.

Here is the full list of the contributions:

Doctrine

- *Fausto Pocar*, The New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters;
- *Peter Mankowski*, Commercial Agents under European Jurisdiction Rules. The Brussels I Regulation Plus the Procedural Consequences of *Ingmar*;
- *Koji Takahashi*, Damages for Breach of a Choice-of-court Agreement;
- *Carlos Esplugues Mota*, Arbitration Agreements in International Arbitration. The New Spanish Regulation;
- *Gerhard Dannemann*, Accidental Discrimination in the Conflict of Laws: Applying, Considering, and Adjusting Rules from Different Jurisdiction;
- *Matthias Lehmann*, What's in a Name? *Grunkin-Paul* and Beyond;

Rome I Regulation – Selected Topics

- *Andrea Bonomi*, The Rome I Regulation on the Law Applicable to Contractual Obligations – Some General Remarks;
- *Eva Lein*, The New Rome I / Rome II / Brussels I Synergy;
- *Pedro A. De Miguel Asensio*, Applicable Law in the Absence of Choice to Contracts Relating to Intellectual or Industrial Property Right;
- *Marie-Elodie Ancel*, The Rome I Regulation and Distribution Contracts;
- *Laura García Gutiérrez*, Franchise Contracts and the Rome I Regulation on the Law Applicable to International Contracts;
- *Francisco J. Garcímartin Alférez*, New Issues in the Rome I Regulation: The Special Provisions on Financial Market Contracts;
- *Helmut Heiss*, Insurance Contracts in Rome I: Another Recent Failure of

the European Legislature;
- *Andrea Bonomi*, Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts;
- *Yasuhiro Okuda*, A Short Look at Rome I on Contract Conflicts from a Japanese Perspective;

New Hague Maintenance Convention and Protocol

- *William Duncan*, The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance. Comments on its Objectives and Some of its Special Features;
- *Andrea Bonomi*, The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations;
- *Philippe Lortie,* The Development of Medium and Technology Neutral International Treaties in Support of Post-Convention Information Technology Systems – The Example of the 2007 Hague Convention and Protocol;

National Reports

- *Richard Frimpong Oppong*, A Decade of Private International Law in African Courts 1997-2007 (Part II);
- *Santiago Álvarez González*, The New International Adoption System in Spain;
- *Daphna Kapeliuk*, International Commercial Arbitration. The Israeli Perspective;
- *Toni Deskoski*, The New Macedonian Private International Law Act of 2007;
- *Karin Sein*, The Development of Private International Law in Estonia;
- *Radu Bogdan Bobei*, Current Status of International Arbitration in Romania;
- *Marijus Krasnickas*, Recognition and Enforcement of Foreign Judicial Decisions in the Republic of Lithuania;
- *Daria Solenik*, Attempting a 'Judicial Restatement' of Private International Law in Belarus;
- *Gilberto Boutin*, The Panamanian Business Company and the Conflict of Laws;

News from UNCITRAL

- *Luca G. Castellani*, International Trade Law Reform in Africa;

Court Decisions

- *Pietro Franzina*, Translation Requirements under the EC Service Regulation: The *Weiss und Partner* Decision of the ECJ;
- *Marta Requejo Isidro*, Regulation (EC) 2201/03 and its Personal Scope: ECJ, November 29, 2007, Case C-68/07, *Sundelind López*;
- *Paola Piroddi*, The French Plumber, Subcontracting, and the Internal Market;
- *Ivana Kunda*, Two Recent Croatian Decisions on Copyright Infringement: Conflict of Laws and More;

Forum

- *Julien Perrin*, The Recognition of Trusts and Their Use in Estate Planning under Continental Laws;
- *Thomas Schultz*, Some Critical Comments on the Juridicity of *Lex Mercatoria*;
- *Benedetta Ubertazzi*, The Inapplicability of the Connecting Factor of Nationality to the Negotiating Capacity in International Commerce.

(See also our previous posts on the 2006 and 2007 volumes of the YPIL)